Study L-750 December 10, 2012

Memorandum 2012-51

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Constitutional Constraints

At the August meeting, the Commission directed the staff to prepare a memorandum on the constitutional constraints applicable to conservatorship proceedings and similar arrangements. Minutes (Aug. 2012), pp. 6-7. As the staff explained in a memorandum for that meeting, the Commission "will need to bear these constitutional constraints in mind" in deciding whether and how to modify the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA") for adoption in California. Memorandum 2012-35, p. 35. This memorandum describes case law on the topic and explores its implications with regard to UAGPPJA.

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." If the conservatee requires assistance with personal care, the proceeding is known as a "conservatorship of the person." If the conservatee requires assistance with financial matters, the proceeding is known as a "conservatorship of the estate." **For the sake of simplicity, we will use California terminology throughout this memorandum.**

TYPES OF CALIFORNIA CONSERVATORSHIPS AND SIMILAR ARRANGEMENTS

California has several types of conservatorships. In addition, there are some other civil proceedings in which a California court evaluates an adult's ability to

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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.

function independently, and, if the adult does not appear sufficiently capable, it designates an individual or entity to provide care, treatment, or other assistance.

A "Probate Code conservatorship," also known as a "general conservatorship," is often established when an adult for some reason (typically sickness or old age) becomes incapable of functioning independently and requires assistance from a relative or other person. This is the classic situation that UAGPPJA appears to be intended to address. The statutes relating to Probate Code conservatorships are intended to:

> (a) Protect the rights of persons who are placed under conservatorship.
>
> (b) Provide that an assessment of the needs of the person is performed in order to determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible.
>
> (c) Provide that the health and psychosocial needs of the proposed conservatee are met.
>
> (d) Provide that community-based services are used to the greatest extent in order to allow the conservatee to remain as independent and in the least restrictive setting as possible.
>
> (e) Provide that the periodic review of the conservatorship by the court investigator shall consider the best interests of the conservatee.
>
> (f) Ensure that the conservatee's basic needs for physical health, food, clothing, and shelter are met.
>
> (g) Provide for the proper management and protection of the conservatee's real and personal property.

Prob. Code § 1800. For more information on Probate Code conservatorships, see Memorandum 2012-34, pp. 11-20.

The Lanterman-Petris–Short Act (Welf. & Inst. Code §§ 5000-5550) provides for another type of conservatorship, which is often referred to as an "LPS conservatorship." In specified circumstances, the Act authorizes involuntary detention of a person who, as a result of a mental disorder or inebriation, is gravely disabled or a danger to others or self. Welf. & Inst. Code §§ 5150, 5170. The initial detention period is 72 hours; that period can be extended under certain conditions, and there can be further extensions as well. The LPS process culminates in a one–year conservatorship (renewable under specified conditions) for a person who is "gravely disabled" due to a mental disorder or impairment by chronic alcoholism. *People v. Barrett*, 54 Cal. 4th 1081, 281 P.3d 753, 144 Cal. Rptr. 3d 661 (2012); see also Welf. & Inst. Code § 5350. A person is considered "gravely disabled" if either of the following circumstances exist:

- The person, as a result of a mental disorder or impairment by chronic alcoholism, is unable to provide for basic personal needs for food, clothing, or shelter.
- The person has been found mentally incompetent to stand trial under Penal Code Section 1370, and:
    (1) The person is charged with a felony involving death, great bodily harm, or a serious threat to the well-being of another person;
    (2) The charge has not been dismissed; and
    (3) As a result of mental disorder, the person is unable to understand the nature and purpose of the legal proceedings and to assist counsel in conducting a defense in a rational manner.

Welf. & Inst. Code § 5008(h).

An LPS conservator is authorized to place the conservatee in a mental health treatment facility against the conservatee's will. See Welf. & Inst. Code § 5358. The is "the primary special power" of an LPS conservatorship that a Probate Code conservator lacks. CEB, California Conservatorship Practice § 23.49, at 1141 (2005); see Prob. Code § 2356. For more information about LPS conservatorships, see Memorandum 2012-34, pp. 26–31.

The LPS Act is not the only civil commitment scheme in California. Other types of civil commitments include:

- A judicial commitment of a person with a "developmental disability" who is dangerous to others or to self. Welf. & Inst. Code §§ 6500-6513 (as amended by 2012 Cal. Stat. chs. 25, 439 & 457).
- Civil commitment of a person found incompetent to stand trial. Penal Code §§ 1367-1376.
- Civil commitment of a person found not guilty by reason of insanity. Penal Code §§ 1026-1027.
- Civil commitment of a mentally disordered offender. Penal Code §§ 2960-2981.
- Civil commitment of a sexually violent predator. Welf. & Inst. Code §§ 6600-6609.3.
- Civil commitment of a person who has been convicted of a misdemeanor or infraction, or whose probation for such an offense has been revoked, and who the judge thinks may be addicted to narcotics or in imminent danger of becoming so addicted. Welf. & Inst. Code §§ 3050-3055.
- Civil commitment of a person who may be addicted to narcotics or in imminent danger of becoming so addicted. Welf. & Inst. Code §§ 3100-3111.

- Civil commitment of a person at the time that person would otherwise be discharged by statute from a Youth Authority commitment. Welf. & Inst. Code §§ 1800-1803.
- Civil commitment of a nondangerous developmentally disabled adult. Welf. & Inst. Code § 4825.

See also Welf. & Inst. Code §§ 5345-5349.5 ("Laura's Law," providing for involuntary outpatient treatment under specified circumstances).

Finally, California has two other conservatorship schemes pertaining to developmentally disabled adults:

(1) *A limited conservatorship for a developmentally disabled adult*. See Prob. Code § 1801(d). In this type of conservatorship, the court must specifically tailor the conservator's powers to match the conservatee's needs. See Prob. Code §§ 1801(d), 1821(j), 1830(b), 1872(b), 2351.5(b). The proposed conservatee must be assessed by a regional center. Prob. Code § 1827.5(a). If appointed, a limited conservator has a duty to "secure for the limited conservatee those habilitation or treatment, training, education, medical and psychological services, and social and vocational opportunity as appropriate and as will assist the limited conservatee in the development of maximum self-reliance and independence." Prob. Code § 2351.5(a)(2).

(2) *A conservatorship in which the Director of Developmental Services is appointed conservator for a developmentally disabled adult.* The Director of Developmental Services may be appointed as conservator of a developmentally disabled adult if that adult is either eligible for the services of a regional center, or is a patient in a state hospital who was admitted or committed to that hospital from a county served by a regional center. Health & Safety Code §§ 416, 416.9; Welf. & Inst. Code § 4825. In general, the rules and procedures applicable to this type of conservatorship are the same as for a Probate Code conservatorship. See Health & Safety Code §§ 416.1, 416.16. The director shall perform the conservatorship duties through the regional centers or designees of the regional centers. Health & Safety Code § 416.19. The director has authority to seek civil commitment of the conservatee under the same standards applicable when a private conservator seeks admission for a developmentally disabled adult. See *In re Violet C.*, 213 Cal. App. 3d 86, 261 Cal. Rptr. 470 (1989); *North Bay Regional Center v. Sherry S.*, 207 Cal. App. 3d 449, 256 Cal. Rptr. 129 (1989).

For more information about these types of conservatorship, see Memorandum 2012-34, pp. 21-24.

There is extensive case law on constitutional constraints applicable to involuntary civil commitments and other involuntary mental health treatment.

There is relatively little case law on constitutional constraints applicable to conservatorships that do not involve involuntary mental health treatment.

