Study L-750 September 27, 2013

Memorandum 2013-44

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Comments on Tentative Recommendation)

After extensive study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"), the Commission approved a tentative recommendation proposing a modified version of UAGPPJA for enactment in California. See Tentative Recommendation on *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* (June 2013) (hereafter, "Tentative Recommendation"). The Tentative Recommendation was posted to the Commission's website (www.clrc.ca.gov) and circulated for comment, with a comment deadline of September 15, 2013. This memorandum begins the process of presenting and analyzing the comments received.

The following comments and materials are attached for the Commission's consideration:

To give Commissioners and interested persons sufficient time to review the comments and the staff's analysis before the upcoming

meeting, the staff decided to segment its analysis of the comments. This memorandum focuses on the comments relating to Article 1 (General Provisions) and Article 2 (Jurisdiction) of the proposed California Conservatorship Jurisdiction Act. We will analyze the comments on the remainder of the proposed legislation in one or more supplements to this memorandum. In addition, two other memoranda for the Commission's upcoming meeting relate to UAGPPJA:

- Memorandum 2013-45 presents and focuses on comments that raise issues specific to Indian tribes.
- Memorandum 2013-46 concerns adjustments of UAGPPJA made by other jurisdictions.

The staff originally hoped to also provide a memorandum on conforming revisions not incorporated into the Tentative Recommendation. Due to the volume of comments received and the complexity of the issues raised, we had to postpone our work on the conforming revisions. We plan to address that topic for the Commission's December meeting.

The Commission is working towards a final recommendation, for printing and submission to the Legislature. To be on track for introduction and enactment of the legislation in 2014, it would be best if the Commission were able to approve a final recommendation in December. **To meet that goal, the Commission would need to give the staff sufficient guidance at its upcoming meeting in Davis to enable the staff to prepare a draft of a final recommendation for consideration in December.**

Of course, however, the Commission's overriding objective is to make a sound recommendation to the Legislature regarding enactment of UAGPPJA in California. **The Commission should focus on that objective and should not sacrifice it, even if that might require a delay in approval of a final recommendation or introduction of the proposed legislation.** While some tinkering could occur even after approval of a final recommendation, the basic framework of the proposal needs to be solid and well-conceived before the Commission gives such approval.

OVERVIEW OF THE COMMENTS

The Commission is fortunate to have received an abundance of thoughtful input from major stakeholders who have followed this study closely and taken the time to carefully review the Tentative Recommendation. None of those stakeholders urge the Commission to abandon the notion of enacting a version of UAGPPJA in California. Many of them express some degree of support for the Tentative Recommendation or specific aspects of the Tentative Recommendation.

For example, the Alzheimer's Association "appreciates all of the work of the CLRC and their careful consideration of implementation in California." Exhibit p. 30. The group says that it "has been and continues to be a strong proponent of UAGPPJA implementation in all 50 states, as we believe it will help facilitate transitions of guardianships between states." *Id.*

Similarly, the Uniform Law Commission ("ULC") "commends the CLRC members and staff who have carefully considered the provisions of UAGPPJA and produced the Tentative Recommendation." Exhibit p. 20. The ULC graciously states that "[m]any of the proposed changes to the uniform act are worthwhile …." *Id.*

The California State Association of Public Administrators, Public Guardians, and Public Conservators ("CAPAPGPC") also believes that UAGPPJA would be a useful addition to California law:

> The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act recognizes the importance of conservatorships in meeting the needs of individuals who are unable to provide for their basic needs of food, clothing and shelter; manage their finances or both. UAGPPJA recognizes the mobility of the population and the need for a streamlined process for transferring a conservatorship and a registration procedure to facilitate the recognition of a conservatorship that was established in another state. *CAPAPGPC agrees there is a need for these procedures and processes, particularly if it means a current conservator from another state can continue to serve in that capacity if relocating to California.*

Exhibit p. 31 (emphasis added).

California Advocates for Nursing Home Reform ("CANHR") does not express a view on UAGPPJA or the Tentative Recommendation as a

whole. The group does say, however, that it "agree[s] with the vast majority of the Commission's conclusions and recommendations." See Exhibit p. 1. Similarly, Disability Rights California ("DRC") "is supportive of many of the modifications to the UAGPPJA as suggested by the Commission, especially in recognizing that California law often offers more legal protections for conservatees." Exhibit p. 6.

Although the Tentative Recommendation drew the supportive comments described above, none of the commenters support it without reservation. Rather, each commenter raises concern about one or more specific aspects of the proposed legislation, suggesting various modifications. The commenters seem to assume that the proposal will go forward in some form and they want to be sure that it is drafted in an optimum manner.

The remainder of this memorandum proceeds sequentially through Article 1 (General Provisions) and Article 2 (Jurisdiction) of the proposed California Conservatorship Jurisdiction Act, discussing the comments on each article or code section in numerical order. At the October meeting, the staff plans to organize the UAGPPJA discussion in the same manner. Accordingly, **if someone has comments or concerns about a particular provision, please plan to raise the point when the discussion reaches that part of the Tentative Recommendation.**

ARTICLE 1. GENERAL PROVISIONS

In the Tentative Recommendation, California's version of UAGPPJA would be known as the "California Conservatorship Jurisdiction Act," and would be codified as Chapter 8 of Part 3 of Division 4 of the Probate Code. Article 1 of the proposed new chapter consists of "general provisions." Most of the provisions in it are similar to ones in UAGPPJA; one additional provision would specify certain limitations on the scope of the chapter. The input on the provisions in Article 1 is discussed below.

Proposed Probate Code Section 1980. Short title [UAGPPJA § 101]

Proposed Probate Code Section 1980 would specify the short title for the new chapter, the "California Conservatorship Jurisdiction Act," which was suggested by the UAGPPJA subgroup of the Executive Committee of the State Bar Trusts and Estates Section (hereafter, "the TEXCOM

subgroup"). Proposed Section 1980 would also make clear that the Legislature intends the chapter to be a modified version of UAGPPJA.

The Commission received no comments specifically referring to proposed Section 1980. However, the Uniform Law Commission ("ULC") expressed general concern about using California's "conservatorship" terminology rather than the same terminology as UAGPPJA. See Exhibit pp. 14, 19.

The ULC's concern is discussed later in this memorandum, in connection with proposed Probate Code Section 1982, which defines various terms for purposes of the California Conservatorship Jurisdiction Act. **Assuming that the Commission decides to stick with California terminology throughout the proposed legislation, the staff recommends leaving proposed Section 1980 in its current form.** Setting aside the ULC's general concern about terminology, the approach taken in that provision appears to be unobjectionable.

Proposed Probate Code Section 1981. Limitations on Scope of Chapter

Proposed Probate Code Section 1981 would limit the application of the California Conservatorship Jurisdiction Act. Subdivisions (a) and (b) would expressly state that the Act does not apply to:

- A minor, regardless of whether the minor is or was married.
- Any proceeding in which a person is appointed to provide personal care or property administration for a minor.
- Any proceeding in which a person is involuntarily committed to a mental health facility or subjected to other involuntary mental health care.

Subdivision (c) would state that the Act's transfer procedure (proposed Article 3) is inapplicable to:

- An adult with a developmental disability.
- Any proceeding in which a person is appointed to provide personal care or property administration for an adult with a developmental disability.

A Note in the Tentative Recommendation (p. 40) says that the Commission would "especially appreciate input on the proposed treatment of an adult with a developmental disability."

We discuss the input on that point next. Afterwards, we describe another suggestion relating to proposed Section 1981.

Application of the Transfer Procedure to an Adult with a Developmental Disability

In the Tentative Recommendation (p. 7), the Commission proposes that "a carefully-tailored limitation should apply with respect to an adult with a developmental disability." It explains:

> In California, an adult with a developmental disability is entitled to be evaluated by a regional center and to receive a broad range of services pursuant to an individualized plan. The intent is to "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." To further that intent, California provides a variety of conservatorship possibilities for an adult with a developmental disability, including the option of a limited conservatorship in which the adult retains all legal and civil rights except those which the court designates as legal disabilities and specifically grants to the limited conservator.
>
> Due to those special opportunities for an adult with a developmental disability, it would be ill-advised to apply UAGPPJA's streamlined transfer procedure to such an adult. Instead, the Commission tentatively recommends making the transfer procedure (but not UAGPPJA's registration procedure) expressly inapplicable to an adult with a developmental disability, and to any proceeding in which a person is appointed to provide personal care or property administration for an adult with a developmental disability.
>
> That would mean that when such an adult moves to California from another state, it will be necessary to commence a new conservatorship proceeding in a California court, as under existing law. Although that might be more costly than using the transfer procedure, it would help ensure that the adult receives the benefit of California's procedures for such adults, and full recognition of the rights to which the adult is entitled under California law. Likewise, if an adult with a developmental disability moves from California to another state, that state will have to evaluate the adult's needs and the available resources using its normal processes, not an abbreviated transfer procedure. Again, the burdens of initiating a new proceeding appear less compelling than the importance of assuring that the developmentally disabled adult receives a careful evaluation and the full benefit of any special programs for such an adult.

Id. at 7-8 (footnotes omitted).

The ULC disagrees with the approach taken in the Tentative Recommendation:

> The ULC wholeheartedly supports the policy of individualized plans for developmentally disabled adults, and the policy of ordering limited conservatorships that maximize a developmentally disabled person's independence. The ULC also agrees with the CLRC that such concerns about the developmentally disabled person's welfare take precedence over any cost savings that could be realized by allowing a transfer of conservatorship from another state without a new hearing. *However, those policies can be fully implemented under UAGPPJA without excluding adults with developmental disabilities from the scope of the act's transfer provisions.*

Exhibit p. 18 (emphasis added); see also Exhibit p. 13.

The ULC recognizes that some states may not have the same legal protections for such adults as California, but it notes that "the great majority do require an individualized evaluation and assessment of needs prior to issuing a guardianship order." Exhibit p. 13. Consequently, the ULC says "it is reasonable to expect that at least some of the guardianship or conservatorship orders issued by the courts of other states were issued using criteria similar to those used in California." Exhibit p. 18.

Further, the ULC believes that the review procedures incorporated into UAGPPJA are sufficient to protect an adult with a developmental disability. *See id.* It asserts that "the CLRC recommendation to carve out adults with developmental disabilities from the scope of UAGPPJA's transfer procedure … does not add any additional protection for California's developmentally disabled adults," and "the *only* effect of the proposed exclusion would be to prevent a court from accepting the transfer of a fully compliant conservatorship order for a developmentally disabled adult." *Id.* (emphasis in original).

