Study L-750 June 13, 2013

Third Supplement to Memorandum 2013-26

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Additional Matters to Consider

The staff would like to bring a few new matters to the Commission's attention, as described below.

NEW INPUT

Attached for the Commission's consideration are the following comments that just arrived:

The staff is pleased to have this new input. We will discuss it at tomorrow's meeting.

DESCRIPTION OF REGISTRATION PROCEDURE IN PRELIMINARY PART

At page 10 of the Second Supplement of Memorandum 2013-26, the staff suggested expanding the discussion of the registration procedure in the preliminary part of the Commission's proposal. The staff did not present any specific language for the Commission to consider, but promised to do so at or before the upcoming meeting.

We now suggest the following revisions of the discussion at page 27, lines 7-29, of the draft attached to Memorandum 2013-26:

> If California decides to enact UAGPPJA, however, a different scenario could also occur: A conservatorship (or comparable proceeding by another name) could be registered in California pursuant to the UAGPPJA procedure, and the out-of-state appointee could then take action in California. ~~Again, that prospect~~
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> Again, that prospect does not appear to be problematic, at least in most circumstances. As explained above, a court appointee acting pursuant to a

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

UAGPPJA registration must comply with the law of the state of registration.[174] Accordingly, if an out-of-state appointment was registered in California, the appointee would have to comply with California law while taking action in California, and thus would not pose any threat to California policies.

The proposed legislation seeks to ensure that the appointee is made aware of that requirement and agrees to comply with it. To register in California, the appointee would have to file not only the registration documents required by UAGPPJA (certified copies of the conservatorship order and letters of office), but also a cover sheet to be developed by the Judicial Council, which would inform the appointee that the appointee is subject to California law while acting in the state, is required to comply with that law in every respect, including, but not limited to, all applicable procedures, and is not authorized to take any action prohibited by California law.[174A] Below that statement would be a signature box, in which the appointee attests to those matters, making it unlikely that an appointee would overlook the need to follow California law.[174B]

It is possible, however, that someone might try to use the registration process as a means of avoiding the more complicated and costly transfer process when relocating a conservatee to California. UAGPPJA does not seem to preclude use of the registration procedure in those circumstances.

The Commission believes, however, that if a conservator-conservatee relationship is relocated to California, it should be officially transferred to California and subjected to the safeguards of the transfer process. For that reason, the registration of an out-of-state conservatorship in California should only be effective while the conservatee resides in another jurisdiction. If the conservatee moves to California, the conservator should no longer be able to take action in California pursuant to the registration, and should have to seek a transfer of the court proceeding to California. The Commission tentatively proposes to modify UAGPPJA's registration procedure to achieve that result[175] and ensure that the conservator and third parties are informed of this limitation.[175A]

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174. See *supra* note 171 & accompanying text.
174A. See proposed Prob. Code § 2023 & Comment *infra*; see also proposed Prob. Code §§ 2011-2013 *infra*.
174B. See proposed Prob. Code § 2023 *infra.*
175. See proposed Prob. Code § 2014 & Comment *infra.*
175A. See proposed Prob. Code §§ 2015, 2023 *infra.*

Would the Commission like to make the revisions shown above?

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

EMAIL FROM DOUGLAS MILLER, ADMINISTRATIVE OFFICE OF THE COURTS (6/12/13)

Dear Ms. Gaal,

I have been working on the transfer provisions of the Commission's current (May 23, 2013) draft of the California Conservatorship Jurisdiction Act, California's version of UAGPPJA. In the progress of that work, I've found some difficulty with identical provisions in proposed Probate Code section 2001(d), (e), and (f). These provisions include a requirement that the court in the transferor state "direct the conservator of the person [subd. d], of the estate [subd. e], or of the person and estate [subd. f] *to petition for a conservatorship* of the person, of the estate, or of the person and estate" in the court where the case is to be transferred.

