Study L-750 October 1, 2012

Memorandum 2012-43

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Special Rules for Certain Types of Actions or Decisions

Once a conservatorship is established in California, the conservator generally has authority to make decisions for the conservatee and take action on the conservatee's behalf. More precisely,

- When someone is appointed as "conservator of the person" for an adult, the appointee "has the care, custody, and control of" the adult. Prob. Code § 2351. The appointment reflects a determination that the adult "is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter." Prob. Code § 1801(a).
- When someone is appointed as "conservator of the estate" of an adult, the appointee "has the management and control" of the adult's estate. Prob. Code § 2401(a). The appointment "is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate." Prob. Code § 1872(a).

Importantly, both of the above rules are subject to exceptions and qualifications.

For example, special requirements apply when a conservator wants to place a conservatee in a secured residential facility for dementia patients, or authorize the administration of psychotropic medication to a conservatee with dementia. Likewise, there are special conservatorship rules with regard to voting, making a will, controlling wages or salary, getting married or divorced, selling the conservatee's personal residence, and consenting to medical treatment. There are also specific restrictions on certain medical procedures, such as convulsive treatment, administration of experimental drugs, and involuntary placement in a mental health treatment facility. These are just some examples of existing limitations on the authority of a conservator in California, not an exhaustive list.

In considering whether California should adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"), it is important for the Commission to examine how UAGPPJA would affect and interrelate with these types of requirements. This memorandum focuses on that set of issues. We begin by describing California's statute governing when a conservator may place a conservatee in a secured residential facility for dementia patients, or authorize the administration of psychotropic medication to a conservatee with dementia. Next, we look at how other jurisdictions handle the same situations. We then analyze the potential impact of UAGPPJA and offer a few recommendations. Finally, we examine some of the other California rules that qualify or restrict a conservator's authority, and provide further analysis.

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 the Commission will ultimately recommend that California limit UAGPPJA to the context of a Probate Code conservatorship. The pros and cons 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.

SPECIAL RULES RELATING TO A CONSERVATEE WITH DEMENTIA

Because they may have a propensity to wander and potentially endanger themselves, persons with Alzheimer's disease or other types of dementia are sometimes placed in a secured residential facility, which they cannot leave without an escort. California has a statute specifying when a conservator may take that step. The same statute also specifies when a conservator may authorize

the administration of psychotropic medication to a conservatee with dementia. That statute is described below, and then contrasted with the law in other states.

California Law

California has a broad variety of laws specifically relating to dementia. *See, e.g.,* Health & Safety Code §§ 1263, 1373.14, 1531.2, 1568.15, 1568.17, 1569.7, 1569.33, 1569.626, 1569.627, 1569.698, 1569.699, 1584, 125275-125285; Ins. Code §§ 10123.16-10123.17; Rev. & Tax Code §§ 18761-18766; Welf. & Inst. Code §§ 9542, 14132.81. Of particular note, there is a conservatorship statute on the subject.

Enacted in 1996, that statute (Prob. Code § 2356.5) is intended to serve the "unique and special needs" of people with dementia. 1996 Cal. Stat. ch. 910, § 1; Prob. Code § 2356.5(a)(1). Prior to its enactment, "many courts [refused to] grant a conservator the authority to place a dementia patient in a secured facility, or to authorize administration of psychotropic medications, unless an LPS conservatorship [was] established, and renewed yearly." Senate Floor Analysis of SB 1481 (Aug. 21, 1996), p. 2; *see also* Prob. Code § 2356(a). There was concern that "the LPS conservatorship requirement of annual renewal [was] inappropriate as applied to dementia patients, because their condition is usually degenerative and progressive." *Id.*

The Legislature apparently agreed that a Lanterman-Petris-Short ("LPS") conservatorship is not always the optimum approach for a person with dementia. It expressly found that "by adding powers to the probate conservatorship for people with dementia, their unique and special needs can be met." Prob. Code § 2356.5(a)(2). Accordingly, it enacted a statute along those lines, so as to "reduce costs to the conservatee and the family of the conservatee, reduce costly administration by state and county government, and safeguard the basic dignity and rights of the conservatee." Prob. Code § 2356.5(a)(2). The Alzheimer's Association supported that legislation, maintaining that it would "provide some relief to conservators while still safeguarding the rights of individual victims." Senate Floor Analysis of SB 1481 (Aug. 21, 1996), p. 3.

Placement in a Secured Residential Facility for Dementia Patients

Under the statute relating to dementia, before a conservator may place a conservatee in a "secured perimeter residential care facility for the elderly operated pursuant to Section 1569.698 of the Health and Safety Code," the conservator, conservatee, or any relative or friend of the conservatee must file a petition in court. See Prob. Code §§ 1891, 2356.5. The conservatee must be

represented by counsel, and must attend the hearing on the petition unless excused on an acceptable ground. Prob. Code §§ 1893, 2356.5(f)(1)-(2). The petition must be supported by a declaration of a licensed physician, or a licensed psychologist with specified qualifications, which demonstrates all of the following:

> (1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."
>
> (2) The conservatee lacks the capacity to give informed consent to this placement and has at least one mental function deficit …, and this deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions ….
>
> (3) The conservatee needs or would benefit from a restricted and secure environment ….
>
> (4) … [T]he proposed placement in a locked facility is the least restrictive placement appropriate to the needs of the conservatee.

Prob. Code § 2356.5((b), f)(3). The court must find that all four of these requirements have been established by clear and convincing evidence. Prob. Code § 2356.5(b); *People v. Karriker*, 149 Cal. App. 4th 763, 780, 57 Cal. Rptr. 3d 412 (2007).

If the court makes the required findings, the conservator may place the conservatee in a "secured perimeter residential care facility for the elderly operated pursuant to Section 1569.698 of the Health and Safety Code." Prob. Code § 2356.5(b). Such a facility must comply with special rules, including dementia training requirements for its staff (Health & Safety Code §§ 1569.616(c)(1)(I), 1569.626), special building standards (Health & Safety Code §§ 1569.698-1569.699), and extra disclosure requirements (Health & Safety Code §§ 1569.15(m), 1569.627). Without additional proof in court, the conservatee may not be placed in a "mental health rehabilitation center as described in Section 5675 of the Welfare and Institutions Code" or an "institution for mental disease as described in Section 5900 of the Welfare and Institutions Code." Prob. Code § 2356.5(b), (e).

A court investigator must investigate the conservatee's situation every year, and must report to the court regarding the conservatee every two years. Prob. Code § 2356.5(g). The investigator's report must assess whether the conservator's power to place the conservatee in a secured residential facility is warranted. *Id.* In

addition, the court investigator must specifically advise the conservatee of the right to object to that power. *Id.*

(**Note.** In addition to establishing requirements for placing a conservatee in "a secured perimeter residential care facility for the elderly operated pursuant to Section 1569.698 of the Health and Safety Code," Probate Code Section 2356.5(b) also refers to "a locked and secured nursing facility which specializes in the care and treatment of people with dementia pursuant to Section 1569.691 of the Health and Safety Code, and which has a care plan that meets the requirements of Section 87724 of Title 22 of the California Code of Regulations …." The latter reference appears to be obsolete. The material formerly in Section 87724 of Title 22 of the California Code of Regulations has been moved to Section 87705 of the same title. See 2008-10 Cal. Regulatory Law Bulletin 108. More importantly, Health and Safety Code Section 1569.691, pertaining to facilities participating as "model projects" for dementia patients, has been repealed. See 1995 Cal. Stat. ch. 550, § 1 (amending Health & Safety Code § 1569.697 to repeal article containing Section 1569.691 upon adoption of regulations); 22 Cal. Code Regs. tit. 22, §§ 87705-87707 (dementia regulations). It might therefore be appropriate to amend Section 2356.5 to delete the reference to "a locked and secured nursing facility which specializes in the care and treatment of people with dementia pursuant to Section 1569.691 of the Health and Safety Code, and which has a care plan that meets the requirements of Section 87724 of Title 22 of the California Code of Regulations …." If the Commission is interested, the staff could prepare a short tentative recommendation proposing such an amendment, correcting another cross-reference to former Section 1569.691, and fixing a few other technical errors the staff has found in the Probate Code. A proposal along those lines would take relatively little time to prepare and would fall within the Commission's authority to "study and recommend revisions to correct technical or minor substantive defects in the statutes of the state …." Gov't Code § 8298.)