The ULC warns that the Commission's proposed approach would undermine a major goal of UAGPPJA: "the avoidance of unnecessary and expensive duplicative legal proceedings." *Id.* It cautions that "families already straining to provide care for a developmentally disabled adult often cannot bear the additional time and expense associated with a new legal proceeding." *Id.* at 19.

The ULC therefore "urges the CLRC to consider whether California could accomplish the goal of supporting individuals with developmental disabilities *while allowing its courts some discretion to accept transfers of conservatorships that are fully compliant with California law*." *Id.* (emphasis added). It observes:

> Nothing in UAGPPJA prevents a court from ordering a new evaluation at one of the state's regional centers. However, a blanket prohibition on all conservatorship transfers involving developmentally disabled adults would impose unnecessary burdens both on the court system and on vulnerable families.

Id.

Unlike the ULC, the Alzheimer's Association does not expressly take any position on whether the transfer procedure should apply to a proceeding for an adult with a developmental disability. Exhibit p. 30. Overall, however, the group "request[s] that the proposed legislation closely align with the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act as possible." *Id.*

In contrast, CANHR expresses support for the approach taken in the Tentative Recommendation:

> On pages 5-8 of the Tentative Recommendation, you list express limitations on the scope of a proposed UAGPPJA. Those limits include minors, mental health treatment, and adults with developmental disabilities. *We agree with those limitations* ….

Exhibit p. 1 (emphasis added).

Similarly, DRC appears to support the Commission's approach:

> The Commission itself noted the importance of protecting a conservatee's rights under California law exempting the streamlined transfer process for court proceedings on involuntary mental health treatment, or those involving individuals with developmental disabilities due to the nature of the rights afforded them under California law. Adults with developmental disabilities would be able to relitigate core issues regarding their conservatorships.

Exhibit p. 8. Instead of criticizing the exclusion of an adult with developmental disabilities from the transfer process, DRC seems to

approve of that treatment but seeks additional protections for "individuals with other types of disabilities." *Id.* DRC's position on this point is especially important, because it "is the federally mandated protection and advocacy agency in California, advocating for the rights of people with disabilities throughout the State." *Id.* at 6.

As the staff has repeatedly pointed out during this study, there is a strong interest in achieving nationwide uniformity on the matters addressed in UAGPPJA. *See, e.g.*, Memorandum 2011-18, p. 9; Third Supplement to Memorandum 2011-31, pp. 2-3. Uniformity would help to ensure smooth and consistent functioning of the Act across state lines.

Further, a main goal of UAGPPJA and the Tentative Recommendation is to help alleviate burdens on conservators, conservatees, other persons involved in conservatorship situations, and the courts. For that reason, the ULC's concern about unnecessarily burdening a conservator of an adult with a developmental disability warrants particular attention.

Thus far, however, the California community of adults with developmental disabilities and their spokespeople and support networks have not expressed any enthusiasm for applying UAGPPJA's transfer procedure to an adult with a developmental disability. In light of the views expressed by DRC and CANHR, and the lack of any objection from the California community of adults with developmental disabilities and their support networks, the staff recommends that the Commission **stick with the approach proposed in the Tentative Recommendation.** At present, that community appears to prefer the certainty offered by the Commission's approach, under which every adult with a developmental disability will be fully reevaluated upon entry into California, to the option of having a judge determine in each case whether such reevaluation is needed. **It seems best to defer to the judgment of that community on this point; absent further input from that community, we do not think it would be wise to change course and try to extend UAGPPJA's transfer procedure to an adult with a developmental disability.**

We note, however, that after California gains some experience with the proposed California Conservatorship Jurisdiction Act, it might be easier to discern how to effectively apply the Act's transfer procedure to an adult with a developmental disability while ensuring that the adult's interests

are adequately protected. If that occurs, then the Legislature could revise the Act to extend the transfer procedure to such an adult, subject to any necessary conditions or qualifications.

That point may be worth mentioning in the preliminary part of the Commission's proposal. For example, the Commission could insert a new footnote at the end of the discussion of "Adults with Developmental Disabilities" (p. 8, line 16), which would say something like:

> 40a/ After California gains some experience with the proposed California Conservatorship Jurisdiction Act, it might be easier to discern how to effectively apply the Act's transfer procedure to an adult with a developmental disability while ensuring that the adult's interests are adequately protected. If that occurs, then the Legislature could revise the Act to extend the transfer procedure to such an adult, subject to any necessary conditions or qualifications.

Would the Commission like to insert a footnote along those lines?

Application of the Proposed Legislation to a Conservatee with Dementia

Although CANHR agrees with the limitations currently stated in proposed Section 1981, the group feels that the Commission has "left out one that is equally important." Exhibit p. 1. In particular, CANHR says that "dementia powers contemplate infringements on a conservatee's autonomy that go far beyond the normal probate conservatorship and are outside of the UAGPPJA." *Id.*

CANHR explains that Probate Code Section 2356.5 "requires a very specific demonstration of a conservatee's disabilities, reflecting a precise California balance between individual rights and state interests." *Id.* The group warns that "[p]ermitting out-of-state conservators or guardians to potentially assume dementia powers without meeting California's exacting standard would subject a class of conservatees to massive deprivations of their liberty without the assurances of propriety our state requires." *Id.* at 2. CANHR further says that the "importance of additional due process in cases involving involuntary dementia care is underscored by recent developments in dementia care research," which the group goes on to describe. *Id.*

CANHR therefore concludes:

> Given the enormous risks of using antipsychotics to treat dementia, the gravity of 2356.6 dementia powers, and a statute that expressly contemplates involuntary treatment for a cognitive disability, granting dementia powers to out-of-state conservators via UAGPPJA would be a misplaced evasion of due process and state policy. The powers at stake are certainly akin if not indistinguishable from involuntary mental health care. In order to receive such powers, California due process demands stringency that is simply not guaranteed in UAGPPJA.
>
> *We therefore recommend the proposed UAGPPJA be revised to specifically exclude Probate Code Section 2356.6 dementia powers or, alternatively, to explicitly require notice and a hearing before dementia powers may be included in a conservatorship transferred from out-of-state.*

Id. (emphasis added).

CANHR's comments surprised the staff, because in drafting the Tentative Recommendation the Commission sought to avoid precisely the kind of problem CANHR raises. To gain a better understanding of CANHR's perspective, the staff alerted CANHR to precise language in the Tentative Recommendation pertinent to a conservatee with dementia, including proposed Probate Code Section 2002(e)(3), which says that "[w]hen a transfer to this state becomes effective, the conservatorship is subject to the law of this state and shall thereafter be treated as a conservatorship under the law of this state" (the "When in Rome principle"), and the accompanying Comment, which states:

> Paragraph (3) of subdivision (3) underscores that once a conservatorship is transferred to California, it is henceforth subject to California law and will be treated as a California conservatorship. *For example, if a conservatorship is transferred to California and the conservator wishes to exercise the powers specified in Section 2356.5 (conservatee with dementia), the requirements of that section must be satisfied.*

See id. at 3-4. The staff also explained its understanding of the Commission's intent as follows:

- If a conservatorship is transferred to California from another state, the conservator cannot place the conservatee in a secured facility for dementia treatment without complying with Probate Code Section 2356.5. Likewise, the conservator cannot authorize the administration of

dementia medications without complying with Probate Code Section 2356.5.

- If a conservatorship in another state is registered in California, the conservator cannot do anything in California that is prohibited by California law. Under Probate Code Section 2356.5, a conservator cannot place a conservatee in a secured facility for dementia treatment without complying with certain statutory requirements. Likewise, a conservator cannot authorize the administration of dementia medications without complying with certain statutory requirements. Thus, if the Commission's proposal was enacted, the conservator of a conservatorship that is registered in California could not take either of those steps without complying with the statutory requirements specified in Section 2356.5.

Id. at 4. The staff inquired whether the proposed language it had pointed out was sufficient to address CANHR's concerns. *Id.*

In response, Anthony Chicotel of CANHR made clear that he would prefer more express language regarding the proper treatment of a conservatee with dementia:

> [W]hen I read proposed Probate Code Section 2002(e)(3), I don't think it necessarily prevents transferred conservatorships from including dementia powers. I appreciate that the Commission's comments express that intention but when read in isolation, the proposed Probate Code section looks like a generic statement meant to bind the transferred conservatorship to California law after the transfer has become effective.
>
> Proposed Probate Code Section 1981 lists express limitations to transferred conservatorships — those involving minors, adults with developmental disabilities, and mental health treatment. *I would feel much more comfortable if dementia powers were specifically included in this list.*
>
> I appreciate that the Commission's comments would be helpful to a determination of legislative intent but from my perspective, if I'm arguing legislative intent in front of a judge, I've already lost: it means there is a tenable argument that dementia powers can be part of a routine UAGPPJA conservatorship transfer from another state. (When I am arguing legislative intent, it is because the judge finds the statute is unclear and is leaning against my interpretation.) *I would prefer there be no room for interpretation — out of state conservators must make an additional 2356.5 showing before*

receiving the authority to lock up or involuntarily drug a conservatee in California.

Exhibit p. 5.

CANHR's request for more express language regarding the proper treatment of a conservatee with dementia seems reasonable and consistent with the intent of the Tentative Recommendation. However, the staff does not think that proposed Section 1981 is the best place to put such language. As we will explain in a supplement to this memorandum, **we believe it would be more appropriate to address the point in the provision on accepting a transfer** (proposed Probate Code Section 2002) **and the provision on the effect of a registration** (proposed Probate Code Section 2014).

If the Commission takes that approach, it might be helpful to cross-refer to those provisions in proposed Section 1981. **That could be done by inserting a new subdivision at the end of proposed Section 1981, along the following lines:**

> 1981. (a)(1) This chapter does not apply to a minor ….
>
> ….
>
> (b) This chapter does not apply to any proceeding in which a person is involuntarily committed to a mental health facility or subjected to other involuntary mental health care ….
>
> (c) Article 3 (commencing with Section 2001) does not apply to an adult with a developmental disability, or to any proceeding in which a person is appointed to provide personal care or property administration for an adult with a developmental disability ….
>
> (d) Application of this chapter to a conservatee with dementia is subject to the express limitations of Sections 2002 and 2014, as well as the other requirements of this chapter.
>
> **Comment.** Section 1981 restricts the scope of this chapter.
>
> ….
>
> Subdivision (d) serves to highlight the rules applicable to a conservatee with dementia.