Most probate attorneys I know would consider that provision to require that the conservator file a new petition for appointment in the transferee state, which would substantially defeat a major purpose of the transfer provisions.

On the other hand, section 2002, which addresses California as the transferee state, provides in section 2002(a)(1) that the conservator must petition the court in this state to *accept the conservatorship*. Under subd. (e) of section 2002, the court must issue a final order "accepting the proceeding" and appointing the conservator as a conservator of the person, estate, or person and estate in this state, upon its receipt from the [transferor state] of a final order issued under provisions similar to Section 2001 transferring the proceeding to this state.

I suggest that this problem might be avoided by describing the conservator's duty under section 2001(d), (e), and (f) in terms identical to the reference in section 2002(a)(1): to petition the [transferee] court for an order accepting the conservatorship of the person [subd. d], the estate [subd. e], or the person and estate [subd. f].

(As an aside, but as an issue that you might want to address at some later time, does the term "final order" in sections 2001 and 2002 mean and refer to a final order as apparently intended in section 2001: that is, not provisional, or does it mean a final order after appeal or after the time for an appeal has expired (see Prob. Code, § 1300, et seq.)? I think the former was intended in both sections, but perhaps that issue should also be clarified.)

As you know from our prior conversations and e-mail traffic, this recommendation is from me as an individual, and is not the official position of the Administrative Office of the Courts, the Judicial Council, or of its Probate and Mental Health Advisory Committee.

I hope this is helpful.

Respectfully,

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Memorandum

To: California Law Revision Commission

From: Ben Orzeske, Legislative Counsel
The Uniform Law Commission

Date: June 12, 2013

Re: CLRC's Tentative Recommendation on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

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Thank you for the opportunity to comment on the CLRC's draft of its Tentative Recommendation relating to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). We appreciate the CLRC's thoughtful and extensive work. My comments are based on CLRC Memorandum 2013-26, dated May 23, 2013, and arranged by section of the proposed legislation.

Section 1981. Limitations on Scope of Chapter. The ULC is concerned about Section 1981(c), which would exclude adults with developmental disabilities from the transfer provisions of the UAGPPJA (Article 3). While we recognize that some states may not have the same legal protections in place for citizens with developmental disabilities, the great majority do require an individualized evaluation and assessment of needs prior to issuing a guardianship order. By stating that Article 3 does not apply to *any* adults with developmental disabilities, the proposed bill would defeat a major purpose of the UAGPPJA: the avoidance of unnecessary and expensive duplicative legal proceedings. The burden should not be underestimated; families already straining to provide care for a developmentally disabled adult often cannot easily bear the additional time and expense associated with a new legal proceeding.

The ULC recommends that the CLRC consider whether California could accomplish the goal of protecting its vulnerable adult citizens by allowing courts some discretion to order a new evaluation for developmentally disabled adults when appropriate. In that case, courts could review a petition for an incoming guardianship transfer and permit the transfer if the order shows that the other state conducted an appropriate evaluation of the protected adult's needs and based the guardianship order on its findings. Otherwise, courts could order a new evaluation. A blanket prohibition on all guardianship transfers involving the developmentally disabled would impose unnecessary burdens both on the court system and on vulnerable families.

Section 1982. Definitions. The drafters of the UAGPPJA recognized that states use different terminology to describe the same legal concepts. (e.g. "guardian" versus "conservator of the person"). In fact, such differing terminology is a major obstacle to the interstate recognition of guardianship and conservatorship orders.

While recognizing that each state has its own legal history and accepted practices, the ULC respectfully suggests that uniform terminology be used to the extent possible when enacting uniform acts. For example, rather than eliminating a uniform term such as "guardian," it would be preferable to incorporate the California terminology into the definition like so:

> Guardian, for the purposes of this chapter, means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under subdivision (a) of Section 1801. The term includes a "conservator of the person" as that term is used in other provisions of California law.