We therefore begin by discussing constitutional constraints applicable to involuntary mental health treatment. We then discuss constitutional constraints that apply to conservatorships that do not involve involuntary mental health treatment. In the course of each section, we explore the implications of the constitutional constraints with regard to adoption of UAGPPJA.

CONSTITUTIONAL CONSTRAINTS APPLICABLE TO INVOLUNTARY MENTAL HEALTH TREATMENT

A civil commitment or other involuntary mental health treatment in California must comply with both the federal Constitution and the California Constitution. We begin by describing some requirements that are clearly grounded on the federal Constitution, as definitively interpreted by the United States Supreme Court. We then describe some California court decisions discussing federal and state constitutional requirements for involuntary mental health treatment.

The intent here, and in the remainder of this memorandum, is to provide a good overview of the state of the law, not an exhaustive catalog of all applicable constitutional constraints. For reasons discussed later, that should be sufficient for present purposes.

Constitutional Constraints Found by the United States Supreme Court

Much of the constitutional case law relating to involuntary mental health treatment concerns due process requirements. We discuss the United States Supreme Court decisions on that topic first, and then turn to equal protection requirements.

General Principles of Federal Due Process Applicable to Civil Commitments

The Fourteenth Amendment to the United States Constitution declares that "[n]o state shall … deprive any person of life, *liberty,* or property, without due process of law." (Emphasis added.) The United States Supreme Court has repeatedly recognized that commitment to a mental hospital entails "a massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *see also Vitek v. Jones,* 445 U.S. 480, 491 (1980). As Justice Brennan explained,

> Persons incarcerated in mental hospitals are not only deprived of their physical liberty, they are also deprived of friends, family, and community. Institutionalized mental patients must live in unnatural surroundings under the continuous and detailed control of strangers. They are subject to intrusive treatment which, especially if unwarranted, may violate their right to bodily integrity. … Furthermore, … persons confined in mental institutions are stigmatized as sick and abnormal during confinement and, in some cases, even after release.

Parham v. JR, 442 US. 584 (1979) (Brennan, J., concurring in part & dissenting in part). Because it so seriously curtails liberty, "civil commitment for any purpose … requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425 (1979).

"For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined." *Lassiter v. Dep't of Social Services,* 452 U.S. 18, 24 (1981). "[T]he phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Id.*

In the context of involuntary mental health treatment, due process analysis has both substantive and procedural components. The substantive component bars certain arbitrary, wrongful government actions, regardless of whether the government used fair procedures. *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992). Thus, "the substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." *Mills v. Rogers,* 457 U.S. 291, 299 (1982).

The procedural prong "concerns the *minimum procedures* required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance." *Id.* (emphasis added). In assessing whether a state's procedures are constitutionally adequate, a court must balance "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter,* 452 U.S. at 27; *see also Washington v. Harper,* 494 U.S. 210, 229 (1990); *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Federal Due Process and Commitment of the Mentally Ill

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha,* 504 U.S. at 80. Nonetheless, "that liberty interest is not absolute." *Kansas v. Hendricks,* 521 U.S. 346, 356 (1997). **"**The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of

emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426.

"Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." *Hendricks*, 521 U.S. at 357. The Court has "consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Id.* But the Court has been clear that "[l]oss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior." *Addington*, 441 U.S. at 427.

In *Foucha*, for example, the Court explained that "to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove … that the person sought to be committed is mentally ill *and* that he requires hospitalization for his own welfare and protection of others. 504 U.S. at 75-76 (emphasis added). "[A]s a matter of due process … it [is] unconstitutional for a State to continue to confine a harmless, mentally ill person." *Id.* "A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Without more, "a State cannot constitutionally confine … a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *Id.* at 576.

Likewise, "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997). The Court has sustained civil commitment statutes, such as the Kansas Sexually Violent Predator Act, only "when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* "These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Id.* There is "no requirement of *total* or *complete* lack of control," but "there must be proof of serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 411, 413 (2002) (emphasis in original).

To comply with federal due process, the state must prove both mental illness and dangerousness by clear and convincing evidence. *Addington*, 441 U.S. at 425-

33. "[T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington*, 441 U.S. at 427.

That requirement applies even when a prisoner is transferred to a mental hospital. *See generally Vitek*, 445 U.S. at 491. It is indisputable that involuntary confinement in a mental hospital "can engender adverse social consequences to the individual." *Addington*, 441 U.S. at 425-26. As the Court has explained, "[w]hether we label this phenomen[on] 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual." *Id.* at 426. Thus, the Court concluded in *Vitek* that "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections." 445 U.S. at 494.

Federal Due Process and Commitment of a Defendant Acquitted by Reason of Insanity

Different considerations apply when a person charged with a crime is found not guilty by reason of insanity. In that situation, "a State may commit the defendant without satisfying the *Addington* burden with respect to mental illness and dangerousness." *Foucha*, 504 U.S. at 76. "Such a verdict, 'establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness ….'" *Id., quoting Jones v. United States*, 463 U.S. 354, 363 (1983). "From these two facts, it could properly be inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed." *Foucha*, 504 U.S. at 76 (footnote omitted).

Moreover, although the prosecution must prove beyond a reasonable doubt that the defendant committed the criminal act, it is constitutionally sufficient to prove by a preponderance of the evidence that the defendant was insane at the time of the act. *Jones v. United States*, 463 U.S. 354, 366-68. Once the State meets that burden, "the acquittee may be held as long as he is *both* mentally ill and dangerous, but no longer." *Foucha*, 504 U.S. at 77 (emphasis added). If the State is to continue to confine the person, "the State [is] required to afford the protections

constitutionally required in a civil commitment proceeding," *id.* at 79, or the acquittee "should not be held as a mentally ill person," *id.*

Federal Due Process and Commitment of a Defendant Who is Incompetent to Stand Trial

Similarly, "a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Jackson v. Indiana,* 406 U.S. 715, 738 (1972). "At the least, due process requires that the nature and duration of commitment bear some *reasonable relation to the purpose* for which the individual is committed." *Id.* (emphasis added).

If such a relationship is lacking, "then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." *Id.* (footnote omitted). In *Jackson*, for instance, the State could not constitutionally continue to confine a deaf mute defendant "on a record that sufficiently establishe[d] the lack of a substantial probability that he [would] ever be able to participate fully in a trial." *Id.* at 738-39.

Federal Due Process and Commitment of a Person with an Intellectual Disability

In addition to reviewing civil commitments that involved mental illness, acquittal by insanity, or incompetency to stand trial, the Court has examined the due process rights of individuals with intellectual disabilities. Commitment of a so-called "mentally retarded person" (the Court's term) under proper procedures "does not deprive him of all substantive liberty interests under the Fourteenth Amendment." *Youngberg v. Romeo,* 457 U.S. 307, 315 (1982). The person retains "a right to adequate food, shelter, clothing, and medical care." *Id.* (footnote omitted).

Such a person also has a right to safe conditions of confinement. As the Court explained in *Youngberg*, "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Id., quoting Ingraham v. Wright,* 430 U.S. 651, 673 (1977). It is "unconstitutional to confine the involuntarily committed … in unsafe conditions." *Youngberg,* 430 U.S. at 316. The State "has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution." *Id.* at 324.

Further, the committed person has "a right to freedom from bodily restraint." *Id.* at 316. The State "may not restrain residents except when and to the extent professional judgment deems this necessary to assure … safety or to provide needed training." *Id.* at 324.