Contingent on inclusion of express language regarding a conservatee with dementia in proposed Sections 2002 and 2014, **would the Commission like to revise proposed Section 1981 as shown above?**

Proposed Probate Code Section 1982. Definitions [UAGPPJA § 102]

Section 102 of UAGPPJA defines various terms for purposes of the uniform act. Proposed Probate Code Section 1982 is similar, but it uses California terminology instead of UAGPPJA terminology, which differs from and conflicts with the corresponding California terminology in some respects. The Tentative Recommendation describes the situation in detail and explains why the Commission chose to use California terminology rather than UAGPPJA terminology (pp. 8-10, 31-34, 41).

The Tentative Recommendation (pp. 10-12) also discusses UAGPPJA's definition of "state," which includes the fifty states and several non-state entities: "the District of Columbia, 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." Proposed Probate Code Section 1982 is similar; it would define "state" to include the same entities. However, a Note in the Tentative Recommendation (p. 42; see also p. 12) specifically requests input on "whether to include a federally recognized Indian tribe in the definition of 'State' and, if not, what alternative treatment would be appropriate."

Memorandum 2013-45 presents and analyzes the comments on the tribal issues. The input on using California terminology instead of UAGPPJA terminology is presented and analyzed below.

Use of California Terminology

The ULC objects to "the use of non-uniform definitions, rather than incorporation of California terminology into the uniform definitions of Section 1982." Exhibit p. 20. The group explains that the drafters of UAGPPJA "recognized that states use different terminology to describe the same legal concepts …." *Id.* "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*." *Id.* (emphasis added).

The ULC suggests that instead of eliminating a uniform term such as "guardian," it would be better to incorporate California terminology into the UAGPPJA definition. For example,

> 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.

Id. The ULC says that "[i]n this manner, confusion between courts of the states that have adopted UAGPPJA can be minimized and local practitioners are not likely to be confused by the use of the uniform terms." *Id.*

No other group or individual has raised any concern about the use of California terminology in the Tentative Recommendation, not even the Alzheimer's Association. If any of the other commenters had such a concern, the staff is confident that the commenter would have raised the matter. In fact, multiple sources expressed concern about the opposite approach (using UAGPPJA's terminology) from the outset of this study. *See, e.g.*, Third Supplement to Memorandum 2011-31, Exhibit p. 2 (comments of DRC); Memorandum 2012-36, Exhibit pp. 24-31 (proposal of TEXCOM subgroup, using California terminology).

Further, several states have already utilized nonuniform terminology in their UAGPPJA enactments. For example, four states (Connecticut, Nevada, Ohio, and Washington) have replaced UAGPPJA's references to "guardian" and "conservator" with other terms, in a manner similar to that proposed in the Tentative Recommendation. See Memorandum 2013-40, p. 6. Thus, uniformity with respect to terminology does not currently exist among enacting UAGPPJA states.

Importantly, as explained in detail in the Tentative Recommendation (pp. 8-10, 31-34), California terminology not only *differs from* the UAGPPJA terminology, but actually *conflicts with* that terminology in some instances. The situation is thus inherently confusing, no matter which way the Commission decides to handle it.

By using California terminology, the proposed legislation would be consistent with the remainder of the Probate Code and with California case law. In the staff's opinion, to do otherwise would create an intolerable danger of confusion in handling matters within the state. While it is a shame to have to deviate from the language of the uniform act, the potential negative consequences of doing so seem less significant than those of using inconsistent terminology within the same state; it is

widely understood that terminology may differ from one jurisdiction to another and operating in a new jurisdiction requires learning new rules. The staff therefore recommends that the Commission **continue to use California terminology in the proposed legislation.**

Proposed Probate Code Section 1983. International Application of Chapter [UAGPPJA § 103]

Proposed Probate Code Section 1983 provides: "A court of this state may treat a foreign country as if it were a state for the purpose of applying this article and Articles 2, 3, and 5." It is the same as Section 103 of UAGPPJA.

The Commission received no comments on this provision. In Memorandum 2013-40, however, the staff described modifications that other states have made to UAGPPJA Section 103. The Commission requested additional information on a modification made by Maryland, which requires a court determination of due process before applying the UAGPPJA to a foreign country. See Md. Code Ann., Est. & Trusts § 13.5-102 (reproduced at Exhibit p. 40).

In Memorandum 2013-40, the staff noted that Maryland's approach "could be challenging to implement and would require additional research to assess its feasibility." In particular, **the staff has several concerns about Maryland's approach.**

First, Maryland's approach requires courts to make an initial determination that the foreign country applies and follows substantive due process. Requiring this additional finding in California could place a considerable burden on the courts, as it may require the court to devote significant investigative resources to this question. The staff is not aware of any authoritative source upon which courts could rely to assess the adequacy of an individual foreign nation's due process.

Next, the standard for what constitutes sufficient due process is unclear and overbroad. Maryland's language requires both "substantive and procedural" due process be provided "consistent with [Maryland's] practices and policies." In a foreign nation, there may be procedural differences from Maryland's practices (or California's), but such procedures may still be fundamentally fair and may not undermine the integrity of the legal proceeding. A due process inquiry should focus not

on procedural differences, but on whether the foreign court provides "essential elements of impartial administration and basic procedural fairness." Uniform Foreign-Country Money Judgments Recognition Act (2005), § 4 Comment.

Also, Maryland's law appears to focus on whether a foreign nation applies and follows due process generally. While this may be necessary, it may not be sufficient. For instance, a foreign nation may provide due process generally, but did not or would not provide it in the individual case at issue. Maryland's language does not clearly address that situation.

Finally, Maryland's language raises the question of to whom the due process must be provided. While it seems clear that the conservatee must be provided with due process, must other interested parties also be provided with due process? If so, does the right to due process run to interested parties under Maryland's law or to interested parties under the foreign nation's law?

At the August meeting, the Commission discussed Maryland's modification and asked the staff to provide more information on the approaches California has taken in previous enactments of uniform laws with international application. The results of that review are presented here for the Commission's consideration.

Uniform Acts That Do Not Address Due Process or Similar Matters

California has enacted several uniform acts with provisions on international application where California's enactment closely tracks the uniform law, treats a foreign country the same as a state, and does not address due process issues. See Health & Safety Code § 7150.85 (Uniform Anatomical Gift Act); Rev. & Tax Code § 25120(f) (Uniform Division of Income for Tax Purposes Act).

In one case, California modified a uniform act to cover foreign nations and treat those nations as states. *Compare* Uniform Interstate Depositions and Discovery Act (2007) § 2(1), (4) *with* Code Civ. Proc. § 2029.200(a). This enactment does not explicitly address due process issues.

California has also enacted some uniform acts that address international issues but lack any specific provisions regarding application of the law to individual foreign nations. *See, e.g.*, Code Civ. Proc. §§ 676-676.16 (Uniform Foreign-Money Claims Act).

The enactments discussed above do not require a court to make assessments about the adequacy of legal protections or processes in a foreign nation, **so they do not provide any guidance on how to make such assessments in the context of UAGPPJA.**

Uniform Interstate Family Support Act

The Uniform Interstate Family Support Act ("UIFSA") has been repeatedly revised. California's current enactment contains two definitions of "state," which are effectively the same as the 1996 and 2001 versions of the UIFSA. *Compare* Fam. Code § 4901(s) (as enacted by 1999 Cal. Stat. ch. 83) *with* UIFSA (1996) § 101(19); *compare* Fam. Code § 4901(s) (as enacted by 2002 Cal. Stat. ch. 349) *with* UIFSA (2001) § 101(21). The two definitions have different operative dates, and the staff could not easily determine which one is operative because that depends in part on whether there has been an administrative approval of the revised UIFSA. See 2002 Cal. Stat. ch. 349, § 47. Thus, both definitions are discussed below.

In the 1996 version of UIFSA, the definition of "state" includes "a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under this [Act], the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act." § 101(19)(ii). In other words, the 1996 definition requires a foreign nation to adopt a law similar to UIFSA or establish similar procedures if UIFSA is to apply.

The staff does not recommend that approach for use in UAGPPJA. While the procedures of a foreign nation are important, the staff is concerned that this approach could unduly limit the ability of California courts to work with foreign nations whose conservatorship procedures, while different from California's, are fair and sufficiently protective of the important interests at stake.

In the 2001 version of UIFSA, the definition of "state" includes "a foreign country or political subdivision that: (i) has been declared to be a foreign reciprocating country or political subdivision under federal law; (ii) has established a reciprocal arrangement for child support with this State as provided in Section 308; or (iii) has enacted a law or established

procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this [Act]." UIFSA § 101(21)(B).

With regard to the first factor, "a declaration by the U.S. State Department that a foreign jurisdiction is a reciprocating country or political subdivision is controlling for all states." UIFSA § 101 Comment. Based on staff's research, the list of foreign reciprocating countries appears to be maintained by the Office of Child Support Enforcement, which is part of the U.S. Department of Health and Human Services. *See* List of Foreign Reciprocating Countries, *available at* <www.acf.hhs.gov>. The federal designation of reciprocating states appears to focus on a determination that the nation's procedures for the establishment and enforcement of support duties be in "substantial conformity with mandatory elements set out in the statute." *See* 65 Fed. Reg. 31953 (May 19, 2000). Some aspects of the Act address procedural and substantive due process issues. UIFSA (2001) § 201 Comment; *see also id.* Prefatory Note, p. 6; § 315 Comment.

California's enactment of the UIFSA provides the Attorney General with the authority to declare that a foreign jurisdiction is a reciprocating state. Fam. Code § 5005; *see also Willmer v. Willmer*, 144 Cal. App. 4th 951, 956-57, 51 Cal. Rptr. 10 (2006). Similar to the federal designations, the reciprocating state designations at the state level are specifically for family support obligations.

The UIFSA reciprocating state designations do not appear to be directly applicable to conservatorships. The staff is not aware of a reciprocating state designation process for conservatorships. Thus, the 2001 UIFSA's approach to the treatment of foreign nations is not appropriate for UAGPPJA at this time. The approach could perhaps serve as a model for UAGPPJA in the future, if a "reciprocating state" designation process is eventually developed for adult conservatorships.

Uniform Child Custody Jurisdiction and Enforcement Act

As approved by the ULC in 1997, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") required a court to treat a foreign country as a state for purposes of the act's general and jurisdictional provisions. UCCJEA § 105(a); *see also* Fam. Code § 3405(a).