In this manner, confusion between courts of the states that have adopted the UAGPPJA can be minimized and local practitioners are not likely to be confused by the use of the uniform terms.

Section 1996. Appropriate Forum. The ULC generally agrees with the CLRC's positions regarding the changes to Section 1996 suggested by the UAGPPJA Working Group of the State Bar Trusts and Estates Section Committee (TEXCOM). More specifically:

1. The ULC agrees that it is more important to stay with the uniform language for this section than to incorporate the concept of "inconvenient forum" as used in Section 3427 of the California Family Code.

2. The ULC has no position on TEXCOM's suggestion to incorporate an additional consideration for determining appropriate forum: the location of the proposed conservatee's family, friends, and other persons required to be notified of the conservatorship proceeding. That location may be relevant, but should not be determinative to the court's decision whether to exercise jurisdiction. If relevant, location can already be considered by the court under the uniform language.

3. The ULC agrees that it is preferable to stay with the uniform language in Section 1996(c)(5) concerning the financial circumstances of the estate. The new language proposed by TEXCOM does not add anything of significance to the statute and could be detrimental because the physical location of the estate's assets is often not important to the determination.

4. The ULC opposes TEXCOM's proposed language that would change the means of raising the issue of appropriate forum. The ULC agrees with the CLRC analysis that the change is unnecessary – a court can always decline to exercise jurisdiction with or without a petition from an interested party. Ms. Wilkerson of TEXCOM described a specific problem: a Nevada court declined to exercise its jurisdiction as a significant-connection state because the home state had not formally declined jurisdiction. Under the uniform act, the solution is communication between the courts as authorized by Sections 1984 and 1985.

Section 2001. Transfer of Conservatorship to Another State. The CLRC draft would shift the burden of proof when an interested person objects to the transfer of a conservatorship. Under the UAGPPJA, the person who objects must establish that the transfer would be contrary to the interests of the protected adult; the CLRC recommends that the transfer should be permitted only if *the court* affirmatively determines that the transfer is not contrary to the protected adult's interests.

The ULC opposes this change because it undermines the conservator's authority to act in the best interest of the protected adult. The proposed language would establish a legal presumption that the transfer should *not* be made unless the conservator can demonstrate a reason for the transfer to the court. This is unnecessary and potentially costly.

Moreover, by relieving the objector of the burden of proving the transfer is not in the protected adult's best interest, the proposed language could encourage baseless objections intended only to obstruct or harass the conservator.

In summary, the ULC believes the process provided in the UAGPPJA adequately protects the adult from a potentially harmful transfer and strongly recommends that the burden of proof should remain with the objector as in the uniform act.

Section 2002. Accepting Conservatorship Transferred from Another State. The ULC believes that the burden of proof should remain with the objector for the same reasons stated above with respect to Section 2001.

The ULC also believes that a hearing on the petition for transfer should be optional at the discretion of the court, as it is in the uniform act. Avoiding duplicitous legal proceedings is a primary objective of the UAGPPJA. Furthermore, in Section 302(c) the uniform act grants the court complete discretion to order a hearing on every transfer, if it chooses to do so. The legislature should not take away the court's discretion to forego a hearing when the court is satisfied from the petition that the transfer is in the best interest of the protected adult.

Conclusion

For the reasons stated above, the ULC opposes some of the CLRC's recommended changes to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

The ULC drafts uniform legislation only on topics where uniformity is desirable and practicable. The UAGPPJA is one of the ULC's most successful acts in recent history (adopted in 38 jurisdictions to date) because it addresses a serious problem and provides a well-considered and appropriate solution. However, the solution only works if all of the states involved in a jurisdictional conflict have adopted the same uniform language. Uniformity is important precisely because it facilitates the necessary cooperation between courts of different states.

Therefore, the ULC urges the CLRC to consider whether the most vulnerable adult citizens of California would be better served by a more uniform adoption of UAGPPJA.

Please address any questions to:

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