Finally, the Court recognized that the liberty interests of the committed person "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319. In appropriate circumstances, this would include, for example, training to reduce the need to restrain an individual "for prolonged periods on a routine basis." *Id.* at 311.

The Court noted, however, that the above rights are not absolute. "In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.'" *Id.* at 320, *quoting Poe v. Ullman,* 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). In assessing whether the State has met that burden, decisions made by the appropriate professional are entitled to a presumption of correctness." *Youngberg,* 457 U.S. at 324.

Federal Due Process and Involuntary Administration of Antipsychotic Medication

In several cases, the Court has given guidance concerning involuntary administration of antipsychotic medication. The first such case was *Washington v. Harper,* 494 U.S. 210 (1990), in which the Court considered but rejected a mentally ill inmate's due process challenge to treatment with antipsychotic drugs against his will.

The Court had "no doubt that … [a person] possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Harper,* 494 U.S. at 221-22. The Court explained, however, that there must be "an accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others." *Id.* at 236. In particular, "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.* at 227.

Certain procedural protections are necessary, however, "to ensure that the decision to medicate an inmate against his will is neither arbitrary nor erroneous …." *Id.* at 228. In particular, the Court concluded that the inmate must be afforded an opportunity to be heard on the matter "'at a meaningful time and in a meaningful manner.'" *Id.* at 235, *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The Court did not consider it necessary for the State to hold that hearing before a judicial decisionmaker. *Harper*, 494 U.S. at 228-33. In the Court's view, "an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge." *Id.* at 231.

The Court further determined that the prison medication policy at issue was constitutionally adequate because it provided for notice to the inmate, the right to be present at an adversary hearing before an unbiased decisionmaker, and the right to present and cross-examine witnesses. *See Harper*, 494 U.S. at 235-36. The Court did not consider it necessary for the State to provide counsel for the inmate, conduct the hearing in accordance with the rules of evidence, or use the "clear, cogent, and convincing" standard of proof. *Id*.

In two later cases, the Court considered the constitutionality of forcibly administering antipsychotic medication to a criminal defendant during trial. In the first such case, the Court said that the State "certainly would have satisfied due process" if the prosecution had satisfied the *Harper* standard. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992). The Court also said that "the State *might* have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of [the defendant's] guilt or innocence by using less intrusive means." *Id.* (emphasis added). Because the record included no evidence supporting either justification, the Court held that the forced administration of antipsychotic medication during trial violated the defendant's right to due process and required reversal of his conviction. *See id.* at 138.

In *Sell v. United States*, 539 U.S. 166 (2003), the Court made clear that in certain limited circumstances a State is permitted to forcibly administer antipsychotic medication for purposes of rendering a defendant fit to stand trial, as opposed to controlling a dangerous defendant. In particular, the Court held that

> the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant

> competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

Id. at 179. The Court cautioned that instances satisfying this standard "may be rare." *Id.* at 180.

Federal Equal Protection Constraints on Civil Commitments

The Fourteenth Amendment to the United States Constitution not only requires each State to comply with due process, but also prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." This equal protection requirement "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Thus, "[t]he United States Supreme Court … ha[s] placed significant constitutional limitations, based on the equal protection clause, on the ability of the government to distinguish between various types of civil committees." *In re Smith,* 42 Cal. 4th 1251, 178 P.3d 446, 73 Cal. Rptr. 3d 469 (2008).

In *Baxstrom v. Herold,* 383 U.S. 107, 110 (1966), for example, the Court held that the petitioner was denied equal protection by a New York statute under which a person could be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in the state, including someone with a past criminal record. The Court explained that for purposes of granting a jury trial on the question whether a person is mentally ill and in need of institutionalization, "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.* at 111-12.

Similarly, in *Jackson,* 406 U.S. 715, the Court considered statutory procedures that made it easier to indefinitely commit defendants who are incompetent to stand trial than to commit other persons, and more difficult for such defendants to obtain release from commitment. The Court held that "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by [certain laws], Indiana deprived [him] of equal protection of the laws under the

Fourteenth Amendment." *Id.* at 730. Referring back to *Baxstrom,* the Court explained that "[i]f criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice." *Id.* at 724.

In *Cleburne,* the Court considered an equal protection challenge to a zoning ordinance that required a special use permit for operation of a group home for the "mentally retarded," but did not require such a permit for "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged …, private clubs or fraternal orders, and other specified uses." 473 U.S. at 447. The challengers maintained that "mental retardation" is a quasi-suspect legislative classification that triggers a heightened standard of judicial scrutiny. For several reasons, the Court disagreed. *See id.* at 442-46.

The Court stated, however, that its refusal to recognize the "retarded" as a quasi-suspect class "does not leave them entirely unprotected from invidious discrimination." *Id.* at 446. The Court went on to say:

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives — such as a "bare desire to harm a politically unpopular group" — are not legitimate state interests.

Id. at 446-47 (citations omitted). Applying that standard, the Court invalidated the challenged ordinance, concluding that it appeared "to rest on an irrational prejudice against the mentally retarded …." *Id*. at 450. Thus, although the Court said it was using "rational basis" scrutiny, its scrutiny nevertheless has some "bite."

In the more recent case of *Heller v. Doe,* 509 U.S. 312 (1993), however, the Court rejected an equal protection challenge to a Kentucky statute that, among other things, imposed a lower standard of proof for a commitment based on

"mental retardation" (proof by clear and convincing evidence) than for a commitment based on mental illness (proof beyond a reasonable doubt). The Court refused to apply a heightened standard of scrutiny to the statute because the challengers did not properly present a claim for such scrutiny. *Id.* at 318-19.

Having decided to use rational basis scrutiny, the Court emphasized that such scrutiny is deferential in nature:

> We many times have said … that rational basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable basis for the classification.

Id. at 320 (citations, internal quotes, and brackets omitted).

The Court then extensively discussed various differences between the "mentally retarded" and the mentally ill. *See id.* at 321-33. Due to those differences, the Court concluded that Kentucky had "proffered more than adequate justifications for the differences in treatment between the mentally retarded and the mentally ill." *Id.* at 321.

Implications for Adoption of UAGPPJA

The case law discussed above concerns constraints of the federal Constitution, as interpreted by the United States Supreme Court. As such, that case law is binding on all fifty states. Because every state must comply with it, there should not be any difference in treatment from state to state. Accordingly, that case law should not be a source of concern in adopting UAGPPJA's approaches to conservatorship issues that cross state lines.

Yet the situation is not quite that simple. First, UAGPPJA would define "State" to include "Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States." UAGPPJA § 102(14). Based on very

preliminary research, the staff cannot say with confidence that all of those entities are bound by the case law discussed above. **The staff will investigate this matter if, after considering this entire memorandum, the Commission decides it is necessary.**

Second, although state courts and the lower federal courts are bound by the United States Supreme Court's interpretations of the federal Constitution, such courts sometimes reach differing results when determining how to apply the Court's guidance to a new fact situation. That can result in regional variations in interpretation of the federal Constitution, which the Court might not resolve for a long time, if at all. In addition, a state court might interpret the Due Process and Equal Protections provisions of the state Constitution more expansively than the corresponding federal provisions, or the state Constitution might include protections not found in the federal Constitution.

These possibilities may lead to differential levels of constitutional protection from one state to another, which could be of concern in adopting UAGPPJA's procedures for registering conservatorships and transferring conservatorships from state to state. With that in mind, and having examined what the United States Supreme Court has said the federal Constitution requires, we next explore what California courts have said about federal and state constitutional requirements for involuntary mental health treatment.