Administration of Psychotropic Medication to a Conservatee with Dementia

Different requirements must be met if the conservator seeks to authorize the administration of psychotropic medication to a conservatee with dementia. In enacting Section 2356.5, the Legislature expressly recognized that "the administration of psychotropic medications has been, and can be, abused by caregivers …." Prob. Code § 2356.5(a)(3). The Legislature therefore determined

that "granting powers to a conservator to authorize these medications for the treatment of dementia requires the protections specified in this section." *Id.*

As before, the section requires the filing of a petition, which can be done by the conservator, the conservator, or any relative or friend of the conservatee. See Prob. Code §§ 1891, 2356.5. Again, the conservatee must be represented by counsel, and must attend the hearing on the petition unless excused on an acceptable ground. Prob. Code §§ 1893, 2356.5(f)(1)-(2). Here, however, the petition must be supported by a declaration of a licensed physician, or a licensed psychologist with specified qualifications, which demonstrates the following three points:

> (1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."
>
> (2) The conservatee lacks the capacity to give informed consent to the administration of medications appropriate to the care of dementia, and has at least one mental function deficit …, and this deficit or deficits significantly impairs the person's ability to understand and appreciate the consequences of his or her actions ….
>
> (3) The conservatee needs or would benefit from appropriate medication ….

Prob. Code § 2356.5(c), (f)(3). The court must find that all of these requirements have been established by clear and convincing evidence; if so, it can grant the conservator the power to "authorize the administration of medications appropriate for the care and treatment of dementia." Prob. Code § 2356.5(c).

Here again, a court investigator must investigate the conservatee's situation every year, and must report to the court regarding the conservatee every two years. Prob. Code § 2356.5(g). The investigator's report must assess whether the conservator's power to authorize the administration of psychotropic medications is warranted. *Id.* In addition, the court investigator must specifically advise the conservatee of the right to object to that power. *Id.*

A special rule applies if the conservatee is "an adherent of a religion whose tenets and practices call for a reliance on prayer alone for healing." See Prob. Code §§ 2355(b), 2356.5(d). In that case, the conservator may not authorize the administration of psychotropic medications. Rather, the conservatee shall be treated "by an accredited practitioner of that religion in lieu of the administration of medications." Prob. Code § 2356.5(d).

Law in Other States

The staff electronically searched the statutes of all 50 states (but, in the interest of time, not the regulations or court rules) for provisions relating specifically to Alzheimer's disease or dementia. We found a great variety of provisions on the subject.

Alabama, for example, has a "Dementia Education and Training Act," which directs the Bureau of Geriatric Psychiatry of the Department of Mental Health to develop educational programs and services on Alzheimer's disease and related illnesses. Ala. Code §§ 22-50-70 to 22-50-83. The Act also creates an "Alzheimer's Disease Task Force," which has many duties, including examination of the "[a]dequacy of the probate system to approve and monitor [conservators] for persons with dementia." Ala. Code § 22-50-80; *see also* Ala. Code § 22-50-82. But Alabama does not appear to have any statute comparable to California's special provision on conservatees with dementia.

Similarly, Nevada has a "Legislative Committee on Senior Citizens, Veterans and Adults With Special Needs," which is authorized to "review, study and comment upon … [t]he improvement of facilities for long-term care in this State, including, without limitation … [c]reating units for acute care and long-term care to treat persons suffering from dementia who exhibit behavioral problems." Nev. Rev. Stat. § 218E.760(1)(h)(2). Nevada also has minimum continuing education requirements concerning the care of persons with dementia, which apply to each licensed or certified employee of a "facility for skilled nursing, facility for intermediate care or residential facility for groups which provides care to persons with any form of dementia." See Nev. Rev. Stat. § 449.094. Further, Nevada has separate regulations governing the licensing and operation of both residential and day care facilities for persons with Alzheimer's disease. See Nev. Rev. Stat. § 449.0302(2).

Most importantly for present purposes, Nevada has restrictions on placing a conservatee in a "secured residential long-term care facility," which is defined as "a residential facility providing long-term care that is designed to restrict a resident of the facility from leaving the facility, a part of the facility or the grounds of the facility through the use of locks or other mechanical means unless the resident is accompanied by a staff member of the facility or another person authorized by the facility or the guardian." Nev. Rev. Stat. § 159.0255. Before placing a conservatee in such a facility, the conservator usually must petition the court for an order authorizing that step. Nev. Rev. Stat. § 159.113(1)(*o*). The

statute does not set specific standards for ruling on such a petition. A petition is not necessary if the court already granted such authority at the time of appointment, or the "transfer is made pursuant to a written recommendation by a licensed physician, a physician employed by the Department of Veterans Affairs, a licensed social worker or an employee of a county's office for protective services." Nev. Rev. Stat. 159.113(6). This scheme is clearly less stringent than California's detailed statutory requirements, but at least reflects specific consideration of the issue.

Virginia also has a statute specifically addressing placement of a conservatee with dementia in a secure part of an assisted living facility. Under that statute, an assisted living facility may provide a "safe, secure environment" for a resident with a "serious cognitive impairment due to a primary psychiatric diagnosis of dementia" if the facility complies with regulations governing such placement. Va. Code Ann. § 63.2-1802. Those regulations must "define (i) serious cognitive impairment, *which shall include,* but not be limited to, *an assessment by a clinical psychologist licensed to practice in the Commonwealth or by a physician* and (ii) safe, secure environment." *Id.* (emphasis added). Before it places

> a resident with a serious cognitive impairment due to a primary psychiatric diagnosis of dementia in a safe, secure environment, an assisted living facility shall obtain the written approval of one of the following persons, in the specified order of priority: (a) the resident, if capable of making an informed decision; (b) a [conservator] or legal representative for the resident; however, such an appointment shall not be required in order that written approval may be obtained; (c) a relative authorized pursuant to the Board's regulations to act as the resident's representative; or (d) an independent physician who is skilled and knowledgeable in the diagnosis and treatment of dementia, if a [conservator], legal representative or relative is unavailable.

Id. The required written approval "shall be retained in the resident's file." *Id.* Unlike California or even Nevada, a court order does not appear to be necessary. *Compare* Va. Code Ann. § 63.2-1802 (expressly requiring written approval of conservator for conservatee's admission to "safe, secure environment" in assisted living facility) *with* Va. Code Ann. § 64.2-2009 (expressly requiring court order for conservator to consent to admission of conservatee to state mental health facility) *and* Va. Code Ann. § 64.2-2019(D) (expressly requiring court order for conservator to change conservatee's residence to another state).

The situation in Utah is somewhat similar. There, a "Type II assisted living facility" is defined as "a residential facility with a home-like setting that provides an array of coordinated supportive personal and health care services available 24 hours per day to residents who have been assessed under Department rules to need any of these services." M. Ciccarello & J. Wetzler, *Assisted Living in Utah: A Brief Overview for Consumers,* 19 Utah Bar J. 24, 24-25 (2006). "A Type II assisted living facility with approved secure units may admit residents with a diagnosis of Alzheimer's/dementia if the resident is able to exit the facility with limited assistance from one person." Utah Admin. Code § R432-270-16. Each secure unit must have an emergency evacuation plan and must have at least one staff member "with documented training in Alzheimer's/dementia care" present at all times. *Id.* A special type of admission agreement is necessary to place a resident in such a unit:

> (2) Each resident admitted to a secure unit must have an admission agreement that indicates placement in the secure unit.
>
> (a) The secure unit admission agreement must document that a Department-approved wander risk management agreement has been negotiated with the resident or resident's responsible person.
>
> (b) The secure unit admission agreement must identify discharge criteria that would initiate a transfer of the resident to a higher level of care than the assisted living facility is able to provide.