However, a court was not required to apply the act when "the child custody law of a foreign country violate[d] fundamental principles of human rights." UCCJEA § 105(c). This provision was to be "invoked only in the most egregious cases," and the court's scrutiny was to focus "on the child custody law of the foreign country and not on other aspects of the other legal system." UCCJEA § 105 Comment. Except as provided above, "a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of [the Act was to] be recognized and enforced" as provided in the Act. UCCJEA § 105(b). Alabama's modification of the UAGPPJA provision on international application appears to have been modeled on this UCCJEA approach. *See* Ala. Code § 26-2B-103.

Although the 1997 UCCJEA provision on international application addressed policy issues akin to due process, its overall approach to foreign nations (mandatory application except for fundamental violations of human rights) differs significantly from the UAGPPJA approach (permissive application to foreign nations). **Given this critical difference, the staff does not recommend replacing UAGPPJA's approach with the approach used in the 1997 UCCJEA provision.**

In 2013, the ULC amended the UCCJEA, but it has not yet published the final text of the act. However, the staff reviewed the nearly-final language.

It appears, from that review, that the amendments primarily address foreign nations and an international convention addressing protection of children, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. See UCCJEA (2013 Annual Meeting Approved Text) §§ 102(7), (8), (16); 105. The 2013 version retains a policy-based exception to international application, akin to Section 105(c) of the earlier version, but the exception has been moved to different provisions of the Act. UCCJEA (2013 Annual Meeting Draft) § 105 Add'l Comment; see also, e.g., *id.* §§ 305(d)(5), 423(3).

The staff is not aware of an international convention addressing conservatorship issues to which the United States is a party. In the absence of such an international convention, **the framework for international application in the 2013 version of the UCCJEA,** which relies heavily on

the Hague Convention, **does not provide a model for the international application of UAGPPJA.**

Uniform Foreign-Country Money Judgments Recognition Act

The Uniform Foreign-Country Money Judgments Recognition Act (2005) ("UFCMJRA") pertains only to money judgments made in jurisdictions outside the United States. *See* UFCMJRA § 2. The Act requires that courts recognize foreign-country judgments except in specific situations, providing separate lists of mandatory and permissive grounds for denying recognition. UFCMJRA § 4.

Specifically, a court is precluded from recognizing a foreign-country judgment if:

> (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
> (2) the foreign court did not have personal jurisdiction over the defendant; or
> (3) the foreign court did not have jurisdiction over the subject matter.

UFCMJRA § 4(b). With regard to the first grounds for mandatory non-recognition, "[p]rocedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition … , so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding." UFCMJRA § 4 Comment.

Under the following circumstances, the Act permits a court to refuse to recognize a foreign-country judgment:

> (1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
> (2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
> (3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;
> (4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

UFCMJRA § 4(c).

With regard to the treatment of foreign countries, California's enactment (Code Civ. Proc. Sections 1713-1724) is essentially uniform with one exception. *Compare* UFCMJRA (2005) § 4 *with* Code Civ. Proc. § 1716. Specifically, California grants a court discretion on whether to recognize a foreign judgment in a defamation claim, depending on the protectiveness of the foreign country's laws on freedom of speech and press. See Code Civ. Proc. § 1716(c)(9).

While the approach in the UFCMJRA has some appeal, the specific language of the Act has some drawbacks in the context of UAGPPJA. The staff is concerned that these provisions could limit a court's discretion in situations that are not described in the lists above. Moreover, these lists were developed for money judgments, not situations where personal liberty is potentially at stake (as in a conservatorship of the person). For these reasons, **the staff does not recommend that the language of the UFCMJRA be employed directly in UAGPPJA.**

However, the staff recognizes that **such lists identify important issues for a court to consider in determining whether to treat a foreign nation as a state under UAGPPJA.** Below, the staff discusses a possible approach to international application for UAGPPJA using lists, as in UFCMJRA.

Staff Analysis

UAGPPJA Section 103 gives a court discretion to decide whether to apply the Act (with the exception of the registration provisions) to a specific foreign proceeding. Under UAGPPJA, a court could refuse to

exercise this discretion based on a failure of due process or another demonstration that justice was not served in the individual case.

As noted above, the lists contained in the UFCMJRA could be useful in providing guidance on important issues a court should consider when deciding whether to exercise its discretion to apply the provisions of UAGPPJA to a foreign proceeding. To utilize such an approach, the Commission could modify UAGPPJA Section 103 as follows:

> **§ 1983. International application of chapter [UAGPPJA § 103]**
>
> 1983. (a) A court of this state may treat a foreign country as if it were a state for the purpose of applying this article and Articles 2, 3, and 5.
>
> (b) In determining whether to treat a foreign country as if it were a state pursuant to subdivision (a), the court shall consider all relevant factors, including, but not limited to, evidence showing any of the following:
>
> (1) The judicial system in the foreign country does not regularly provide impartial tribunals.
>
> (2) The judicial system in the foreign country does not regularly provide procedures compatible with the requirements of due process of law.
>
> (3) The specific proceeding in the foreign court was not conducted in an impartial tribunal.
>
> (4) The specific proceeding in the foreign court was not compatible with the requirements of due process of law.
>
> (5) An aspect of the foreign proceeding is repugnant to the public policy of this state or of the United States.
>
> (6) The circumstances of the foreign proceeding raise substantial doubt about the integrity of the foreign judicial system.
>
> **Comment.** Subdivision (a) of Section 1983 is the same as Section 103 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) ("UAGPPJA").
>
> Subdivision (b) provides additional guidance on which factors a court should consider in determining whether to treat a foreign country as if it were a state for purposes of UAGPPJA. The language is drawn from Code of Civil Procedure Section 1716, which is similar to Section 4 of the Uniform Foreign-Country Money Judgments Recognition Act (2005).

To preserve the broad discretion regarding the treatment of foreign nations provided to courts in UAGPPJA, however, **it may be preferable to**

put the guidance only in the Comment, as opposed to modifying the language of the Act itself. Modifying the language of the Act to expressly refer to specific situations would create a risk that a court might construe those revisions to somehow limit the court's discretion. Such modification would also be contrary to the general preference for uniformity emphasized by the ULC and the Alzheimer's Association.

If the Commission is interested in incorporating this guidance into its proposal without modifying the statutory text, **such guidance could be provided by revising the Comment to proposed Probate Code Section 1983, along the following lines:**

> **Comment.** Section 1983 is the same as Section 103 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) ("UAGPPJA"). In determining whether to treat a foreign country as if it were a state pursuant to this section, the court should consider all relevant factors, including, but not limited to, evidence showing any of the following:
>
> (1) The judicial system in the foreign country does not regularly provide impartial tribunals.
>
> (2) The judicial system in the foreign country does not regularly provide procedures compatible with the requirements of due process of law.
>
> (3) The specific proceeding in the foreign court was not conducted in an impartial tribunal.
>
> (4) The specific proceeding in the foreign court was not compatible with the requirements of due process of law.
>
> (5) An aspect of the foreign proceeding is repugnant to the public policy of this state or of the United States.
>
> (6) The circumstances of the foreign proceeding raise substantial doubt about the integrity of the foreign judicial system.
>
> See generally Code Civ. Proc. § 1716; Uniform Foreign-Country Money Judgments Recognition Act § 4 (2005).

Proposed Probate Code Section 1984. Communication Between Courts [UAGPPJA § 104]

Proposed Probate Code Section 1984 would authorize communication between a California court and a court in another state concerning a conservatorship proceeding:

> 1984. (a) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter. The court may allow the parties to participate in the communication. Except as otherwise provided in

> subdivision (b), the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.
>
> (b) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record.

A Note in the Tentative Recommendation (p. 44) specifically requests input on whether a court should charge any fees for the court services described in proposed Section 1984, and, if so, what fees to charge. The Note further states:

> In seeking this input, the Commission notes that proposed Section 1984 is similar to Family Code Section 3410, which governs communications between courts in matters arising under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Comments describing experience under that section would be particularly helpful. Are any fees charged for court communications under that section? If a court makes a record of a communication under that section, is the record filed? If so, what is the filing fee, if any? Do the answers to these questions depend on whether a proceeding is pending before the court?

Id.

Despite this Note, the Commission did not receive any comments on proposed Section 1984 or related issues. **We continue to encourage input on the issues raised in the Note.**

Absent any input, the staff recommends that the Commission **leave the provision as currently drafted.** It is closely similar to existing Family Code Section 3410, which seems to be functioning fine without providing any guidance regarding fees. If such guidance turns out to be necessary or useful in connection with proposed Probate Code Section 1984, the Legislature could always add it, but it should go in the Uniform Civil Fees and Standard Fee Schedule Act (Gov't Code §§ 70600-70678) rather than in the Probate Code.

Proposed Probate Code Section 1985. Cooperation Between Courts [UAGPPJA § 105]

Proposed Probate Code Section 1985 would authorize a California court to request that a court in another state take certain action in

connection with a conservatorship proceeding, and to comply with such a request by a court in another state:

> 1985. (a) In a conservatorship proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:
>
> (1) Hold an evidentiary hearing.
>
> (2) Order a person in that state to produce evidence or give testimony pursuant to procedures of that state.
>
> (3) Order that an evaluation or assessment be made of the proposed conservatee.
>
> (4) Order any appropriate investigation of a person involved in a proceeding.
>
> (5) Forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph (1) or any other proceeding, any evidence otherwise produced under paragraph (2), and any evaluation or assessment prepared in compliance with an order under paragraph (3) or (4).
>
> (6) Issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the conservatee or the proposed conservatee.
>
> (7) Issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as defined in Section 160.103 of Title 45 of the Code of Federal Regulations.
>
> (b) If a court of another state in which a conservatorship proceeding is pending requests assistance of the kind provided in subdivision (a), a court of this state has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

A Note in the Tentative Recommendation (p. 45) specifically requests input on whether a court should charge any fees for the court services described in proposed Section 1985, and, if so, what fees to charge. The Note further states:

> In seeking this input, the Commission notes that proposed Section 1985 is similar to Family Code Section 3412, which governs cooperation between courts in matters arising under the UCCJEA. Subdivision (c) of that provision states that "[t]ravel and other necessary and reasonable expenses incurred under subdivisions (a) and (b) may be assessed against the parties according to the law of this state." How does that rule work in practice? Should similar language be included in proposed Section 1985? Should the

> Commission take other steps to clarify what fees to charge or how to allocate expenses?

Despite this Note, the Commission did not receive any comments on proposed Section 1985 or related issues. **We continue to encourage input on the issues raised in the Note.**

As the Note explains, proposed Section 1985 is closely similar to Family Code Section 3412 (governing cooperation between courts in child custody cases), which includes a subdivision (c) stating:

> (c) Travel and other necessary and reasonable expenses incurred under subdivisions (a) and (b) may be assessed against the parties according to the law of this state.