Constitutional Constraints Found by California Courts

There are numerous published cases in which a California court considered a constitutional challenge to a civil commitment. In some of those cases, the California court just followed a United States Supreme Court decision that involved a closely similar set of facts. *See, e.g., In re Davis*, 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973) (adopting rule of *Jackson v. Indiana* on continued detention of person found incompetent to stand trial). In other cases, the California court rejected a constitutional challenge to a civil commitment. *See, e.g., Conservatorship of Ben C.*, 40 Cal. 4th 529, 150 P.3d 738, 53 Cal. Rptr. 3d 856 (2007) (concluding that neither federal nor California Constitution requires *Anders*/*Wende* procedures in appeal from imposition of LPS conservatorship). Those cases are of little import in evaluating UAGPPJA for possible adoption in California.

More interesting for present purposes are cases in which a California court found a constitutional protection that the United States Supreme Court has not

recognized, either because the protection is grounded in the California Constitution rather than the federal Constitution, or because the California court is interpreting the federal Constitution in a context that the United States Supreme Court has not specifically addressed. We provide some examples of such cases below.

Due Process Protections in the California Constitution

Much like the federal Constitution, the California Constitution declares that a person "may not be deprived of life, *liberty*, or property without due process of law." Cal. Const. art. I, § 7 (emphasis added); *see also* Cal. Const. art. I, § 15. Although the wording is almost identical to the federal Due Process Clause, the level of protection is not. As a court of appeal explained:

> Our state due process constitutional analysis differs from that conducted pursuant to the federal due process clause in that the claimant need not establish a property or liberty interest as a prerequisite to invoking due process protection. Focused rather on an individual's due process liberty interest to be free from arbitrary adjudicative procedures, procedural due process under the California Constitution is *"much more inclusive" and protects a broader range of interests* than under the federal Constitution.

Ryan v. California Interscholastic Federation, 94 Cal. App. 4th 1033, 1069, 114 Cal. Rptr. 2d 798 (2001) (emphasis added, citations omitted). "This approach presumes that when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudicial decision-making and in being treated with respect and dignity." *People v. Ramirez*, 25 Cal. 3d 260, 268, 599 P.2d 622, 158 Cal. Rptr. 316 (1979).

Due to this difference in focus and scope, it is not surprising that, in construing involuntary civil commitment statutes, the California Supreme Court has occasionally reached a holding under California's due process clause "regardless of whether the result was compelled as a matter of federal constitutional law." *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 1152 n.19, 969 P.2d 584, 81 Cal. Rptr. 2d 492 (1999). A string of cases relating to the standard of proof for commitment and the necessity of a unanimous jury verdict clearly illustrate this phenomenon.

The Requirements of Proof Beyond a Reasonable Doubt and a Unanimous Jury Verdict Under California's Due Process Guarantee

In 1975, the California Supreme Court considered the proper standard of proof in mentally disordered sex offender ("MDSO") proceedings (the predecessor of today's Sexually Violent Predators Act ("SVPA")). *See People v. Burnick*, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975). The Court carefully reviewed the severe consequences of being committed as an MDSO, describing in detail the conditions at the state mental hospital where MDSOs were confined, the indeterminate nature of the commitment, and the stigma associated with being classified as an MDSO. *See id.* at 319-22. The Court emphasized the cruelty of "falsely find[ing] a man to be a 'mentally disordered sex offender' and confin[ing] him indefinitely in a prison-like state mental institution." *Id.* at 310. To help avoid erroneous imposition of such a drastic deprivation of liberty, the Court rejected the State's contention that it could "publicly brand a man as a mentally disordered sex offender and lock him up for an indeterminate period in a maximum security mental hospital on a mere preponderance of the evidence …." *Id.* Instead, the Court held "that in order to comply with the requirements of the due processes clause of the *California* and federal Constitutions, so drastic an impairment of the liberty and reputation of an individual *must be justified by proof beyond a reasonable doubt*." *Id.* (emphasis added).

In another case decided the same day, the Court considered whether an MDSO defendant is constitutionally entitled to a unanimous verdict on the question of being an MDSO. *See People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975). The Court referred back to its *Burnick* discussion of the consequences of being committed to a state mental hospital as an MDSO. *See id.* at 351. It concluded that under the same reasoning as *Burnick*, "a mentally disordered sex offender is entitled to a unanimous verdict." *Id.* Because the MDSO statute failed to include such a requirement, the Court held that "it violates the provisions of the California Constitution guaranteeing due process of law (art. I, § 7, subd. (a)) and a unanimous jury verdict (art. I, § 16)." *Id.* at 350 (footnote omitted).

In later cases, the Court used similar reasoning to extend the requirements of proof beyond a reasonable doubt and a unanimous jury verdict to other types of civil commitment proceedings. *See In re Hop*, 29 Cal. 3d 82, 93-94, 623 P.2d 282, 171 Cal. Rptr. 721 (1981) (civil commitment of developmentally disabled person

pursuant to Welf. & Inst. Code § 4825 requires proof beyond reasonable doubt); *Conservatorship of Hofferber,* 28 Cal. 3d 161, 616 P.2d 836, 167 Cal. Rptr. 854 (1980) ("grave disability" for commitment under LPS Act must be proved to unanimous jury beyond reasonable doubt because it "involves loss of liberty and substantial stigma"); *Conservatorship of Roulet,* 23 Cal. 3d 219, 235, 590 P.2d 1, 152 Cal. Rptr. 425 (1979) ("The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act."); *People v. Thomas,* 19 Cal. 3d 630, 637, 644, 566 P.2d 228, 139 Cal. Rptr. 594 (1977) (commitment as narcotics addict under Welf. & Inst. Code § 3108 requires proof beyond reasonable doubt and unanimous jury verdict under federal and state due process clauses and state guarantee of unanimous jury verdict).

Some, but not all, of the cases described above predate the United States Supreme Court's 1979 decision in *Addington,* 441 U.S. 418 (discussed above), which holds that "clear and convincing evidence" of mental illness and dangerousness is sufficient to satisfy the requirements of federal due process. In *Addington,* the United States Supreme Court "concluded that the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment." *Id.* at 432.

To the extent that some of the above-described California cases rely on the federal Due Process Clause, they might be undercut by *Addington*. But the California Supreme Court is the ultimate authority on interpretation of the California Constitution, not the United States Supreme Court. *See, e.g., Fallbrook Irr. Dist. v. Bradley,* 164 U.S. 112, 155 (1896); 7 B. Witkin, Summary of California Law *Constitutional Law* § 112, p. 218 (10th ed. 2005). Thus, the above-described California cases appear to remain good law to the extent that they are grounded on the due process and unanimous jury requirements of the California Constitution.

Consistent with that analysis, those cases continue to be widely cited and relied on in California civil commitment cases. *See, e.g., Conservatorship of John L.,* 48 Cal. 4th 131, 143, 225 P.3d 554, 105 Cal. Rptr. 3d 424 (2010); *Conservatorship of Ben C.*, 40 Cal. 4th at 541; *Conservatorship of Susan T.*, 8 Cal. 4th 1005, 1009, 884 P.2d 988, 36 Cal. Rptr. 2d 40 (1994). However, the requirement that the State provide proof beyond a reasonable doubt does not apply to every type of issue in

such cases. *See, e.g., People v. McKee,* 47 Cal. 4th 1172, 1188-91, 223 P.3d 566, 104 Cal. Rptr. 3d 427 (2010) (requiring sexually violent predator ("SVP") to prove entitlement to release at subsequent commitment proceeding does not violate due process); *Conservatorship of Christopher A.,* 139 Cal. App. 4th 604, 43 Cal. Rptr. 3d 427 (2006) (State must prove "grave disability" beyond reasonable doubt, but "case law suggests that the party seeking conservatorship has the burden to prove by clear and convincing evidence the least restrictive placement and disabilities necessary to achieve the purpose of the LPS conservatorship"); *Hofferber,* 28 Cal. 3d at 178 (appellant's dangerous mental condition must be found beyond reasonable doubt and, if appellant insists, by a unanimous jury, but law does not require equally stringent showing of incompetence to stand trial).