Id. (emphasis added). Again, a court order does not appear to be necessary for a conservator to place a conservatee in such a facility. *See generally* Utah Code Ann. § 75-5-312(a) (giving conservator broad authority to establish conservatee's "place of abode").

This is just a small sampling of state statutes that specifically address dementia, focusing on ones that deal to some extent with the role of a conservator. Many other provisions address Alzheimer's disease and other dementias in different ways, such as by creating "Silver Alert" procedures for missing persons with Alzheimer's disease, or facilitating research on cures for Alzheimer's disease.

There are also state statutes that generally govern where a conservatee may reside, without providing specific rules for a conservatee with dementia. Of particular note, some states preclude placement of a conservatee in a residential facility without court approval, *see, e.g.,* 755 Ill. Comp. Stat. 5/11a-14.1, or preclude placement of a person in a residential treatment facility against that

person's will, *see* Wash. Rev. Code § 11.92.190. Other states preclude placement of a conservatee in a mental health treatment facility without following the normal procedure for an involuntary commitment. *See, e.g.*, Colo. Rev. Stat. § 15-14-316(4); La. Code Civ. Proc. Ann. art. 4566(H); *see also* D.C. Code § 21-2047.01(4) (precluding conservator from consenting to voluntary or involuntary commitment). These provisions do not expressly state whether they are meant to restrict placement of a conservatee with dementia in a secured residential facility.

Similarly, it goes almost without saying that states across the country have provisions governing consent to medical treatment generally and specific medical procedures, as well as provisions governing a conservator's authority to authorize medical treatment of a conservatee. In Utah, for example, a conservator "may give any consents or approvals that may be necessary to enable the [conservatee] to receive medical or other professional care, counsel, treatment, or service." Utah Code Ann. § 75-5-312(c).

The staff's research on these matters, while reasonably thorough, has not been exhaustive. We do not purport to be familiar with every state law that might have some bearing on placement or treatment of a conservatee with dementia. Based on the work we have done, however, *we are confident* that no other state has a statute that is the same, or even closely similar, to California's carefully-tailored provision specifying when a conservatee with dementia may be placed in a secure residential facility, and when a conservator may authorize the administration of psychotropic medication to a conservatee with dementia.

The value of guidance on such matters has not escaped notice. Under a recently enacted Connecticut statute, a conservatee may not be placed in an "institution for long-term care" unless the conservator prepares a report explaining why such placement is the least restrictive means of meeting the conservatee's needs, and the court agrees with that assessment after holding a hearing (or the conservatee waives the hearing after consulting with counsel). Conn. Gen. Stat. Ann. § 45a-656b; *see also* Conn. Gen. Stat. Ann. § 45a-656. Nonetheless, a few years after enactment of that statute, the Associate Director of the Center on Aging at the University of Connecticut Health Center wrote:

> In Connecticut, involuntary confinement requires that two physicians, one of which must be a psychiatrist, certify that the patient is dangerous to himself or others, the illness has resulted or will result in serious disruption of his mental and behavioral functioning, and that hospital treatment is both necessary and available.…

> Long-term care facilities, such as skilled nursing homes and dementia-specific assisted living facilities may also have residents who are there on an involuntary basis. Rarely in my experience is a legal process followed to ensure that an involuntary confinement in long-term care is necessary. For the vast majority of patients with advanced dementia who demonstrate extreme functional impairment, a formal process may not be necessary. *I have, however, on several occasions, seen residents in dementia specific assisted living facilities who have only a modest degree of cognitive impairment and are held in the facility against their will. No matter how loudly and vigorously they protest their incarceration; they are not allowed to leave. Does a [conservator] have the authority to have a patient with dementia held at a long-term care facility against his will? Should a probate court judge decide? Regardless of who decides, there should be more attention given to ensuring due process in these situations.*

P. Coll, M.D., *Legal and Ethical Issues at the End-of-Life: Dementia,* 23 Quinn. Prob. L.J. 378, 383-84 (2010) (emphasis added, footnote omitted).

Analysis

If UAGPPJA were enacted in California, what impact would it have on placement of a conservatee with dementia in a secured residential facility, or administration of psychotropic medication to such a conservatee? Would enactment of UAGPPJA be consistent with the policy judgments underlying California's statute on those matters (Prob. Code § 2356.5)? Would any problems arise due to the lack of a similar statute in other jurisdictions?

Answering these questions requires careful consideration of the three key substantive components of UAGPPJA:

(1) Jurisdiction (UAGPPJA Article 2).
(2) Transfer (UAGPPJA Article 3).
(3) Registration (UAGPPJA Article 4).

We address each component separately, starting with jurisdiction (which seems to be the simplest to analyze), then turning to registration (which seems to be somewhat more complicated than jurisdiction), and finally focusing on registration (which seems to pose the most challenging issues).

Jurisdiction (UAGPPJA Article 2)

Article 2 of UAGPPJA provides rules for determining which state has jurisdiction of a conservatorship proceeding. Those rules are based on the

strength of a conservatee's contacts with a particular state. A proposed conservatee's "home state" is defined as:

> the state in which the [proposed conservatee] was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition of a [conservatorship]; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six months ending within the six months prior to the filing of the petition.

UAGPPJA § 201(2). The proposed conservatee's "home state" has primary jurisdiction to appoint a conservator. *See* UAGPPJA § 203 & Comment. If a proposed conservatee does not have a "home state," the "home state" declines jurisdiction, or certain other circumstances exist, the conservatorship petition may be heard in a "significant-connection state" instead of the "home state." *See id.* A "significant-connection state" is "a state, other than the home state, with which a [proposed conservatee] has a significant connection other than mere physical presence and in which substantial evidence concerning the [proposed conservatee] is available." UAGPPJA § 201(3). In rare circumstances, a state other than the proposed conservatee's "home state" or "a significant-connection state" may exercise jurisdiction under UAGPPJA. *See* UAGPPJA § 203 & Comment.

The above-described three-level hierarchy, with its focus on the strength of a proposed conservatee's ties to a particular state, seems generally consistent with constitutional principles of due process. As the United States Supreme Court recently reaffirmed, a state court may subject a person to judgment only when the person has sufficient contacts with the state that maintaining a lawsuit there is consistent with traditional notions of fair play and substantial justice. *See Goodyear Dunlop Tires Operations v. Brown,* __ U.S. __, __, 131 S.Ct. 2846, 2853 (2011); *see also Internat'l Shoe Co. v. Washington,* 326 U.S. 310 (1940).

Consequently, adopting Article 2 of UAGPPJA would not have much impact on which conservatorship proceedings are subject to jurisdiction in California. The scope of the state's jurisdiction over proposed conservatees would remain much the same. Article 2 of UAGPPJA would simply provide a clear, widely-used and well-understood framework for resolving multi-state jurisdictional issues in conservatorship cases. Where a proposed conservatee has contacts with more than one state, the state with the strongest contacts generally would have jurisdiction, which seems appropriate. The article would thus make little change in the circumstances under which California can enforce its special statute

governing conservatees with dementia (Prob. Code § 2356.5). **With regard to Article 2 of UAGPPJA, no special tailoring of the ULC's language or other drafting adjustments appear necessary to protect and effectuate the policy interests underlying California's special statute governing conservatees with dementia.**

Registration (UAGPPJA Article 4)

Article 4 of UAGPPJA is "designed to facilitate the enforcement of [conservatorship] orders in other states." UAGPPJA Art. 4 General Comment. For example, it is intended to provide a means of recourse "when a care facility questions the authority of a [conservator of the person] appointed in another state." *Id.*

Article 4 achieves this objective by providing a means of registering a conservatorship order that was issued in another state. See UAGPPJA §§ 401, 402. Upon registration of a conservatorship order from another state, the conservator

> *may exercise in [the state of registration] 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) (emphasis added).