The staff is not aware of any existing problems relating to the operation of that provision.

Moreover, inclusion of similar language in proposed Section 1985 would not be contrary to the goal of nationwide uniformity. Rather, the ULC deliberately refrained from addressing costs and expenses in the corresponding UAGPPJA provision, "leaving that issue to local law." UAGPPJA § 105 Comment.

Thus, unless the Commission receives some input on this point, the staff recommends that the Commission **revise proposed Section 1985 to add a subdivision (c), which would be identical to subdivision (c) of Family Code Section 3420 (shown above).**

Proposed Probate Code Section 1986. Taking Testimony in Another State [UAGPPJA § 106]

Proposed Probate Code Section 1986 concerns the taking and use of testimony in another state for purposes of a conservatorship proceeding pending in California. The Commission did not receive any comments specifically relating to this provision. **Absent further input, the staff recommends leaving the provision as currently drafted.**

ARTICLE 2. JURISDICTION

Article 2 of the Commission's proposed California Conservatorship Jurisdiction Act consists of jurisdictional rules. Every provision in that article is based on a similar provision in UAGPPJA.

The Commission received no input on the following provisions and the staff is not aware of any outstanding issues relating to these provisions:

- **Proposed Prob. Code § 1991.** Definitions and significant connection factors [UAGPPJA § 201]
- **Proposed Prob. Code § 1992.** Exclusive basis [UAGPPJA § 202]
- **Proposed Prob. Code § 1993.** Jurisdiction [UAGPPJA § 203]
- **Proposed Prob. Code § 1994.** Special jurisdiction [UAGPPJA § 204]
- **Proposed Prob. Code § 1995.** Exclusive and continuing jurisdiction [UAGPPJA § 205]
- **Proposed Prob. Code § 1999.** Proceedings in more than one state [UAGPPJA § 209]

The input and issues relating to the remaining provisions in Article 2 are discussed below.

Proposed Probate Code Section 1996. Appropriate Forum [UAGPPJA § 206]

In certain circumstances, proposed Probate Code Section 1996 would authorize a California court to decline to exercise its jurisdiction to appoint a conservator:

> **§ 1996. Appropriate forum [UAGPPJA § 206]**
>
> 1996. (a) A court of this state having jurisdiction under Section 1993 to appoint a conservator may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.
>
> (b) If a court of this state declines to exercise its jurisdiction under subdivision (a), it shall either dismiss or stay the proceeding. The court's order dismissing or staying the proceeding shall be in a record and shall expressly state that the court declines to exercise its jurisdiction because a court of another state is a more appropriate forum. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a conservator of the person, conservator of the estate, or conservator of the person and estate be filed promptly in another state.
>
> (c) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including all of the following:

(1) Any expressed preference of the proposed conservatee.

(2) Whether abuse, neglect, or exploitation of the proposed conservatee has occurred or is likely to occur and which state could best protect the proposed conservatee from the abuse, neglect, or exploitation.

(3) The length of time the proposed conservatee was physically present in or was a legal resident of this or another state.

(4) The location of the proposed conservatee's family, friends, and other persons required to be notified of the conservatorship proceeding.

(5) The distance of the proposed conservatee from the court in each state.

(6) The financial circumstances of the estate of the proposed conservatee.

(7) The nature and location of the evidence.

(8) The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence.

(9) The familiarity of the court of each state with the facts and issues in the proceeding.

(10) If an appointment were made, the court's ability to monitor the conduct of the conservator.

Two issues relating to this provision require discussion: (1) whether to incorporate a modification made in Idaho's version of UAGPPJA, and (2) whether to provide a short-cut procedure for a court to decline to exercise its jurisdiction. Those points are discussed in order below.

Idaho's Modification of the Factor Relating to Abuse, Neglect, or Exploitation of the Proposed Conservatee

The list of factors in subdivision (c) of proposed Section 1996 (which is similar to UAGPPJA Section 206(c)) is not intended to be exhaustive. Rather, subdivision (c) directs a court to consider "all relevant factors," but then provides a list of illustrations.

By providing additional specificity regarding the listed items, the provision could (but need not necessarily) be construed to implicitly limit the court's consideration on those particular issues. In drafting its version of UAGPPJA, Idaho seems to have identified a situation where this might be problematic. Specifically, the factor relating to abuse, neglect or exploitation of the proposed conservatee (UAGPPJA § 206(c)(2)) does not refer to *suspected* abuse, neglect, or exploitation. Idaho expanded that

factor, requiring a court to consider "[w]hether *there is a reason to suspect that* abuse, neglect, or exploitation of the respondent has occurred." Idaho Code Ann. § 15-13-206 (emphasis added).

In a memorandum for the August meeting, the staff described Idaho's approach. See Memorandum 2013-40, p. 23. The Commission directed the staff to further explore that approach. Draft Minutes (Aug. 2013), p. 4.

If the Commission would like to expressly refer to suspected abuse, neglect, or exploitation in proposed Section 1996, **that could be done by revising subdivision (c)(2) and the corresponding Comment as follows:**

> (c) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including all of the following:
>
> ….
>
> (2) Whether there is reason to suspect that abuse, neglect, or exploitation of the proposed conservatee has occurred or is likely to occur and which state could best protect the proposed conservatee from the abuse, neglect, or exploitation.
>
> ….
>
> **Comment.** Section 1996 is similar to Section 206 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) ("UAGPPJA"). Revisions have been made to conform to California terminology for the proceedings in question. See Section 1982 & Comment (definitions); see also Section 1980 Comment.
>
> Revisions have also been made to:
>
> (1) Require a court to prepare a record when it declines to exercise its jurisdiction, which expressly states that the court is taking that step. A person can present that record when seeking jurisdiction in another state.
>
> (2) Make clear that a court must consider suspected abuse, neglect, or exploitation when determining whether to decline jurisdiction. For a similar provision, see Idaho Code Ann. § 15-13-206(c)(2).
>
> ~~(2)~~ (3) Emphasize that in determining whether it is an appropriate forum, a court must ….

The staff thinks that such a change might be helpful but, because of the benefits of uniformity and because subdivision (c) expressly directs a court to consider "*all* relevant factors" (emphasis added), **we do not have strong feelings about this matter.**

Short-Cut Procedure for a Court to Decline to Exercise Its Jurisdiction

Subdivision (a) of proposed Section 1996 provides: "A court of this state having jurisdiction under Section 1993 to appoint a conservator may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum." The first sentence of subdivision (b) says: "If a court of this state declines to exercise its jurisdiction under subdivision (a), it shall either dismiss or stay *the proceeding*." (Emphasis added.) That sentence, which is drawn directly from UAGPPJA Section 206(b), appears to contemplate that when a court "declines to exercise its jurisdiction," there will be a pending conservatorship proceeding for the court to "dismiss or stay."

Shortly before the Commission's April meeting, Peter Stern of the TEXCOM subgroup suggested that it should not be necessary to file a conservatorship proceeding in a proposed conservatee's home state for the sole purpose of obtaining an order in which that court declines to exercise its jurisdiction, which the petitioner can then use to convince a court in a significant-connection state to exercise jurisdiction. He suggested instead that "there should be a more expedited method adopted for declining jurisdiction." Second Supplement to Memorandum 2013-15, Exhibit p. 1. Jennifer Wilkerson of the TEXCOM subgroup presented additional information about this concept, including suggested statutory language, at the April meeting. See Fourth Supplement to Memorandum 2013-15.

At the Commission's direction, the staff analyzed the concept for the June meeting. Among other things, the staff pointed out that UAGPPJA provides more than one means for a court in a significant-connection state to acquire jurisdiction over a proposed conservatee who has a home state; it is not essential that there be an order from a court in the home state declining jurisdiction. Memorandum 2013-26, p. 9; see UAGPPJA § 203(2)(B); proposed Prob. Code § 1993(d). The staff also wrote:

> [I]t might not be wise to make it easy for an interested party to seek an order in which a California court declines to exercise its jurisdiction as the proposed conservatee's home state. Entering such an order would be a serious step, because the court would in effect be forfeiting California's right to protect the proposed conservatee and enforce its conservatorship policies. That should not be done lightly.

> **The key question here is whether the jurisdictional issue can be effectively presented to a court without submitting a conservatorship petition.** Does the court need all of the information in such a petition, and all of the steps associated with presenting such a petition, to be able to decide the issue of jurisdiction? If not, which requirements can safely be omitted?

Id. (boldface in original).

In a letter submitted just before the June meeting, the ULC opposed the concept of modifying UAGPPJA to expressly provide an expedited method for declining jurisdiction. It explained:

> 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.

Third Supplement to Memorandum 2013-26, Exhibit p. 3 (reproduced at Exhibit p. 14).

The Commission decided not to make the change suggested by the TEXCOM subgroup. Minutes (June 2013), p. 8. It made clear, however, that it was "open to further input on the concept of allowing an interested person to raise the issue of conservatorship jurisdiction without having to file a conservatorship petition." *Id.* The Commission expressed particular interest in "hear[ing] specifically which, if any, aspects of a conservatorship petition would be unnecessary to a California court (and could therefore be omitted) in determining whether to relinquish conservatorship jurisdiction over a person whose 'home state' is California." *Id.*

In response to the Tentative Recommendation, the entire Executive Committee of the Trusts and Estates Section of the State Bar (hereafter, "TEXCOM") — not just the TEXCOM subgroup — comments on the matter. TEXCOM urges the Commission to revise proposed Section 1996 to include a statement that "[t]he issue of appropriate forum may be

raised upon petition of party, the court's own motion, or request of another court." Exhibit p. 34. TEXCOM explains:

> It would be unduly burdensome and costly to both the parties and courts to require a full Conservatorship proceeding be initiated for the court to "dismiss or stay", especially since the proposed conservatee is no longer in this state when this situation arises. We believe that the court's review of a petition offers protection to the proposed conservatee while making a minimal change in the language of the uniform law that will promote substantial economy and efficiency in application of the Act.
>
> If the legislation were to include our proposal, we would urge the Judicial Council to adopt a form petition to determine appropriate forum for jurisdiction in conservatorship proceedings.

Id.

The California Judges Association ("CJA") takes a similar position. It frames the issue by stating that under the Commission's proposal, "if a California resident not under conservatorship were to move to another state where a conservatorship is sought, an application to have California cede jurisdiction to the other state would require the filing of a full conservatorship proceeding." Exhibit p. 10. CJA says that it does not make sense to require a conservatorship petition "when the applicant has no intention or desire to become a conservator under the petition at all." *Id.* at 10-11. According to CJA, "[w]e should not force people to file what is, essentially, a frivolous action, merely to get before the court the simple issue of whether California should cede jurisdiction so another state may properly proceed with the conservatorship." *Id.* at 11.