The Requirement of a Unanimous Jury Verdict Under Equal Protection Doctrine in California

In *Feagley,* the California Supreme Court relied on equal protection doctrine, as well as due process, to justify its decision requiring a unanimous jury verdict in MDSO proceedings. The Court "characterized the right to a unanimous verdict under the California Constitution as 'fundamental.'" 14 Cal. 3d at 356. For that reason, the Court concluded that the State bore a stiff burden to justify its practice of requiring a unanimous jury verdict in LPS trials but not MDSO proceedings: It would have to show that "there is a *compelling* interest which justifies this significant distinction between the rights of mentally disordered sex offenders and those committed under the LPS Act, and that the distinction is *necessary* to further such purpose." *Id.* (emphasis added). The Court concluded that the State failed to meet that burden:

> [I]n comparison with the procedure under the LPS Act, it is easier to commit a man as a mentally disordered sex offender and harder for him to secure his release. One would therefore expect the procedural safeguards in the latter proceeding to be commensurately greater. Instead, they are substantially lesser, in that the Legislature denies the mentally disordered sex offender the right to a unanimous jury verdict which it grants to a person committed under the LPS Act. This is common sense turned upside down, a discrimination without semblance of rational basis — let alone a compelling state interest, and *a wholesale denial of equal protection under both the California and federal Constitutions.*

Id. at 358 (emphasis added).

The California Supreme Court thus found an equal protection violation in a context not specifically addressed in any decision of the United States Supreme Court. It based that decision on both the California Constitution and the federal Constitution, and, due to the "fundamental" nature of the right to a unanimous jury verdict under the California Constitution, it used a more rigorous standard of scrutiny than the United States Supreme Court used in cases such as *Cleburne* and *Heller*. Employing a similar approach, the California Supreme Court also concluded in *Roulet* that the equal protection clauses of the California and federal Constitutions require a unanimous jury verdict in "grave disability" proceedings under the LPS Act. *See* 23 Cal. 3d at 231-33.

Other California Decisions on Equal Protection and Involuntary Mental Health Treatment

Feagley and *Roulet* are not the only decisions in which California courts have applied rigorous scrutiny to legislative classifications involving involuntary mental health treatment. As the California Supreme Court explained in *Hubbart,*

> *Hendricks* … suggests a willingness on the part of the United States Supreme Court to accord substantial deference to involuntary civil commitment laws challenged under the federal Constitution. However, *this court has traditionally subjected involuntary civil commitment statutes to the most rigorous form of constitutional review ….*

19 Cal. 4th at 1153 n.20 (emphasis added). Likewise, in *In re Smith* the Court explained that under California law, strict scrutiny is the correct standard for evaluating equal protection claims of disparate treatment in civil commitment, because an individual's personal liberty is at stake. 42 Cal. 4th at 1263. Accordingly, the government must show that it has a compelling interest that justifies the challenged procedure and that the legislative distinctions drawn are necessary to further that interest. *Id.*

Other California cases also apply heightened scrutiny to claims of disparate treatment in involuntary commitment standards. *See, e.g., McKee,* 47 Cal. 4th at 1210 ("fundamental distinctions between classes of individuals subject to civil commitment are subject to strict scrutiny"); *Hop,* 29 Cal. 3d at 89 (personal liberty is fundamental interest, so State justifying civil commitment scheme must show legislative classification is necessary to serve compelling interest); *Hofferber,* 28 Cal. 3d at 171 n.8 ("conservator concedes that, because a fundamental liberty interest is at stake, strict scrutiny is the correct standard of review"); *In re Moye,*

22 Cal. 3d 457, 465, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978) ("Because petitioner's personal liberty is at stake, the People concede that the applicable standard for measuring the validity of the statutory scheme now before us requires application of strict scrutiny"); *People v. Smith,* 5 Cal. 3d 313, 318-19, 486 P.2d 1213, 96 Cal. Rptr. 13 (1971) ("The state's power to order the involuntary commitment of a person suspected of being a danger to the public is a proper case in which to impose upon the state the more onerous burden of demonstrating that there exists a compelling interest and that the distinction is necessary to further that purpose."); *People v. Hubbart,* 88 Cal. App. 4th 1202, 1217, 106 Cal. Rptr. 2d 490 (2001) (strict scrutiny is appropriate standard to measure claims of disparate treatment in civil commitments); *People v. Buffington,* 74 Cal. App. 4th 1149, 1156, 88 Cal. Rptr. 2d 696 (1999) ("Strict scrutiny is the correct standard of review in California for disparate involuntary civil commitment schemes because liberty is a fundamental interest.").

Just as California courts have applied strict scrutiny to distinctions in involuntary commitment standards (i.e., legislation that imposes a particular prerequisite or requirement for obtaining one type of involuntary commitment but not for obtaining another type of involuntary commitment) and distinctions in jury unanimity rules for involuntary commitment (i.e., legislation that requires jury unanimity for one type of involuntary commitment but not for another type of involuntary commitment), they have done the same to distinctions in affording a jury trial for involuntary commitment (i.e., legislation that provides a jury trial for one type of involuntary commitment but not for another type of involuntary commitment). As the California Supreme Court explained in *In re Gary W.,* 5 Cal. 3d 296, 306, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971), "[t]he right to a jury trial in an action which may lead to the involuntary confinement of the defendant, even if such confinement is for the purpose of treatment, is … fundamental," and therefore triggers strict scrutiny.

The same is true with regard to involuntary administration of antipsychotic medication. A person has a significant liberty interest in avoiding unwanted administration of such drugs. *In re Calhoun,* 121 Cal. App. 4th 1315, 1353, 18 Cal. Rptr. 3d 315 (2004); *see also In re Qawi,* 32 Cal. 4th 1, 15 n.4, 81 P.3d 224, 7 Cal. Rptr. 3d 780 (2004) (coercive administration of antipsychotic medication, with its potentially serious side effects, "imposes a significant additional burden on the MDO's liberty interest"). Because of the potential impact on "the fundamental interest of personal liberty," a legislative scheme that applies different rules for

involuntary administration of antipsychotic medication to one group of people than to another group "is subject to strict scrutiny review." *Calhoun,* 121 Cal. App. 4th at 1353. In *Calhoun,* the State failed to demonstrate a compelling state interest justifying a statutory distinction between mentally disordered offenders ("MDOs") and SVPs concerning administration of antipsychotic medication. *Id.* at 1353-54. The court thus concluded that "[e]qual protection principles require that an SVP be provided with the same right as an MDO to refuse antipsychotic medication." *Id.* at 1351.

By applying stringent scrutiny in this context and the other contexts discussed above, California courts have taken a more protective approach to equal protection issues than the United States Supreme Court. As a result, an equal protection claim relating to involuntary mental health treatment might be more likely to succeed in California than in a state that adheres more closely to the federal approach, at least if the claim involves involuntary commitment standards, the right to a jury or unanimous jury verdict, or involuntary administration of antipsychotic medication. For some statutory distinctions relating to involuntary mental health treatment, however, the California Supreme Court has applied rational basis review, rather than more stringent scrutiny. *See Barrett,* 54 Cal. 4th 1081, 111 n.21, P.3d 753, 144 Cal. Rptr. 661 (2012) (jury trial advisement and personal waiver of jury trial); *but see id.* at 1113 (Werdegar, J., concurring & dissenting)) (court should apply *Cleburne* rational basis review with "bite"); *id.* at 1115, 1144-46 (Liu, J., concurring & dissenting) (same).