If California adopted UAGPPJA, then (1) an out-of-state conservator could register an out-of-state conservatorship in California, and (2) a California conservator could register a California conservatorship in another state. Each scenario is discussed separately below.

Registration of an Out-of-State Conservatorship in California

Suppose California adopted UAGPPJA and a Nevada conservator registered a Nevada conservatorship in California. Upon such registration, the Nevada conservator could exercise conservatorship powers in California.

Significantly, however, the Nevada conservator could only exercise powers that were "authorized in the order of appointment." UAGPPJA § 403(a). Further, the Nevada conservator would be "subject to any conditions imposed upon nonresident parties." *Id.* Even more importantly, the Nevada conservator could not take any action in California that is prohibited under California law. *Id.*

Accordingly, the Nevada conservatee could not place the conservatee in a "secured perimeter residential care facility for the elderly," or authorize the administration of "medications appropriate to the care of dementia," without satisfying the requirements of California's special statute on those points (Prob. Code § 2356.5). In other words, the Nevada conservator would be required to respect and abide by the policy determinations reflected in that statute.

But such a requirement will achieve its objective only if the Nevada conservator becomes aware of it. In some instances, a third party located in California (e.g., a care facility or medical provider) might alert the Nevada conservator to the requirements of California law. To further ensure such awareness, however, the Commission might want to supplement UAGPPJA's registration requirement with a requirement that an out-of-state conservator file a declaration in which the conservator promises to become familiar with applicable California law and to comply with that law when taking action in California. For example, **UAGPPJA Section 403(a) could perhaps be modified along the lines shown in underscore below:**

> (a) Upon registration of a [conservatorship] order from another state, and filing of a declaration in which the [conservator] pledges under penalty of perjury to become familiar with, and to comply with, all applicable laws of this state while taking action in this 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.

Does the Commission wish to pursue this concept? Would it prefer to address this situation in some other manner? At this point in the Commission's study, it is not necessary to settle on precise statutory language; it would be enough to decide whether to pursue the general concept.

Registration of a California Conservatorship in Another State

Under UAGPPJA's registration procedure, it would not only be possible for an out-of-state conservator to register an out-of-state conservatorship in California, but it would also be possible for a California conservator to register a California conservatorship in another state. Through such registration, the California conservator would be empowered to take action in the other state, at least if such action was (1) "authorized in the order of appointment," (2)

permitted in the other state, and (3) not precluded by a condition that the other state imposes on nonresident parties. See UAGPPJA § 403(a).

What would this mean with regard to placing the conservatee in a "secured perimeter residential care facility for the elderly," or authorizing the administration of "medications appropriate to the care of dementia"? Could the registration process be used as a way to sidestep California's requirements on those points? For example, could a conservator transport the conservatee across the Nevada or Oregon border to receive dementia medication each day, instead of satisfying California's special requirements for administration of such medication?

Most likely, such sidestepping of California's requirements would not be condoned. The Judicial Council's form order for appointment of a probate conservator (Form GC-340) includes a special box for the court to grant "authority to authorize the administration of medications appropriate for the care and treatment of dementia described in Probate Code section 2356.5(c)." Unless the California court checked that box, it would be hard to argue that over-the-border administration of dementia medication was "authorized in the order of appointment" as required by Section 403 of UAGPPJA. The situation is similar with regard to placement of a conservatee in a "secured perimeter residential care facility for the elderly." Not only does the Judicial Council form include a special box for this matter, but also relocation of a conservatee's residence to another state is subject to court approval and various other restrictions beyond Section 2356.5. *See, e.g.*, Prob. Code §§ 2352, 2352.5; Cal. R. Ct. 7.1063. Further, every California conservator must "[t]ake an oath to perform the duties of the office *according to law* …. Prob. Code § 2300 (emphasis added). That oath would seem to bind the conservator to obey California law, including both the letter and the spirit of Section 2356.5, throughout the duration of the conservatorship, regardless of where the conservator and conservatee are located at any particular time.

But it might be helpful to make that point express. For example, **Probate Code Section 2300 could be revised along the following lines:**

> 2300. Before the appointment of a guardian or conservator is effective, the guardian or conservator shall:
>
> (a) Take an oath to perform the duties of the office according to law~~, which~~. The oath obligates the guardian or conservator to comply with the law of this state, as well as other applicable law, at

all times, in any location within or without the state. The oath shall be attached to or endorsed upon the letters.

(b) File the required bond if a bond is required.

Would the Commission like to incorporate this concept into a tentative recommendation? In answering this question, the Commission should consider whether the suggested amendment is actually needed, and whether there is a better way to prevent a California conservator from using UAGPPJA's registration process to evade compliance with statutory requirements reflecting California's policy interests.

Transfer (UAGPPJA Article 3)

Article 3 of UAGPPJA provides a means of "transferring" a conservatorship from one state to another state. Although UAGPPJA uses the term "transfer," that is technically a misnomer. Rather than actually transferring a conservatorship from one state to another, UAGPPJA provides an expeditious way to end a conservatorship 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 Prof. David English (the reporter for UAGPPJA) 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.

Memorandum 2011-31, Exhibit p. 3.

The transfer process involves the following main steps:

(1) The conservator files a petition requesting transfer of the conservatorship in the court currently supervising the conservatorship. UAGPPJA § 301(a).

(2) The court considers the petition and determines whether it satisfies the standard for provisionally granting it. If so, that court (hereafter, "the transferring court") issues an order provisionally granting the transfer petition. UAGPPJA § 301(d), (e).

(3) The conservator files a petition in a court in the other state, asking that court to accept the transfer. UAGPPJA § 302(a).

(4) The court in the other state (hereafter, "the accepting court") considers the petition for acceptance of the transfer and decides whether it satisfies the standard for provisionally granting it. If so,

that court issues an order provisionally accepting the transfer. UAGPPJA § 302(d).

(5) The transferring court issues a final order confirming the transfer. UAGPPJA § 301(f).

(6) Upon receipt of the final order from the transferring court, the accepting court issues a final order accepting transfer of the conservatorship. UAGPPJA § 302(e).

(7) "Not later than [90] days after issuance of a final order accepting transfer of a … conservatorship, the court shall determine whether the … conservatorship needs to be modified to conform to the law of this state." UAGPPJA § 302(f) (brackets in original). The 90-day period can be adjusted to meet the needs of the accepting court. "The number '90' is placed in brackets to encourage states to coordinate this time limit with the time limits for other required filings such as … conservatorship plans." UAGPPJA Art. 3 General Comment.

If California adopted UAGPPJA, then (1) a California conservator could seek to transfer a California conservatorship to another state, and (2) an out-of-state conservator could seek to transfer an out-of-state conservatorship to California. Each scenario is discussed separately below.

Transfer of a California Conservatorship to Another State

If California adopted UAGPPJA's transfer process, a California conservator could use this process to transfer the conservatorship to another state. The Commission should therefore consider whether such a transfer would impinge on California's policies regarding placement of a conservatee in a "secured perimeter residential care facility for the elderly," or administration of dementia medications to a conservatee.

The staff does not think so. Presumably, the California conservator would continue to have to comply with California law, including California's special statute on conservatees with dementia (Prob. Code § 2356.5), until the California court issues a final order confirming the transfer. To reach that point, the California court would have to find, among other things, that the conservatee was physically present in or reasonably expected to move permanently to the other state, and that plans for care and services for the conservatee in the other state are reasonable and sufficient. UAGPPJA § 301(d). Having determined that the conservatee is, or will be, beyond its borders and appears to be in good hands, the California court can in good conscience relinquish control over the conservatee and entrust the conservatee to the accepting court. The situation is

comparable to any other conservatee beyond California's jurisdictional reach: California lacks a basis for intervening and must respect the policy determinations of its sister state, whether on dementia care or any other matter.