CJA further explains:

> Preparation of a conservatorship petition and the mandatory accompanying documents is burdensome. The forms are not simple, nor intended to be, because of the difficult conflict between our respect for individual freedoms and our civil obligation to protect those whose disability prevents them from protecting themselves. It is appropriate to require that a great amount of personal information be provided to the court that will be making this decision.
>
> The filing of those lengthy forms generates an immediate and substantial process within the court. Because of the court's responsibility to independently investigate the

> situation, and the requirement that Probate Code petitions be calendared, these pleadings do not simply repose in a folder in the court's file unit. Further, the filing of a petition for appointment of conservator commonly generates visceral responses by friends and family of the proposed conservatee, which can lead to family discord and even litigation.

Id. at 10. CJA says that "[a]ll of the trouble caused by the filing of a petition for appointment of a conservator is appropriate because of the fundamental rights involved." *Id.* But CJA does not consider that "trouble" appropriate if the petitioner is merely seeking to have the court decline to exercise its jurisdiction. *Id.* at 10-11.

Rather, CJA says,

> a petition should be allowed, seeking directly the relief sought (an order ceding jurisdiction to the other state). With appropriately broad notice (i.e., the same notice that would be required for a conservatorship proceeding), if any interested person disagrees with the proposal to have the matter determined in another state, that person then should be able to object directly, rather than seeming to object to a conservatorship petition which is not actually being pursued. Only if the objector believes that there is a need for a conservatorship to be granted in California should the court and other interested persons be required to deal with a formal petition for appointment of a conservator.

Id. CJA thus proposes to allow a petition for an order declining jurisdiction, and to rely on a broad notice requirement to ensure that the jurisdictional issue is properly decided.

The staff understands the concerns about avoiding unnecessary burdens on proposed conservatees, their family and friends, and the court system. We also see merit to CJA's view that a broad notice requirement will help ensure that interested persons have an opportunity to speak up if they have concerns about California relinquishing its jurisdiction.

With some additional procedural requirements, perhaps the suggested "short-cut" approach would be sufficient to protect California's citizens and conservatorship policies. **For example, the Commission could revise proposed Section 1996 and the corresponding Comment along the following lines:**

§ 1996. Appropriate forum [UAGPPJA § 206]

1996. (a)(1) A court of this state having jurisdiction under Section 1993 to appoint a conservator may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(2) The issue of appropriate forum may be raised upon petition of any interested person, the court's own motion, or the request of another court.

(3) The petitioner, or, if there is no petitioner, the court in this state, shall give notice of the petition, motion, or request to the same persons and in the same manner as for a petition for a conservatorship under Section 1801. The notice shall state the basis for the petition, motion, or request, and shall inform the recipients of the date, time, and place of the hearing under paragraph (4). The notice shall also advise the recipients that they have a right to object to the petition, motion, or request. The notice to the potential conservatee shall inform the potential conservatee of the right to be represented by legal counsel if the potential conservatee so chooses, and to have legal counsel appointed by the court if the potential conservatee is unable to retain legal counsel.

(4) The court shall hold a hearing on the petition, motion, or request.

(b) If a court of this state declines to exercise its jurisdiction under subdivision (a), it shall grant the petition, motion, or request, and either dismiss or stay ~~the~~ any conservatorship proceeding pending in this state. The court's order ~~dismissing or staying the proceeding~~ shall be based on evidence presented to the court. The order shall be in a record and shall expressly state that the court declines to exercise its jurisdiction because a court of another state is a more appropriate forum. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a conservator of the person, conservator of the estate, or conservator of the person and estate be filed promptly in another state.

(c) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including ….

Comment. Section 1996 is similar to Section 206 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) ("UAGPPJA"). Revisions have been made to conform to California terminology for the proceedings in question. See Section 1982 & Comment (definitions); see also Section 1980 Comment.

Revisions have also been made to:

(1) Permit an interested person, a court of this state, or a court of another state to raise the issue of

appropriate forum by a petition, motion, or request specifically directed to that issue, without filing a conservatorship proceeding in this state.

(2) Specify procedural requirements applicable to such a petition, motion, or request.

~~(1)~~(3) Require a court to prepare a record ….

~~(2)~~(4) Emphasize that in determining whether ….

While this approach would be a deviation from uniformity, it would not seem to hamper interstate handling of conservatorships. On the contrary, it would help to promote UAGPPJA's overall goal of alleviating burdens on conservators, conservatees, courts, and others involved in conservatorship situations.

Does the Commission agree with the approach in concept? If so, can the above draft be improved in any way?

Proposed Probate Code Section 1997. Jurisdiction Declined by Reason of Conduct [UAGPPJA § 207]

Under proposed Probate Code Section 1997 (which is similar to UAGPPJA Section 207), a court may decline to exercise jurisdiction or take certain other steps if it "determines that it acquired jurisdiction to appoint a conservator because of unjustifiable conduct …." Subdivision (b) says:

> (b) If a court of this state determines that it acquired jurisdiction to appoint a conservator because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this chapter.

In its version of UAGPPJA, Connecticut modified subdivision (b) to expressly allow recovery of medical examination expenses. See Conn. Gen. Stat. Ann. § 45-667m(b). The staff brought this modification to the Commission's attention in a memorandum for the August meeting. See Memorandum 2013-40, p. 24. The Commission expressed interest in the possibility of making a similar modification in California's version of UAGPPJA. See Draft Minutes (Aug. 2013), p. 4.

To make such a modification, **the Commission could revise subdivision (b) and the corresponding Comment as follows:**

> (b) If a court of this state determines that it acquired jurisdiction to appoint a conservator because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, medical examination expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this chapter.
>
> **Comment.** Section 1997 is similar to Section 207 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) ("UAGPPJA"). Revisions have been made to conform to California terminology for the proceedings in question. See Section 1982 & Comment (definitions); see also Section 1980 Comment.
>
> In subdivision (b), revisions have also been made to expressly authorize recovery of medical examination expenses. For a similar provision, see Conn. Gen. Stat. Ann. § 45-667m(b).
>
> For limitations on the scope of this chapter, see Section 1981 & Comment.

The staff believes that **providing such clarification would be useful, and permitting recovery of medical examination expenses would be appropriate when a party has engaged in unjustifiable conduct.**

Proposed Probate Code Section 1998. Notice of Proceeding [UAGPPJA § 208]

Proposed Probate Code Section 1998 (which is similar to UAGPPJA Section 208) is a notice requirement. In its version of UAGPPJA, Ohio modified this notice requirement to specify who is required to give the notice. Ohio Rev. Code Ann. § 2112.26.

In a memorandum for the August meeting, the staff alerted the Commission to the Ohio modification. Memorandum 2013-40, p. 26. The Commission expressed interest in the concept and directed the staff to pursue it further. Draft Minutes (Aug. 2013), p. 4.

The staff believes that such clarification would be helpful and the benefits of it would outweigh any detriments of deviating from

uniformity on this point. Specifically, we recommend that the Commission **revise proposed Section 1998 and the corresponding Comment as follows:**

> **§ 1998. Notice of proceeding [UAGPPJA § 208]**
>
> 1998. If a petition for the appointment of a conservator of the person, conservator of the estate, or conservator of the person and estate is brought in this state and this state was not the home state of the proposed conservatee on the date the petition was filed, in addition to complying with the notice requirements of this state, the petitioner must give notice of the petition or of a hearing on the petition ~~must be given~~ to those persons who would be entitled to notice of the petition or of a hearing on the petition if a proceeding were brought in the home state of the proposed conservatee. The notice must be given in the same manner as notice is required to be given in this state.
>
> **Comment.** Section 1998 is similar to Section 208 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) ("UAGPPJA"). Revisions have been made to conform to California terminology for the proceedings in question. See Section 1982 & Comment (definitions); see also Section 1980 Comment. Revisions have also been made to ~~reflect that some states require notice of a hearing on a petition, as opposed to notice of a petition.~~:
>
> (1) Reflect that some states require notice of a hearing on a petition, as opposed to notice of a petition.
> (2) Make clear who is responsible for giving the required notice. For a similar provision, see Ohio Rev. Code Ann. § 2112.26.
>
> See Section 1991(a) (defining "home state"). For limitations on the scope of this chapter, see Section 1981 & Comment.

Would the Commission like to make this change?

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

CALIFORNIA ADVOCATES FOR NURSING HOME REFORM

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July 22, 2013

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)

Dear California Law Revision Commission:

I recently reviewed the Commission's Tentative Recommendation for adopting the UAGPPJA. We agree with the vast majority of the Commission's conclusions and recommendations but continue to have the same concerns we had in January 2012 when we wrote to you about conservatorship "dementia powers."

On pages 5-8 of the Tentative Recommendation, you list express limitations on the scope of a proposed UAGPPJA. Those limits include minors, mental health treatment, and adults with developmental disabilities. We agree with those limitations but feel you have left out one that is equally important.

Probate Code Section 2356.5 permits conservators to authorize placement of conservatees in a secured perimeter facility as well as appropriate medications upon a showing that a conservatee has dementia and would benefit from such treatment. The powers regarding "secured perimeters" and "appropriate medications" give a conservator the ability to lock up a conservatee and have her injected with psychotropic drugs, actions tantamount to involuntary mental health care and which encroach on some of the most intimate rights adults have.

I have reviewed the legislative history of Section 2356.5 (Senate Bill 1481 (1996)) and the statute was clearly intended to both bypass and substitute for the LPS conservatorship process in cases where the conservatee has dementia. Much of the legislative history can be viewed at *http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_1481&sess=9596&house=B&author=senator_mello.*

While the legislature believed the procedures in the LPS conservatorship were inappropriate for proposed conservatees with dementia, it nonetheless required special procedures due to the fundamental nature of the rights involved. Section 2356.5 requires clear and convincing evidence that the conservatee has dementia, lacks capacity, and has significant impairments. In addition, an attorney must represent the conservatee, expert testimony is required, and additional court reviews are required. These procedures demonstrate that dementia powers contemplate infringements on a conservatee's autonomy that go far beyond the normal probate conservatorship and are outside the scope of the UAGPPJA.