Due Process and Waiver of Statutory or Constitutional Rights Relating to Involuntary Mental Health Treatment

Another group of California cases examine the circumstances under which a waiver of a statutory or constitutional right relating to involuntary mental health treatment is effective and will withstand a due process challenge. In some such cases, California courts have held that counsel effectively waived a client's right. In *Barrett,* for example, the California Supreme Court concluded:

> [S]omeone … who is alleged to be mentally retarded and dangerous under Section 6500, is not in a position to personally assert or waive the right to jury trial, to sufficiently comprehend the jury trial advisement, or to override the views of counsel on the subject. Sole control over such tactical and procedural decisions rests with counsel.

54 Ca. 4th at 1105; *see also Conservatorship of Mary K.*, 234 Cal. App. 3d 265, 271, 285 Cal. Rptr. 618 (1991) (counsel for proposed LPS conservatee effectively waived her right to jury trial when he informed court he had spoken with client and she wished to waive jury; "an on-the-record personal waiver of a jury trial is not required from the proposed conservatee.").

Similarly, in *John L.*, the California Supreme Court determined that counsel had effectively waived a proposed LPS conservatee's right to attend the conservatorship hearing and contest the conservatorship petition:

> "[T]he superior court did not deprive John of due process when it established the conservatorship of his person in his absence. This conclusion is consistent with decisions generally recognizing that, even though certain rights implicated in civil proceedings are substantial, they may be waived by an attorney with the client's express consent.

48 Cal. 4th at 156; *see also Conservatorship of Deidre B.*, 180 Cal. App. 4th 1306, 1316, 103 Cal. Rptr. 3d 825 (2010) (counsel's sworn stipulation to reestablish LPS conservatorship was effective when it stated that counsel had communicated with conservatee and conservatee "consented to reestablishment of the conservatorship by stipulation and to the proposed placement and disabilities without a formal hearing.").

But in other cases California courts have found due process violations. For example, in *People v. Wilkinson,* 185 Cal. App. 4th 543, 110 Cal. Rptr. 3d 776 (2010), the trial court found Sheila Wilkinson to be a "mentally retarded" person pursuant to Welfare and Institutions Code Section 6500. On appeal, the main issue was

> one of those procedural protections guaranteed to a criminal defendant — the right to be present at the hearing that could result in a loss of liberty. Cal. Const. art. I, § 15.

Id. at 547-48. Ms. Wilkinson argued that her commitment must be reversed because her attorney "waived her appearance at the hearing without consulting with her and against her expressed desire to be present." *Id.* at 546. The court of appeal agreed:

> [T]he trial court erred in accepting the attorney's waiver of Wilkinson's right to be present at the hearing over her objection. Ample case law recognizes that a proposed conservatee has the right under the due process clauses of the federal and state Constitution to be present at a hearing that could result in substantial deprivation of liberty.

Id. at 546. The court of appeal distinguished the cases involving waiver of a jury trial, explaining that "because an attorney may waive his or her client's right to a jury trial, it does not necessarily follow that an attorney may waive all of a client's rights." *Id.* at 551.

Similarly, in *People v. Fisher,* 172 Cal. App. 4th 1006, 91 Cal. Rptr. 3d 609 (2009), an MDO appealed from an order authorizing a state mental hospital to forcibly administer psychotropic medication to him. He contended, among other things, that his due process rights were violated because he did not personally waive his right to be present for the hearing that led to the order. The court of appeal agreed, saying that "[a]ppellant's constitutional right to a fair hearing was violated here because he did not personally waive his right to be present and was not unable to attend the hearing." *Id.* at 1014.

Wilkinson and *Fisher* are not isolated examples. There are several other California cases along these lines as well. *See, e.g., Conservatorship of David L.,* 164 Cal. App. 4th 701, 705-06, 79 Cal. Rptr. 3d 530 (2008) ("[A] prospective conservatee who requests substitute appointed counsel must be given a full opportunity to state his reasons for his request …, and the trial court's failure to afford David a full opportunity to state his reasons for requesting substitute counsel here violated his right to due process of law."); *Christopher A.,* 139 Cal. App. 4th at 613 (stipulated judgment on placement, disabilities, and powers of LPS conservator approved by counsel without express consent of conservatee and adopted by court after no formal hearing on those issues violates procedural due process); *In re Watson,* 91 Cal. App. 3d 455, 462, 154 Cal. Rptr. 151 (1979) ("In the absence of an affirmative showing that a patient is physically unable to attend or has waived personal attendance, due process requires the physical presence of the mentally retarded person at the commitment hearing under section 6500.1.").

Other California Cases Recognizing Constitutional Rights Relating to Involuntary Mental Health Treatment

There are also a variety of other contexts in which courts have recognized constitutional rights relating to involuntary mental health treatment. *See, e.g., K.G. v. Meredith,* 204 Cal. App. 4th 164, 185, 138 Cal. Rptr. 3d 645 (2012) (Public Guardian's practices violated due process because they gave proposed conservatee inadequate notice and opportunity to be heard regarding involuntary administration of antipsychotic medication during temporary

conservatorship); *Conservatorship of Ivey*, 186 Cal. App. 3d 1559, 1566, 231 Cal. Rptr. 376 (1986) (due process requires mailing of LPS conservatorship investigation report "directly to the proposed conservatee"); *Lillian F. v. Superior Court*, 160 Cal. App. 3d 314, 206 Cal. Rptr. 603 (1984) (Due process requires presentation of clear and convincing evidence to support order that conservatee lacks the capacity to consent to or refuse electroconvulsive therapy). It does not seem necessary to discuss such rulings further at this time.

Implications for Adoption of UAGPPJA

What are the implications of the above-described case law with regard to adoption of UAGPPJA in California?

From the preceding discussion, it should be clear that in reviewing civil commitments and other involuntary mental health treatment, California courts have recognized and applied significant constitutional safeguards that have not been enunciated by the United States Supreme Court. That situation can occur when a California court decides that the California Constitution contains a protection that may not exist in the federal Constitution. Alternatively, it can occur when a California court interprets a provision of the federal Constitution in a context that the United States Supreme Court has not specifically considered. It can also occur when a California statutory scheme provides rights to some individuals and equal protection principles (especially California's rigorous equal protection principles) require extension of those rights to similarly situated individuals as a matter of constitutional, rather than statutory, law.

Because California courts have found a variety of constitutional protections with regard to involuntary mental health treatment that are not the established "law of the land" (i.e., federal law, as definitively interpreted by the United States Supreme Court), the concept of transferring an out-of-state proceeding involving such treatment to California poses serious problems.

A California court could not constitutionally permit such a transfer and allow involuntary mental health treatment to occur in California unless it was satisfied that the out-of-state proceeding complied with all of the constitutional constraints applicable here, both substantive and procedural. Assessing whether that was true would be burdensome on the court and the litigants, and might involve costly and protracted disputes over which rights are statutory as opposed to constitutional and whether a particular out-of state procedure was equivalent to one constitutionally required in California.