During the transfer process, however, the situation is different: The California court still has responsibility for supervising the care of the conservatee. While it might seem obvious that the conservator is bound by California law (including the laws governing the conservatee's place of residence and administration of dementia medications to the conservatee) until the California court issues a final order confirming the transfer, **it might be helpful to make that point explicit.** For example, the above-suggested amendment of Probate Code Section 2300 could be supplemented with additional language, along the following lines:

> 2300. Before the appointment of a guardian or conservator is effective, the guardian or conservator shall:
>
> (a) Take an oath to perform the duties of the office according to law~~, which~~. The oath obligates the guardian or conservator to comply with the law of this state, as well as other applicable law, at all times, in any location within or without the state. If the conservator petitions for transfer of the conservatorship to another state pursuant to [Article 3 of UAGPPJA, as codified in California], the conservator shall continue to comply with the law of this state until the court issues a final order confirming the transfer and terminating the conservatorship pursuant to [UAGPPJA § 301(f), as codified in California]. The oath shall be attached to or endorsed upon the letters.
>
> (b) File the required bond if a bond is required.

For purposes of a tentative recommendation, is the Commission interested in this concept?

Transfer of an Out-of-State Conservatorship to California

If California adopted UAGPPJA's transfer process, a conservator appointed in another UAGPPJA state could seek to transfer an out-of-state conservatorship to California. That raises the question of whether such a transfer would be consistent with California's policies regarding placement of a conservatee with dementia in a "secured perimeter residential care facility for the elderly" and administration of psychotropic medication to such a conservatee.

The Commission has previously 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. From that prior decision, it seems to follow that Section 2356.5 would apply to a transferred conservatorship and the conservator could not place the conservatee in a "secured perimeter residential care facility for the elderly" or authorize the administration of psychotropic medications without complying with the requirements of that section.

In other words, although an out-of-state conservatorship could be transferred to California under California's version of UAGPPJA, the proceeding would simply become a Probate Code conservatorship. As with any other Probate Code conservatorship in California, the conservator could not place the conservatee in a "secured perimeter residential care facility for the elderly" without establishing in court, through clear and convincing evidence, that

> (1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."
>
> (2) The conservatee lacks the capacity to give informed consent to this placement and has at least one mental function deficit …, and this deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions ….
>
> (3) The conservatee needs or would benefit from a restricted and secure environment ….
>
> (4) … [T]he proposed placement in a locked facility is the least restrictive placement appropriate to the needs of the conservatee.

Prob. Code § 2356.5(b), (f)(3). Such findings would only suffice if they were made at a hearing in which the conservatee was present (or excused on an acceptable ground) and represented by counsel. Prob. Code §§ 1893, 2356.5(f)(1)-(2). Further, the findings would have to be based on evidence provided by a licensed physician, or a licensed psychologist with specified qualifications. Prob. Code § 2356.5(b).

That would seem to be true regardless of what type of facility the conservatee was living in just before the transfer: the conservatee's own home, a facility comparable to a "secured perimeter residential care facility for the elderly operated pursuant to Section 1569.698 of the Health and Safety Code," or something in-between. Likewise, the general principle that California law applies to a transferred conservatorship would seem to require compliance with California's rules on administration of dementia medications before the conservator of a transferred conservatorship could authorize administration of such medications here in California. Although UAGPPJA is intended to facilitate

movement of conservator-conservatee relationships between states, it does not purport to guarantee that a conservator will be able to exercise exactly the same powers, in exactly the same manner, in the new state as in the original state. Rather, subdivision (f) of Section 302 of UAGPPJA expressly recognizes that a conservatorship might have to be "modified to conform to" the law of the new state.

The drafters of UAGPPJA cannot possibly have intended to allow a conservator from anywhere in the country to transfer a conservatorship to a new state and have the courts in that new state treat the transferred conservatorship according to the conservatorship laws of the transferring state. Not only would such a result be contrary to the text of UAGPPJA and what we have heard from ULC representatives (see Memorandum 2012-40, pp. 2-3), but it would also mean that the courts in each UAGPPJA state would have to become familiar with the conservatorship laws of every other UAGPPJA state, and ready to enforce those laws on a daily basis (not just in rare instances of an interjurisdictional issue). Such a situation would be untenable, and would result in disparate treatment of similarly situated California conservatees.

It would, of course, be easier for the conservator of a transferred conservatorship to be able to place the conservatee in a secured facility and authorize administration of dementia medications without complying with Section 2356.5 than to have to meet the statutory requirements. Notably, however, the statute includes an exception for an emergency situation. See Prob. Code § 2356.5(j). Thus, the statute would not impede an urgent transfer in which the conservatee must, for his or her own safety, continuously remain in a secured facility and receive dementia medications. But compliance with Section 2356.5 would not be excused indefinitely, only to the extent necessitated by the emergency.

The burden on the conservator of a transferred conservatorship would thus be comparable to the burden faced by a California conservator when the conservatee's dementia progresses and it becomes necessary to seek permission to put the conservatee in a secured facility and administer psychotropic medications. In each situation, the conservator would have to comply with the requirements of Section 2356.5, despite having previously established the need for the conservator-conservatee relationship. It would be hard to justify treating these two situations differently; in both sets of circumstances, the policies

underlying Section 2356.5 would be defeated by excusing compliance so as to ease the costs and strains of conservatorship.

The staff therefore believes that the Commission acted wisely in deciding to make clear that a transferred conservatorship "is henceforth subject to California law and will be treated as a California conservatorship." **The Commission should stick with that decision.**

However, several additional steps may also be in order. First, **the Commission's Comment to UAGPPJA Section 302 could expressly note that a transferred conservatorship must comply with the requirements of Section 2356.5,** because that is an important and unusual feature of California conservatorship law. That would help to underscore the need for, and importance of, such compliance.

Second, although subdivision (f) of Section 302 of UAGPPJA already expressly acknowledges that a transferred conservatorship might have to be "modified to conform to" the law of the new state, it does not expressly say that a California court could eliminate or reduce any conservator powers that are inconsistent with California law. The latter point is implicit in the former one, but **it might be helpful to state the point expressly, either in statutory language or the Commission's Comment.** For example, subdivision (f) could be revised as shown in underscore below:

> (f) Not later than [90] days after issuance of a final order accepting transfer of a … conservatorship, the court shall determine whether the … conservatorship needs to be modified to conform to the law of this state. <u>The court may take any step necessary to achieve compliance with the law of this state, including, but not limited to, striking or modifying any conservator powers that are not permitted under the law of this state.</u>

If the Commission is interested in pursuing this concept, it could wait until later to decide precisely how to draft the implementing language.

Third, it would be important for the conservator of a transferred conservatorship to learn what is required under California law, including Section 2356.5, and promise to obey that law. The Commission could address this point **by proposing that the conservator of a transferred conservatorship receive the same educational materials as other California conservators, and take the same oath as other California conservators.** See Prob. Code §§ 1457, 1834, 1835; 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 of Handbook (form GC-348)."). The staff raised this possibility in prior materials, but the Commission never discussed its merits. See Second Supplement to Memorandum 2011-31, p. 17; Third Supplement to Memorandum 2011-31, pp. 10-11. If the Commission is interested in pursuing this approach, the staff could draft implementing language for consideration at a future meeting.