Section 2356.5 requires a very specific demonstration of a conservatee's disabilities, reflecting a precise California balance between individual rights and state interests. Although I've not done the research, I expect that no state has an identical standard and few states have similar

standards. Permitting out-of-state conservators or guardians to potentially assume dementia powers without meeting California's exacting standard would subject a class of conservatees to massive deprivations of their liberty without the assurances of propriety our state requires.

The importance of additional due process in cases involving involuntary dementia care is underscored by recent developments in dementia care research. Since SB 1481's passage in 1996, clinical studies have exposed significant shortcomings of psychotropic drugs for "treating" dementia. In 2005, following a number of studies showing severe side effects, including death, the FDA issued a public health advisory that the treatment of dementia with atypical antipsychotic drugs was contra-indicated. Antipsychotics are associated with increased stroke, heart attack, pneumonia, extrapyramidal side effects, and a host of other serious conditions.

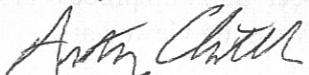
The significant risks of declines and death associated with antipsychotics for "treating" dementia might be acceptable if the drugs had proven countervailing clinical benefits. Yet, research demonstrates that antipsychotics have minimal benefit, often outperformed by placebos or simple pain medications like Tylenol. There are no studies showing that antipsychotics improve the cognitive functioning of a person with dementia. The only benefits – if they can be called benefits – are sedation and submission.

Given the enormous risks of using antipsychotics to treat dementia, the gravity of 2356.5 dementia powers, and a statute that expressly contemplates involuntary treatment for a cognitive disability, granting dementia powers to out-of-state conservators via UAGPPJA would be a misplaced evasion of due process and state policy. The powers at stake are certainly akin if not indistinguishable from involuntary mental health care. In order to receive such powers, California due process demands stringency that is simply not guaranteed in UAGPPJA.

We therefore recommend the proposed UAGPPJA be revised to specifically exclude Probate Code Section 2356.5 dementia powers or, alternatively, to explicitly require notice and a hearing before dementia powers may be included in a conservatorship transferred from out-of-state.

Thank you for the opportunity to comment on the Tentative Recommendation.

Sincerely,



Anthony Chicotel
Staff Attorney

EMAIL FROM BARBARA GAAL TO ANTHONY CHICOTEL (8/30/13)

Re: CLRC Study of UAGPPJA

Hi, Tony --

Thank you again for submitting CANHR's comments on the Law Revision Commission's tentative recommendation relating to UAGPPJA. Comments from key stakeholders are critical in the Commission's study process, and the Commission much appreciates the time and effort CANHR spent reviewing the tentative recommendation and preparing comments.

Before I present CANHR's comments in a staff memorandum for the upcoming CLRC meeting (Oct. 10), I want to draw your attention to some parts of the tentative recommendation and ask a few questions so that I have a clear understanding of CANHR's perspective. It's possible that CANHR's views on conservatees with dementia and compliance with Probate Code Section 2356.5 are more similar to the Commission's views than you may realize.

Please see in particular the following parts of the tentative recommendation:

(1) **Page 20, line 19 to Page 21, line 27.** Of particular note is the paragraph that says:

> [Proposed Probate Code Section 2002(e)(3)] will help ensure that California policies are protected. For example, California has detailed requirements for placing a conservatee with dementia in a secured perimeter residential care facility for dementia patients, and for authorizing the administration of psychotropic medications to such a conservatee. Under the Commission's proposed approach, it would be clear that a conservator would have to satisfy those requirements before taking those steps in California.

(Footnotes omitted.)

(2) **Page 62, lines 19-21** (proposed Prob. Code § 2002(e)(3), which says: "When a transfer to this state becomes effective, the conservatorship is subject to the law of this state and shall thereafter be treated as a conservatorship under the law of this state") & page 63, lines 44-48 (Comment to proposed Prob. Code § 2002(e)(3)), which says:

> Paragraph (3) of subdivision (3) underscores that once a conservatorship is transferred to California, it is henceforth subject to California law and will be treated as a California conservatorship. For example, if a conservatorship is transferred to California and the conservator wishes to exercise the powers specified in Section 2356.5 (conservatee with dementia), the requirements of that section must be satisfied.

(3) **Page 26, line 26 to page 28, line 16** (explaining constraints on use of UAGPPJA registration procedure). See in particular page 27, lines 1-3, which say: "In other words, when taking action in the state where the appointment is registered, the court appointee must comply with the laws of that state." (Emphasis in original.)

(4) **Page 66, lines 20-23,** which say: "Upon registration of a conservatorship order from another state, the conservator may, while the conservatee resides out of this state, exercise in any county of this state all powers authorized in the order of appointment except as prohibited under the laws of this state …."

My understanding of the Commission's intent is as follows:

- If a conservatorship is transferred to California from another state, the conservator cannot place the conservatee in a secured facility for dementia treatment without complying with Probate Code Section 2356.5. Likewise, the conservator cannot authorize the administration of dementia medications without complying with Probate Code Section 2356.5.
- If a conservatorship in another state is registered in California, the conservator cannot do anything in California that is prohibited by California law. Under Probate Code Section 2356.5, a conservator cannot place a conservatee in a secured facility for dementia treatment without complying with certain statutory requirements. Likewise, a conservator cannot authorize the administration of dementia medications without complying with certain statutory requirements. Thus, if the Commission's proposal was enacted, the conservator of a conservatorship that is registered in California could not take either of those steps without complying with the statutory requirements specified in Section 2356.5.

In its comments, CANHR stresses the importance of the protections in Section 2356.5, and cautions that "[p]ermitting out-of-state conservators or guardians to potentially assume dementia powers without meeting California's exacting standard would subject a class of conservatees to massive deprivations of their liberty without the assurances of propriety our state requires." As explained above, the tentative recommendation does not endorse the type of approach CANHR cautions against.

CANHR recommends that "the proposed UAGPPJA be revised to specifically exclude Probate Code Section 2356.5 dementia powers or alternatively, to explicitly require notice and a hearing before dementia powers may be included in a conservatorship transferred from out-of-state."

Is the proposed language I've pointed out above sufficient to address CANHR's concerns about this matter? In considering this point, please bear in mind that courts routinely rely on Commission Comments and reports in determining legislative intent (see the discussion at pp. 348-54 of the Commission's most recent annual report (http://www.clrc.ca.gov/pub/Printed-Reports/Pub237-AR.pdf), which cites numerous examples).

I'd much appreciate hearing your thoughts on this question and any insights you can give me about CANHR's perspective. I'm optimistic that we can work out a mutually acceptable approach.

Warm regards,

Barbara

EMAIL FROM ANTHONY CHICOTEL TO BARBARA GAAL (9/19/13)

Re: CLRC Study of UAGPPJA

Dear Barbara:

Thanks for your very considerate email. I appreciate you pointing out the specific references to the 2356.5 dementia powers in the Commission's tentative recommendation. I am not nearly as well-versed in the UAGPPJA as you but when I read proposed Probate Code Section 2002(e)(3), I don't think it necessarily prevents transferred conservatorships from including dementia powers. I appreciate that the Commission's comments express that intention but when read in isolation, the proposed Probate Code section looks like a generic statement meant to bind the transferred conservatorship to California law after the transfer has become effective.

Proposed Probate Code Section 1981 lists express limitations to transferred conservatorships — those involving minors, adults with developmental disabilities, and mental health treatment. I would feel much more comfortable if dementia powers were specifically included in this list.

I appreciate that the Commission's comments would be helpful to a determination of legislative intent but from my perspective, if I'm arguing legislative intent in front of a judge, I've already lost: it means there is a tenable argument that dementia powers can be part of a routine UAGPPJA conservatorship transfer from another state. (When I am arguing legislative intent, it is because the judge finds the statute is unclear and is leaning against my interpretation.) I would prefer there be no room for interpretation — out of state conservators must make an additional 2356.5 showing before receiving the authority to lock up or involuntarily drug a conservatee in California.

Sincerely,

Tony

Disability Rights California

California's protection and advocacy system

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September 12, 2013

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Email: bgaal@clrc.ca.gov

Re: Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)("Act")

Dear Ms. Gaal:

We appreciate the opportunity to respond with comments before the deadline of September 15, 2013 to the June 2013 Tentative Recommendation (Recommendation) on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) by the California Law Revision Commission (Commission).

Disability Rights California (DRC) is the federally mandated protection and advocacy agency in California, advocating for the rights of people with disabilities throughout the State. DRC previously submitted comments to the Commission on October 26, 2011 which were attached as Exhibit 2 - 11 to the Third Supplement to Memorandum 2011-31.

DRC is supportive of many of the modifications to the UAGPPJA as suggested by the Commission, especially in recognizing that California law often offers more legal protections for conservatees. It is critical to uphold these protections in a transfer of a conservatorship to this state. Several Memoranda from the Commission highlight this fact and provide illustrations why conservatorships from out of state that are transferred to

California should not be able to ignore the stricter legal protections afforded to the conservatee had the conservatorship originated in California.

Transfer of Non-California Conservatorship to California

DRC strongly supports the application of California law in transfer situations, as found in the Recommendation, at page 20, regarding "Transfer of Another State's Conservatorship to California." Here, useful language exists at lines 19-26: "UAGPPJA does not say expressly, but it is fairly obvious that the ULC intended for a transferred proceeding to be governed by the law of the state to which it was transferred. ULC representatives have confirmed as much. Application of California law also appears to be the only sensible solution: Otherwise similarly situated California conservatees would be subject to disparity in treatment depending on where a conservatorship originated, and California courts would have to learn to apply the rules of numerous other jurisdictions on a daily basis." DRC supports the Commission's proposed language at lines 27-31 that addresses how conservatorships upon effective transfer are subject to California law.

Similarly, limiting the authority of the court appointee until the transfer is complete and effective as the Commission urges and as described at page 21, lines 6-23 of the Recommendation is prudent and consistent with legal protections in California.

Determining or Re-Evaluating Capacity of Conservatee Upon Transfer

DRC appreciates the Commission recognizing that it is problematic for a California court to accept another state's ruling on capacity or choice of conservator without qualification. To have California courts conform to Section 302 of the UAGPPJA would result in dismissing the weight of California law that maintains the importance of establishing capacity. To illustrate the conflict, "[i]n granting a petition under this section, the court *shall recognize a ...conservatorship order from the other state, including the determination of the [conservatee's] incapacity and the appointment of the ...conservator."* (Recommendation at page 22, lines 1 -5).

As the Commission identified in its Recommendation at pages 22-23, lines 18 to 22 and lines 1-8, California's Due Process in Competence Determination Act establishes detailed rules and procedures in regard to

determining capacity with stricter standards than California's neighboring states. To require a California court to accept another state's determination of capacity unfairly reduces the conservatee's rights that lie under California law.