A cleaner approach would be to preclude such a transfer and require that the need for an LPS conservatorship or other type of involuntary mental health treatment be litigated from scratch here in California, in accordance with California law. In other words, the staff suggests that **under California's version of UAGPPJA, the transfer process could not be used to convert an out-of-state conservatorship into any of the following:**

- An LPS conservatorship. Welf. & Inst. Code §§ 5000-5550.
- A judicial commitment of a person with a "developmental disability" who is dangerous to others or to self. Welf. & Inst. Code §§ 6500-6513 (as amended by 2012 Cal. Stat. chs. 25, 439 & 457).
- Civil commitment of a person found incompetent to stand trial. Penal Code §§ 1367-1376.
- Civil commitment of a person found not guilty by reason of insanity. Penal Code §§ 1026-1027.
- Civil commitment of a mentally disordered offender. Penal Code §§ 2960-2981.
- Civil commitment of a sexually violent predator. Welf. & Inst. Code §§ 6600-6609.3.
- Civil commitment of a person who has been convicted of a misdemeanor or infraction, or whose probation for such an offense has been revoked, and who the judge thinks may be addicted to narcotics or in imminent danger of becoming so addicted. Welf. & Inst. Code §§ 3050-3055.
- Civil commitment of a person who may be addicted to narcotics or in imminent danger of becoming so addicted. Welf. & Inst. Code §§ 3100-3111.
- Civil commitment of a person at the time that person would otherwise be discharged by statute from a Youth Authority commitment. Welf. & Inst. Code §§ 1800-1803.
- Civil commitment of a nondangerous developmentally disabled adult. Welf. & Inst. Code § 4825.

Rather, under this proposed approach, UAGPPJA's transfer process could only be used to convert an out-of-state conservatorship into a Probate Code conservatorship, or possibly (as we will discuss later) into a limited conservatorship for a developmentally disabled adult or a conservatorship in which the Director of Developmental Services acts as conservator for a developmentally disabled adult who does not require confinement to a state mental hospital.

Further, **the staff recommends the following rules regarding other types of involuntary mental health treatment:**

(1) When a conservatorship is transferred to California under UAGPPJA, involuntary mental health treatment of the conservatee (e.g., administration of antipsychotic medication) would be permitted only after complying with California's usual procedures for obtaining authority to provide such treatment.

(2) The same restriction would apply when an out-of-state conservatorship is registered in California under UAGPPJA and the out-of-state conservator seeks involuntary mental health treatment of the conservatee within California. This is already achieved by UAGPPJA § 403(a), which, if adopted in California, would preclude an out-of-state conservator from taking any action in California that is prohibited under California law.

These suggested rules are merely specific illustrations of the "when in Rome" principle previously approved by the Commission and discussed at length in Memorandum 2012-43 (on "Special Rules for Certain Types of Actions or Decisions"): The concept that once a conservatorship comes to California under UAGPPJA, the conservatorship "is henceforth subject to California law and will be treated as a California conservatorship." See Minutes (Aug. 2011), p. 5; Memorandum 2012-43, pp. 13-14, 18-22, 30, 31, 34-35.

Moreover, both Disability Rights California ("DRC") and California Advocates for Nursing Home Reform ("CANHR") previously suggested this type of approach. See Third Supplement to Memorandum 2011-31, pp. 6-8 & Exhibit pp. 7-8 (DRC); Memorandum 2012-36, pp. 2-3 & Exhibit pp. 1-2 (CANHR). Based on the information we have so far, the staff also believes that the approach is consistent with the ULC's intent in proposing UAGPPJA. We have specifically requested information from the ULC on whether UAGPPJA is meant to permit transfer of a conservatorship involving involuntary mental health care. See First Supplement to Memorandum 2012-50, Exhibit p. 2. We look forward to hearing what Mr. Fish has to say on this subject. **The Commission should carefully consider his comments, as well as any other input it receives, and determine whether to proceed as suggested above.**

CONSTITUTIONAL CONSTRAINTS APPLICABLE TO CONSERVATORSHIPS THAT DO NOT INVOLVE INVOLUNTARY MENTAL HEALTH TREATMENT

As we have seen, there is abundant case law regarding constitutional constraints on LPS conservatorships and other types of civil commitments in California. In contrast, there are fewer cases that involve a constitutional challenge to a Probate Code conservatorship, limited conservatorship for a developmentally disabled adult, or conservatorship in which the Director of Developmental Services serves as conservator for a developmentally disabled adult who does not require confinement to a state mental hospital. We examine some of the case law first, and then discuss the implications for adoption of UAGPPJA in California.

Case Law on Constitutional Constraints

In 1979, the California Supreme Court recognized that an LPS commitment involves not only physical confinement but also deprivation of many other liberties:

> The gravely disabled person for whom a conservatorship has been established faces the loss of many other liberties in addition to the loss of his or her freedom from physical restraint. For example, the conservator is also given the powers granted to the guardian of an incompetent in chapters 7, 8 and 9 of division 4 of the Probate Code. These include: payment of the conservatee's debts and collection or discharge of debts owed the conservatee; management of the conservatee's estate, including sale or encumbrance of the conservatee's property; commencement, prosecution, and defense of actions for partition of the conservatee's property interests; disposition of the conservatee's money or the other property for court-approved compromises or judgments; deposit of the conservatee's money in a bank, savings and loan institution, or credit union; the giving of proxies to vote shares of the conservatee's stocks; and the borrowing of money when it will benefit the conservatee. In addition, the court may grant the conservator any or all of the powers specified in Probate Code section 1853.
>
> Further, an individual found to be "gravely disabled" may suffer numerous statutory disabilities, including possible loss of the following rights: to remain licensed to practice a profession (e.g., law; medicine); to continue to hold certain public offices; to remain employed as a teacher; to establish or maintain certain relationships (e.g., custody of children; marriage; to object to sterilization; to refuse certain types of medical treatment; to possess a driver's

> license; to own or possess firearm; to remain registered to vote; and to enter into contracts.

Roulet, 23 Cal. 3d at 227-28 (citations & footnotes omitted). Due to these circumstances, the Court concluded that

> there can be no question that a finding of grave disability may result in serious deprivation of personal liberty. Indeed, *a conservatee may be subjected to greater control of his or her life than one convicted of a crime.*

Id. at 228 (emphasis added). The Court further concluded that due process requires proof beyond a reasonable doubt for establishment of an LPS conservatorship. *Id.* at 235.

A year later, Mary Sanderson appealed from an order establishing a Probate Code conservatorship for her. Relying on *Roulet,* she argued that "the trial court should have required proof beyond a reasonable doubt before appointing a conservator." *Conservatorship of Sanderson*, 106 Cal. App. 3d 611, 613, 165 Cal. Rptr. 217 (1980).

In considering her argument, the court of appeal noted that "a probate conservator has the same powers as an LPS conservator, other than the power to place the conservatee in a mental health facility." *Id.* at 618. As in *Roulet*, the Court viewed this as a serious deprivation of liberty. It observed that "there can be little doubt that a 'stigma' attaches to a person who has been determined to be unable to feed, clothe, house himself or take care of his financial resources." *Id.* at 620. It further explained:

> While having a residence chosen for an individual (in this case a rest home) may not be the same deprivation of liberty as being placed in a mental institution, there can be little doubt that if a residence is chosen for an individual that his or her freedom has been seriously curtailed. Since the conservator of the person and estate of a conservatee is given complete control over the conservatee's property, the conservatee's ability to leave the domicile chosen for him or her is further restricted by financial constraints or by rules of the domicile chosen for him. *The potential for deprivation of liberty under probate conservatorship is illustrated by the facts of this case.* Appellant had lived much of her life in Palo Alto and wished to obtain an apartment in Palo Alto. However, she was placed in a rest home in San Jose.