Fourth, Disability Rights California has expressed concern about what would happen during the transitional period, between the commencement of the transfer process in the out-of-state court and the conclusion of that process here in California, when the accepting court determines whether the conservatorship needs to be modified to conform to California law. See Third Supplement to Memorandum 2011-31, pp. 10-12 & Exhibit p. 10. It might be helpful to **make explicit that the duty to comply with California law attaches as soon as the conservator begins functioning as such in California;** there is no grace period during or immediately after a transfer. Again, the staff raised this possibility in prior materials, but the Commission never discussed its merits. See Third Supplement to Memorandum 2011-31, pp. 11-12.

If the Commission is interested in this approach it should **find out the ULC's views on when during the transfer process a conservator can begin functioning as such in the accepting state.** Is it when the accepting state issues an order provisionally granting a transfer petition? Is it when the accepting state issues a final order accepting the transfer? Does it occur at some other stage during the transfer process? This would be a good set of questions to ask Eric Fish in December. Without such information, it would be difficult to decide how to draft appropriate language. See Third Supplement to Memorandum 2011-31, pp. 11-12.

The four steps recommended above should help to safeguard the policy interests underlying California's special statute on conservatees with dementia (Prob. Code § 2356.5). The staff encourages the members of the Commission, stakeholders, and other interested persons to **comment on those ideas and suggest other possibilities.**

OTHER SPECIAL CONSERVATORSHIP RULES FOR CERTAIN TYPES OF ACTIONS OR DECISIONS

Just as Probate Code Section 2356.5 establishes special rules relating to a conservatee with dementia, other code sections establish special conservatorship rules for other types of actions or decisions. Among the most important of these are the provisions relating to the following matters:

- Voting.
- Estate planning.
- Controlling an allowance.
- Controlling wages or salary.
- Providing necessaries of life to the conservatee and the conservatee's family.
- Marital status.
- Place of residence.
- Medical treatment.

We briefly describe those special rules below, and then analyze how to protect the underlying policies of those rules if California adopts UAGPPJA.

Voting

Establishment of a California conservatorship does not automatically deprive the conservatee of the right to vote. Rather, the conservatee retains that right unless "the court determines the conservatee is not capable of completing an affidavit of voter registration in accordance with Section 2150 of the Elections Code …." Prob. Code § 1910. In that circumstance, "the court shall by order disqualify the conservatee from voting …." *Id.*

When a California court issues a citation informing a proposed conservatee of the hearing date on a conservatorship petition, the citation must warn the proposed conservatee of the possibility of being disqualified from voting. Prob. Code § 1823(b)(3). Before the hearing, the court investigator must assess and report to the court on whether the proposed conservatee is capable of completing a voter registration affidavit. Prob. Code § 1826(g). The investigator must reassess the conservatee's capability, or lack thereof, during each periodic review of the conservatorship. Prob. Code § 1851(a). If a conservatee is disqualified from voting but later regains the ability to function independently and the court

terminates the conservatorship, the court must notify the county elections official that the person can again register to vote. Prob. Code § 1865.

Estate Planning

In general, appointment of a conservator of the estate in California "is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate." Prob. Code § 1872. However, appointment of a conservator does not automatically deprive the conservatee of the right to make a will. Prob. Code § 1871(c).

Instead, the conservatee's right to make a will depends on whether the conservatee has testamentary capacity. "Testamentary capacity is determined by a different standard, which depends on soundness of mind." Prob. Code § 1871 Comment; see Prob. Code § 6100. More specifically, a person

> is not mentally competent to make a will if at the time of making the will either of the following is true:
>
> (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.
>
> (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.

Prob. Code § 6100.5.

In some circumstances, a conservator may make a will on behalf of a conservatee, applying the doctrine of "substituted judgment." See Prob. Code §§ 2580-2586, 6100(b). But a conservator can only do this with court approval, pursuant to statutory requirements. *Id.* Moreover, a conservatee who is mentally competent to make a will is entitled to revoke or amend a will made by the conservator, or make a new and inconsistent will. Prob. Code § 6100(b).

The statute protecting a conservatee's right to make a will (Prob. Code § 1871(c)) does not refer to any other type of testamentary instrument. Thus, the extent to which a conservatee may effectively execute a testamentary instrument other than a will appears to be less clear-cut; it might fall within the spirit of Sections 1871(c) and 810 (which establishes a rebuttable presumption that all persons have capacity to made decisions), or it might be governed by the general

rule that a conservatee lacks capacity to bind the conservatorship estate (Prob. Code § 1872). A quick search did not uncover any case law on this point. The staff can investigate this further if the Commission considers it important.

Controlling an Allowance

With court approval, a California conservator may pay to a conservatee a reasonable allowance for the conservatee's personal use. Prob. Code § 2421. "The funds so paid are subject to the sole control of the … conservatee." *Id.*; see also Prob. Code § 1871(a).

Controlling Wages or Salary

Unless the court orders otherwise, if a California conservatee is employed during the conservatorship, the wages or salary for such employment "shall be paid to the … conservatee and are subject to his or her control to the same extent as if the … conservatorship did not exist." Prob. Code § 2601; see also Prob. Code § 1871(b). The conservator is not accountable for such wages or salary. *Id.*

Providing Necessaries of Life to the Conservatee and the Conservatee's Family

Establishment of a California conservatorship does not deny the conservatee the right "to enter into transactions to the extent reasonable to provide the necessaries of life to the conservatee and the spouse and minor children of the conservatee…." Prob. Code § 1871(d). Similarly, the conservatee retains the right to provide the basic living expenses (as defined in Fam. Code § 297) to the conservatee's domestic partner. *Id.*

Marital Status

In California, the appointment of a conservator "does not affect the capacity of the conservatee to marry or to enter into a registered domestic partnership." Prob. Code § 1900. "Whether the conservatee has capacity to marry is determined by the law that would be applicable had no conservatorship been established." Prob. Code § 1900 Comment; see also Prob. Code §§ 810-812. If a conservatee is "of unsound mind" at the time of a marriage, the marriage may be annulled, unless the conservatee, "after coming to reason," freely cohabitated with his or her spouse. Fam. Code § 2210(c).

Whether a conservatee's marriage may be dissolved at the instigation of the conservatee also depends on the conservatee's capacity. A conservator serving as a guardian ad litem (see Code Civ. Proc. §§ 372, 373) may bring or maintain a

petition for dissolution of a conservatee's marriage, but only if the conservatee "is capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so." *In re Marriage of Higgason*, 10 Cal. 3d 476, 485, 516 P.2d 289, 100 Cal. Rptr. 897 (1973), *overruled on other grounds by Marriage of Dawley*, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976); *see also In re Straczynski*, 189 Cal. App. 4th 531, 116 Cal. Rptr. 3d 938 (2010).

Place of Residence

California has many protections regarding a conservatee's place of residence. Although the conservator usually has authority to select the conservatee's place of residence, in some instances the court may reserve that power to the conservatee. See Prob. Code § 2351 & Comment. A court order is not necessary for a conservator to select a place of residence within the state, but the conservator must select "the *least restrictive appropriate residence* … that is available and necessary to meet the needs of the conservatee, and that is in the best interests of the conservatee." Prob. Code § 2352 (emphasis added).

Under Probate Code Section 2352.5, "[i]t shall be presumed that the *personal residence of the conservatee* at the time of commencement of the [conservatorship] proceeding is the least restrictive appropriate residence for the conservatee." (Emphasis added.) Section 2352.5 does not define the "personal residence of the conservatee," but Rule of Court 7.1063(b) defines it as "the residence the conservatee understands or believes, or reasonably appears to understand or believe, to be his or her permanent residence" at the time the conservatorship petition was filed, regardless of whether the conservatee was living in that residence on that date.

If the conservatee is not living in his or her personal residence when the conservatorship commences, the conservator must provide the court with "a plan to return the conservatee to his or her personal residence or an explanation of the limitations or restrictions on a return of the conservatee to his or her personal residence in the foreseeable future." *Id.* Special requirements apply if the conservator wants to sell the conservatee's personal residence. See Prob. Code §§ 2540, 2591.5.