Id. at 619-20 (emphasis added).

The court of appeal determined that the liberty deprivation in a Probate Code conservatorship warranted a heightened standard of proof, but not proof beyond a reasonable doubt, because the liberty deprivation was less severe than in an LPS conservatorship:

> Balancing the benefit and purpose of the probate conservatorship proceedings against the adverse consequences to the individual clearly suggests *the proper standard is clear and convincing proof.* The deprivation of liberty and stigma which attaches under a probate conservatorship is not as great as under an LPS conservatorship. However, to allow many of the rights and privileges of everyday life to be stripped from an individual under the same standard of proof applicable to the run-of-the-mill automobile negligence actions cannot be tolerated.

Id. at 620 (emphasis added; footnote & internal quotes omitted). The court of appeal did not clearly identify the legal basis for its conclusion, but most likely the decision was grounded on due process principles, as in *Roulet*.

Roulet's list of restrictions on LPS conservatees (quoted above) is outdated, but the principles discussed in *Sanderson* are not. It is still true that the primary difference between a Probate Code conservatorship and an LPS conservatorship is the power to place the conservatee in a locked facility. *See People v. Karriker*, 149 Cal. App. 4th 763, 780, 57 Cal. Rptr. 3d 412 (2007).

It also remains true that in a Probate Code conservatorship, "the inability to care for one's personal needs need be established by only clear and convincing evidence." *Id.*; *see also People v. Engelbrecht*, 88 Cal. App. 4th 1236, 1254 n.5, 106 Cal. Rptr. 2d 738 (2001). Notably, however, this standard or a comparable standard is also used in the conservatorship law of every other state that the staff has examined so far. *See, e.g.*, Colo. Rev. Stat. § 15-14-311(1)(a); D.C. Code § 21-2002(d); ch. 755 Ill. Comp. Stat. 5/11a-3; La. Code Civ. Proc. art. 4548; *In re Boyer*, 636 P.2d 1085, 1092 (Utah 1981); *see also* Wash. Rev. Code § 11.88.045(3) (requiring clear, cogent and convincing evidence). Consequently, UAGPPJA does not appear to pose any threat to the doctrine of *Sanderson*.

Aside from *Sanderson* and other cases discussing the burden of proof, there are various cases that have involved constitutional challenges to medical treatment of conservatees. *See, e.g., Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (Missouri provision requiring that wishes of "incompetent person" regarding withdrawal of life-sustaining treatment be proved by clear and convincing evidence does not violate federal due process); *Conservatorship of*

Wendland, 26 Cal. 4th 519, 28 P.3d 151, 110 Cal. Rptr. 2d 412 (2001) (clear and convincing proof of conservatee's wishes or best interests regarding withdrawal of life-sustaining treatment is constitutionally required when a conservator proposes to withhold life-sustaining treatment of conscious conservatee who has not left formal healthcare instructions); *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985) ("present legislative scheme, which absolutely precludes the sterilization option, impermissibly deprives developmentally disabled persons of privacy and liberty interests protected by the Fourteenth Amendment to the United States Constitution, and article I, section 1 of the California Constitution"); *Conservatorship of Angela D.*, 70 Cal. App. 4th 1410, 83 Cal. Rptr. 2d 411 (1999) (following *Valerie N.* with regard to sterilization of conservatee); *Maxon v. Superior Court*, 135 Cal. App. 3d 626, 633-34, 185 Cal. Rptr. 516 (1982) (hysterectomy of conservatee is serious and intrusive violation of her privacy, so decision to proceed must be supported by clear and convincing evidence of medical necessity, as well as finding that hysterectomy is least restrictive means of achieving objective). While these cases are important, the staff does not think it necessary to get into their details here. We will do that later if a need appears.

The staff also found some cases in which California courts rejected due process challenges to procedures for appointment of a temporary conservator under the Probate Code. *See O'Brien v. Dudenhoeffer*, 16 Cal. App. 4th 327, 19 Cal. Rptr. 2d 826 (1993); *Conservatorship of Gray*, 12 Cal. App. 3d 513, 90 Cal. Rptr. 776 (1970). Because the courts rejected the constitutional challenges in these cases, the cases are of little relevance with regard to adoption of UAGPPJA.

Aside from the above-described cases, there does not appear to be much case law specifically addressing constitutional constraints applicable to Probate Code conservatorships, limited conservatorships, or conservatorships in which the Director of Developmental Services serves as conservator for a developmentally disabled adult who does not require confinement to a state mental hospital. The staff's research has not been exhaustive, but it is safe to say that constitutional challenges relating to these types of proceedings are relatively infrequent as compared to LPS conservatorships and other involuntary commitments.

Certainly, however, Probate Code conservatorships implicate constitutional rights, such as the due process right to notice and an opportunity to be heard before being deprived of a liberty or property interest. But, as previously explained, due process is a flexible concept and the precise requirements depend

on the context. As *Sanderson* demonstrates, the demands in the context of a Probate Code conservatorship are generally likely to be less stringent than in the context of a civil commitment.

In addition, the statutes governing Probate Code conservatorships have been carefully structured to preserve the conservatee's freedom and independence as much as possible. By statute, the conservatee retains certain rights, such as the right to marry and the right to vote. See Memorandum 2012-43, pp. 23-24, 25-26. Where the conservatee's freedoms are restricted, the statutory scheme calls for use of the least restrictive means, such as in the selection of the appropriate residence of the conservatee. See Prob. Code § 2352.5. The same rules generally apply to conservatorships involving the Director of Developmental Services (see Health & Safety Code §§ 416.1, 416.16), and limited conservatorships are even more carefully tailored to preserve the conservatee's rights as much as possible (see Prob. Code § 1801(d)).

Consequently, these types of conservatees have *statutory* rights to retain their freedoms. That might help explain why there appear to be relatively few cases involving *constitutional* challenges to these types of conservatorships. Whatever the explanation, there is a clear difference in the degree to which these types of conservatorships, as opposed to civil commitments, are subject to disputes over constitutional requirements.

Implications for Adoption of UAGPPJA

Because Probate Code conservatorships are not subject to the same thicket of constitutional protections that apply to LPS conservatorships and other involuntary commitments, they do not appear to pose as difficult a problem with regard to UAGPPJA's transfer process. **It does not seem necessary to wholly preclude use of the transfer process,** as the staff has suggested with regard to the various types of civil commitments.

Rather, **the staff believes that other steps, particularly adoption of the "when in Rome" principle previously discussed and other ideas discussed in Memorandum 2012-43, should be sufficient to protect the constitutional rights recognized in California and the policies underlying those rights.** For example, the constitutional requirements relating to medical treatment of a conservatee would be safeguarded by ensuring that any medical treatment occurring in California, or authorized by a California conservator, be done in accordance with California law. **We invite input on this position, and on any specific steps that**

might help to ensure protection of California's constitutional safeguards in adopting UAGPPJA.

With regard to protecting constitutional rights, similar treatment would seem appropriate for limited conservatorships and conservatorships in which the Director of Developmental Services serves as conservator for a developmentally disabled adult who does not require confinement in a state mental hospital. However, those types of conservatorships involve the provision of services through regional centers for the developmentally disabled. That raises questions about how to coordinate the provision of such services with UAGPPJA's transfer process. The staff has sought information from the ULC on this point. See First Supplement to Memorandum 2012-50, Exhibit p. 2. **We encourage comment on whether and, if so, how UAGPPJA should apply to these types of conservatorships.**

Respectfully submitted,

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