There are also special rules governing relocation of the conservatee's residence to a place outside the state. See Prob. Code § 2352. In particular, the conservator can only do this with court approval. *Id.*

Various notification requirements apply when a conservator changes a conservatee's place of residence. See Prob. Code § 2352; Cal. R. Ct. 7.1063. To change the conservatee's "personal residence," both pre-move and post-move notification are necessary. See Cal. R. Ct. 7.1063.

Medical Treatment

By far the most detailed and complicated rules govern medical treatment of a California conservatee. In considering a conservatorship petition, a court must determine whether "there is no form of medical treatment for which the conservatee has the capacity to give an informed consent …." Prob. Code § 1880. There is a detailed process for making such a determination. See Prob. Code §§ 1881-1898. The key question is whether, "for all medical treatments, the conservatee is unable to respond knowingly and intelligently to queries about medical treatment or is unable to participate in a treatment decision by means of a rational thought process." Prob. Code § 1881. If so, the court shall adjudge that the conservatee lacks the capacity to give informed consent, and shall give the conservator the power to make medical decisions for the conservatee in accordance with Probate Code Section 2355. *Id.*

Under Probate Code Section 2355,

> The conservator shall make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interest. The conservator shall consider the conservatee's personal values to the extent known to the conservator.

The conservator may require the conservatee to receive the health care, whether or not the conservatee objects. *Id.* But a special rule applies if, before the conservatorship was established, the conservatee "was an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing …." Prob. Code § 2355(b). In that case, any treatment required by the conservator "shall be by an accredited practitioner of that religion." *Id.*

A different set of rules applies when the conservatee is not subject to a court determination that "there is no form of medical treatment for which the conservatee has the capacity to give an informed consent …." In that circumstance, the conservatee may consent to medical treatment. Prob. Code §

2354(a). "The conservator may also give consent to the medical treatment, but the consent of the conservator is not required *if the conservatee has the capacity to give informed consent to the medical treatment* …." *Id.* (emphasis added).

Further, the consent of the conservator is not by itself sufficient if the conservatee objects to the medical treatment. *Id.* To override a conservatee's objection, the conservator must either obtain a court order authorizing the conservator to consent to the medical treatment, or "determin[e] in good faith based upon medical advice that the case is an emergency case in which the medical treatment is required because (1) the treatment is required for the alleviation of severe pain or (2) the conservatee has a medical condition which, if not immediately diagnosed and treated, will lead to serious disability or death." Prob. Code § 2354(b)-(c).

There is a detailed process for obtaining a court order authorizing a conservator to consent to medical treatment of the conservatee. See Prob. Code § 2357. The conservator must file a petition that meets certain requirements. Notice must be given to certain persons, counsel must be appointed for the conservatee, and, except in limited circumstances, the court must hold a hearing. *Id.* The court may grant the request if all of the following conditions are met:

> (1) The existing or continuing medical condition of the … conservatee requires the recommended course of medical treatment.
> (2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the ward or conservatee.
> (3) The … conservatee is unable to give an informed consent to the recommended course of treatment.

Id.

There is also a process by which a conservatee may seek a court order directing a conservator to "obtain or consent to, or obtain and consent to, specified medical treatment to be performed upon the … conservatee." See Prob. Code § 2357(i).

The above rules are all "subject to a valid and effective advance health care directive under the Health Care Decisions Law …." Prob. Code § 2356(e). In other words, the conservatee's wishes, as expressed in such a health care directive, are to be respected first and foremost.

Other limitations also apply. In particular,

- "Involuntary civil placement of a … conservatee in a mental health treatment facility may be obtained only pursuant to chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code." Prob. Code § 2356(a).
- "[A]n experimental drug may be prescribed for or administered to a … conservatee only as provided in Article 4 (commencing with Section 111515) of Chapter 6 of Part 5 of Division 104 of the Health and Safety Code." Prob. Code § 2356(b).
- "Convulsive treatment may be performed on a … conservatee only as provided in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code." Prob. Code § 2356(c).

These limitations "make clear that provisions of other statutes relating to highly intrusive forms of medical treatment are the only provisions under which such treatment may be authorized for a … conservatee, thus assuring that procedural safeguards in those provisions will be applied." Prob. Code § 2356 Comment.

In addition, California has an extensive set of rules governing sterilization of a developmentally disabled adult. Prob. Code §§ 1950-1969. This might be of importance if the Commission decides that California's version of UAGPPJA should include not only a Probate Code conservatorship, but also a limited conservatorship of a developmentally disabled adult.

Through statutes, constitutional provisions, and case law, California also imposes various other limitations and requirements regarding medical care of a conservatee, especially in particular situations. *See, e.g., Conservatorship of Wendland,* 26 Cal. 4th 519, 28 P.3d 151., 110 Cal. Rptr. 2d 412 (2001); *Conservatorship of Drabick,* 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988). The above discussion just describes some of the basic provisions, and is not meant to be exhaustive. The staff will provide additional information later in this study if that appears necessary.

ANALYSIS

The above discussion only describes California conservatorship law on the matters in question: voting, estate planning, controlling an allowance, controlling wages or salary, providing necessaries of life to the conservatee and the conservatee's family, marital status, place of residence, and medical treatment.

The staff has not attempted to compare and contrast such law with comparable law in other jurisdictions.

Preparing such a comparison for each of the matters discussed would be quite time-consuming. At least at this stage of the Commission's study, the staff is not sure that such work is necessary. Without question, there are many differences between California conservatorship law and the law of sister states on these matters, both minor and more significant. We are confident that in some instances California has policy-based protections that most, if not all, sister states lack (and probably also vice versa).

With regard to adopting UAGPPJA, however, the steps previously recommended in connection with the conservatee dementia statute would go a long way towards protecting California's policy interests relating to the other matters described above. The key principle is the one that the Commission has already tentatively adopted: Once a conservatorship comes to California under UAGPPJA, the conservatorship "is henceforth subject to California law and will be treated as a California conservatorship." Minutes (Aug. 2011), p. 5. In other words, "when in Rome, do as the Romans do," or more precisely, "when in California, do as the California conservators do."

The staff has also recommended a complementary principle, applicable to California conservators who are taking action in, or in the process of transferring to, a new state: "Be loyal to your master." In other words, so long as you are a California conservator, you must comply with and protect California's policies, as well as any other applicable laws.

Under this general approach, UAGPPJA would seem to pose little threat to the policy interests reflected in the California conservatorship statutes described above, while potentially providing important benefits to persons who require the assistance of a conservator, their friends and families, the judicial system, and the public generally.

With that in mind, we re-visit the staff's recommendations regarding the key substantive components of UAGPPJA: (1) jurisdiction, (2) registration, and (3) transfer.

Jurisdiction (UAGPPJA Article 2)

In connection with the conservatee dementia statute, we explained that UAGPPJA's jurisdictional rules (Article 2), like the jurisdictional principles of due process, focus on the strength of a proposed conservatee's ties to a particular

state. Consequently, adoption of those rules would not dramatically change which conservatorship proceedings are subject to jurisdiction in California, and would not have much impact on the circumstances under which California can enforce its special statute governing conservatees with dementia (Prob. Code § 2356.5). Similarly, adoption of UAGPPJA's jurisdictional rules would not have much impact on the circumstances under which California can enforce the other conservatorship statutes described above. As before, **with regard to Article 2 of UAGPPJA, no special tailoring of the ULC's language or other drafting adjustments appears necessary to protect and effectuate the policy interests underlying the California conservatorship statutes discussed above.**

Registration (UAGPPJA Article 4)

With regard to UAGPPJA's registration process (Article 4), we previously examined two different scenarios: (1) registration of an out-of-state conservatorship in California, and (2) registration of a California conservatorship in another state. We re-visit each of those scenarios below.

Registration of an Out-of-State Conservatorship in California

If California adopted UAGPPJA's registration process, an out-of-state conservatorship could be registered in California. As previously discussed, however, UAGPPJA already provides that the out-of-state conservator could not take any action in California that is prohibited under California law. See UAGPPJA § 403(a). In other words, in this context UAGPPJA already incorporates the "When in Rome" principle.

To promote compliance with that principle, the staff recommended that an out-of-state conservator who registers a conservatorship in California **be required to file a declaration in which the conservator promises to become familiar with applicable California law, and to comply with that law when taking action in California.** Such a requirement would not only help protect the policy interests underlying California's conservatee dementia statute, but would also help protect the policy interests underlying the other California statutes discussed above.

Does the Commission agree with this proposed approach? In this context, do any other steps seem necessary or more appropriate to harmonize UAGPPJA with California's special rules for certain types of actions or decisions?

In all likelihood, the staff has not yet considered all of the practical implications and complexities, and some additional steps may be necessary to fully coordinate this aspect of UAGPPJA with existing California law. We encourage Commissioners and other interested persons to try to envision how these bodies of law would interrelate in this context, and raise any problems they foresee. Specific coordination issues may also become apparent as the Commission proceeds with the drafting process in this study. We will address such matters as they surface.

Registration of a California Conservatorship in Another State

UAGPPJA's registration process would also permit a California conservator to register a California conservatorship in another state. That raises the question of whether the California conservator would have to comply with California law while taking action in the other state.

As previously discussed, a California conservator is already bound by oath to "perform the duties of the office *according to law* …." Prob. Code § 2300 (emphasis added). That requirement may well suffice to compel a California conservator to comply with California law (as well as other applicable law) while taking action in another state.

In discussing the conservatee dementia statute, however, the staff recommended making this point express. More specifically, **we suggested amending Probate Code Section 2300 along the following lines:**

> 2300. Before the appointment of a guardian or conservator is effective, the guardian or conservator shall:
>
> (a) Take an oath to perform the duties of the office according to law~~, which~~. The oath obligates the guardian or conservator to comply with the law of this state, as well as other applicable law, at all times, in any location within or without the state. The oath shall be attached to or endorsed upon the letters.
>
> (b) File the required bond if a bond is required.

This would amount to requiring a California conservator to "be loyal to your master" (i.e., the State of California) at all times, wherever you are. Such a requirement would help to protect the policy interests underlying all of the California statutes discussed above, not just the conservatee dementia statute.

Would the Commission like to pursue this idea? In this context, do any other steps seem necessary or more appropriate to harmonize UAGPPJA with California's special rules for certain types of actions or decisions?

Again, the staff expects that further analysis and study might reveal a need for additional adjustments to properly coordinate this aspect of UAGPPJA with California law. Input on this matter would be helpful.

Transfer (UAGPPJA Article 3)

Under UAGPPJA's transfer process (Article 3), again there are two scenarios to consider: (1) transfer of a California conservatorship to another state, and (2) transfer of an out-of-state conservatorship to California. We re-visit each of those scenarios below.

Transfer of a California Conservatorship to Another State

Before a California conservatorship could be transferred to another state under UAGPPJA, a California court would have to find, among other things, that the conservatee was physically present in or reasonably expected to move permanently to the other state, and that plans for care and services for the conservatee in the other state are reasonable and sufficient. UAGPPJA § 301(d). Under such circumstances, a California court could transfer the conservatorship in good conscience, and let its sister state take responsibility for the conservatee once the transfer is complete. At that point, relinquishing control would be appropriate; the situation would be comparable to that of any other conservatee beyond California's jurisdictional reach.

As previously discussed, however, the transfer process involves a number of steps, and is likely to take some time. Consequently, the Commission might want to **make clear that the conservatorship remains under California control until the transfer process is complete.** As we suggested in connection with the conservatee dementia statute, that could perhaps be done by expressly addressing the point in Probate Code Section 2300, along the following lines:

> 2300. Before the appointment of a guardian or conservator is effective, the guardian or conservator shall:
>
> (a) Take an oath to perform the duties of the office according to law~~, which~~. The oath obligates the guardian or conservator to comply with the law of this state, as well as other applicable law, at all times, in any location within or without the state. If the conservator petitions for transfer of the conservatorship to another state pursuant to [Article 3 of UAGPPJA, as codified in California], the conservator shall continue to comply with the law of this state until the court issues a final order confirming the transfer and terminating the conservatorship pursuant to [UAGPPJA § 301(f), as

codified in California]. The oath shall be attached to or endorsed upon the letters.

(b) File the required bond if a bond is required.

This would not only help to ensure compliance with the conservatee dementia statute during the transfer process, but would also help to ensure compliance with the other California conservatorship statutes discussed above.

For purposes of a tentative recommendation, is the Commission interested in this concept? In this context, do any other steps seem necessary or more appropriate to harmonize UAGPPJA with California's special rules for certain types of actions or decisions?

Here again, the staff expects that further analysis and study might reveal a need for additional adjustments to properly coordinate this aspect of UAGPPJA with California law. Input on this matter would be helpful.

Transfer of an Out-of-State Conservatorship to California

Finally, UAGPPJA's transfer process could be used to transfer an out-of-state conservatorship to California. To address this possibility, the Commission tentatively adopted the "When in Rome" principle: It 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.

For all the reasons presented in connection with the conservatee dementia statute, **the staff believes this decision was sound and the Commission should stick with it in drafting a tentative recommendation.** The approach would not only help safeguard the policy interests underlying California's conservatee dementia statute, but would also help safeguard the policy interests underlying the other California conservatorship statutes discussed above.

The staff also suggested several other steps in connection with the conservatee dementia statute. First, we suggested that the Commission's Comment to UAGPPJA Section 302 could expressly note that a transferred conservatorship must comply with the requirements of the conservatee dementia statute (Prob. Code § 2356.5), because that is an important and unusual feature of California conservatorship law. **The same could be done with some or all of the other conservatorship statutes discussed above.** If the Commission likes this concept, it does not need to decide now precisely how to draft the Comment

language, or even which provisions should be specifically enumerated. **Preliminary input on those points would be helpful, but the actual drafting can wait until later in this study.**

In connection with the conservatee dementia statute, we also suggested the following additional steps:

- Expressly state, either in statutory text or a Commission Comment, that under California's version of UAGPPJA Section 302(f), that when a California court reviews a transferred conservatorship for compliance with California law, it may eliminate or reduce any conservator powers that are inconsistent with California law.
- Require that the conservator of a transferred conservatorship receive the same educational materials as other California conservators, and take the same oath as other California conservators.
- Make explicit that the duty to comply with California law attaches as soon as the conservator begins functioning as such in California.

Each of these steps would help to protect the policy interests underlying all of the California statutes discussed above, not just the conservatee dementia statute.

Would the Commission like to pursue these ideas? With regard to transferring an out-of-state conservatorship to California, do any other steps seem necessary or more appropriate to harmonize UAGPPJA with California's special rules for certain types of actions or decisions?

As before, the staff expects that further analysis and study might reveal a need for additional adjustments to properly coordinate this aspect of UAGPPJA with California law. Input on this matter would be helpful.

IMPORTANT ROLE OF STAKEHOLDERS AND OTHER INTERESTED PERSONS

Practitioners and others who work regularly with California conservatorships have far greater familiarity with this area of the law than the Commission staff, especially with the various special rules and doctrines that California has developed to meet the needs of conservatees and those assisting them. We strongly encourage those with personal experience or other expertise in these matters to **think hard about how best to harmonize UAGPPJA with California's special rules for certain types of actions or decisions.**

Providing comments to the Commission about these matters will greatly aid the Commission in determining how to adjust UAGPPJA for adoption in

California. The Commission recognizes the effort this requires, and much appreciates the contributions of those who participate in this study.

Respectfully submitted,

Barbara Gaal
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