The Commission itself noted the importance of protecting a conservatee's rights under California law exempting the streamlined transfer process for court proceedings on involuntary mental health treatment (Recommendation, page 6, lines 12-20), or those involving individuals with developmental disabilities due to the nature of the rights afforded them under California law (Recommendation page 7, lines 14-16; page 8, lines 1-16). Adults with developmental disabilities would be able to relitigate core issues regarding their conservatorship.

As individuals with other types of disabilities also have important rights under California law, the Commission adopted a "middle ground" position allowing relitigation of core issues in certain circumstances. Rather than litigating the issues of capacity and choice of conservator in every situation, which the Commission describes as burdening or even embarrassing for the individual as well as costly, the Commission proposes a "middle ground." This middle ground position entails the possibility of relitigation, if requested, just as in any California conservatorship (Recommendation page 23, lines 16-25). However, DRC feels that this middle ground position needs further modification to protect conservatees' rights.

DRC offers a different position that it hopes the Commission supports favoring the use of a court investigator early on in the transfer process to address the determination of capacity. This may reduce the burden or embarrassment concerns. This position is contrary to footnote 150 in the Recommendation that provides, "...it does not seem advisable to require the court investigation earlier in the transfer process, because it may be difficult and unduly expensive to obtain information about the conservatorship while the conservatee, the conservator, or both are located in another state."

Because capacity is the linchpin of a conservatorship, and California has strict rules and procedures on capacity, DRC recommends that a capacity determination be made earlier and through use of a court investigator prior to issuance of the final order. This is preferable to the Commission recommendation that the court investigator have a role *after* the issuance

of the final order accepting the transfer. In its role, the investigator would determine whether the conservatee objects to the conservator, whether the conservator is acting in the best interests of the conservatee, and would make specific findings concerning the conservatee's capacity (Recommendation, page 24, lines 6-17).

As tentatively recommended by the Commission, the court is to consider the investigator's report within ninety days of the final order accepting the transfer (Recommendation, page 24, lines 18-23). A ninety day time-frame for review by the court is excessively long and may lead to a situation where a conservator exercises powers in a way that harms the conservatee while the court is reviewing the conservatorship. This would be especially unfortunate if it is ultimately determined that the conservatee has capacity and thus no need for a conservatorship.

Thank you for the opportunity to provide comments.

Sincerely,

Suzanna Gee
Associate Managing Attorney

ESTABLISHED 1929

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The Voice of the Judiciary

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September 13, 2013

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303
Via email: commission@clrc.ca.gov

RE: Proposed UAGPPJA Revisions, June 2013

Dear Commission Representatives:

In response to the Commission's request for public comment on the Commission's June 2013 tentative conclusions for enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) as proposed, the California Judges Association respectfully provides the following recommendations:

I.
Issue: Under the proposal, if a California resident not under conservatorship were to move to another state where a conservatorship is sought, an application to have California cede jurisdiction to the other state would require the filing of a full conservatorship proceeding.

Analysis: Preparation of a conservatorship petition and the mandatory accompanying documents is burdensome. The forms are not simple, nor intended to be, because of the difficult conflict between our respect for individual freedoms and our civil obligation to protect those whose disability prevents them from protecting themselves. It is appropriate to require that a great amount of personal information be provided to the court that will be making this decision.

The filing of those lengthy forms generates an immediate and substantial process within the court. Because of the court's responsibility to independently investigate the situation, and the requirement that Probate Code petitions be calendared, these pleadings do not simply repose in a folder in the court's file unit. Further, the filing of a petition for appointment of conservator commonly generates visceral responses by friends and family of the proposed conservatee, which can lead to family discord and even litigation.

All of the trouble caused by the filing of a petition for appointment of a conservator is appropriate because of the fundamental rights involved. Conversely, none of the burden for all involved makes any sense when the applicant has no intention or

desire to become conservator under the petition at all. We should not force people to file what is, essentially, a frivolous action, merely to get before the court the simple issue of whether California should cede jurisdiction so another state may properly proceed with the conservatorship.

Instead, a petition should be allowed, seeking directly the relief sought (an order ceding jurisdiction to the other state). With appropriately broad notice (i.e., the same notice that would be required for a conservatorship proceeding), if any interested person disagrees with the proposal to have the matter determined in another state, that person then should be able to object directly, rather than seeming to object to a conservatorship petition which is not actually being pursued. Only if the objector believes that there is a need for a conservatorship to be granted in California should the court and other interested persons be required to deal with a formal petition for appointment of a conservator.

As in a conservatorship proceeding, the court should have the authority to appoint counsel in the California proceeding to represent the interests of the proposed conservatee in California.

Recommendation: Create a proceeding allowing a petition to be filed directly seeking to have a California court cede jurisdiction to a foreign state for purposes of the relief sought. Include provisions that a ceding of jurisdiction order be allowed instead of a full conservatorship proceeding.

II:
Issue: If a conservatorship is established for someone in another state, the proposal would allow registering that conservatorship in California to avoid going through the entire conservatorship process in California in some situations. The proposal is unclear about the effect of foreign registration, and lacks appropriate notice requirements.

Analysis: The provisions for registration of a foreign conservatorship in California are not sufficiently clear as to the operative effect of that registration. For example, a common activity of a foreign conservator will be to sell California real estate that was formerly the home of the conservatee. We cannot tell from the recommendation whether the foreign conservator would be required to respect the carefully enacted procedures to protect conservatees from having their homes sold unnecessarily (Chapter 490, Statutes of 2006). These California statutes reflect thoughtful public policy of the State of California.

It should be made clear in the proposal whether requirements such as these are applicable to, or waived, as to sales by foreign conservators under a registered decree. If these requirements are waived for foreign conservators, some clear rationale for that should be expressed by the CLRC. If a California court receives information that the foreign conservatee's interests are being put at risk by the foreign conservator, would the California court have the authority to appoint a guardian *ad litem*, or an attorney, or even consider an *ex parte* communication as would be the case for a California conservatorship?

When California conservatorships were revised in 2006, a principle adopted was that mischief against conservatees can best be protected by having interested persons made aware of what is happening. Requirements were added so that interested persons receive copies of the Court Investigator's Report, the Inventory & Appraisal, etc. For that same reason, giving notice of the registration of a foreign conservatorship in California should be required. The potential for mischief by a foreign conservator acting in California is at least as great as that potential by a California conservator. For example, the registered conservatorship is not supposed to be effective if the conservatee's residence is in California. The court in California is not in a position to monitor that. Giving notice to the people who are interested in the conservatee creates the best potential for awareness.

Recommendations: Clarify the extent to which foreign conservators would be subject to the protections in California law regarding conservatorship transactions. Require notice be provided to the persons who would be entitled to notice of a California conservatorship when a foreign conservatorship is registered in California.

These comments are intended to provide initial input on the proposed enactment of the UAGPPJA in California at a future date. The comments herein may be further modified, supplemented, or changed. Please contact us if you have questions about these comments or if we can provide further information.

Sincerely,

Lexi Howard
Legislative Director
lhoward@caljudges.org

cc: Hon. Allan D. Hardcastle, President
Mike Belote, California Advocates, Inc.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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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

---

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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Memorandum

To: California Law Revision Commission

From: Ben Orzeske, Legislative Counsel
The Uniform Law Commission

Date: September 13, 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 Tentative Recommendation relating to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). We appreciate the CLRC's thoughtful and extensive work. These comments are based on the CLRC Tentative Recommendation dated June 2013. The Uniform Law Commission is concerned about proposed deviations from the uniform language in four sections of the proposed statute: **Sections 1981, 1982, 2001, and 2002.**

Section 1981. Limitations on Scope of Chapter. Section 1981(c) would exclude adults with developmental disabilities from the transfer provisions of UAGPPJA (Article 3).[1] The Tentative Recommendation sets forth the reasoning:

> In California, an adult with a developmental disability is entitled to be evaluated by a regional center and to receive a broad range of services pursuant to an individualized plan. The intent is to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. To further that intent, California provides a variety of conservatorship possibilities for an adult with a developmental disability, including the option of a limited conservatorship in which the adult retains all legal and civil rights except those which the court designates as legal disabilities and specifically grants to the limited conservator.[2]

[1] The ULC has no objection to the CLRC's other proposed limitations on scope for minors and for proceedings involving involuntary mental health treatment.
[2] Tentative Recommendation, p. 7, lines 4-13 (internal quotation marks and citations omitted).

The ULC wholeheartedly supports the policy of individualized plans for developmentally disabled adults, and the policy of ordering limited conservatorships that maximize a developmentally disabled person's independence. The ULC also agrees with the CLRC that such concerns about the developmentally disabled person's welfare take precedence over any cost savings that could be realized by allowing a transfer of conservatorship from another state without a new hearing. However, those policies can be fully implemented under UAGPPJA without excluding adults with developmental disabilities from the scope of the act's transfer provisions.

California's legislature led the country in enacting laws that protect the rights of developmentally disabled individuals. Thankfully, other states have made significant progress over the last thirty years, and state laws generally require some combination of cognitive, functional, and medical assessments for individuals alleged to be incapacitated. Additionally, most state laws require that courts use the least restrictive means necessary to protect at-risk individuals, including limited guardianship orders; and require as well that the needs and preferences of the individual be taken into account.[3] Consequently, it is reasonable to expect that at least some of the guardianship or conservatorship orders issued by the courts of other states were issued using criteria similar to those used in California.

Even so, UAGPPJA recognizes a court's responsibility to review any conservatorship orders proposed to be transferred from another state, and a court's authority to order a hearing on a petition to transfer a conservatorship.[4] Under the uniform language of UAGPPJA, a California court that determined a transfer of a conservatorship would be contrary to the interests of a developmentally disabled person could deny the petition to transfer and require the out-of-state conservator to reapply under California's ordinary procedures for establishing a conservatorship.[5] Moreover, even when a court accepts a conservatorship from out-of-state, UAGPPJA *requires* the court to hold a hearing within 90 days of issuing the acceptance order to determine whether the terms of the conservatorship need to be modified in order to conform to the law of the accepting state.[6] Therefore, the CLRC recommendation to carve out adults with developmental disabilities from the scope of UAGPPJA's transfer procedure and require a new conservatorship proceeding does not add any additional protection for California's developmentally disabled adults.

If the Tentative Recommendation is enacted into law, the *only* effect of the proposed exclusion would be to prevent a court from accepting the transfer of a fully compliant conservatorship order for a developmentally disabled adult. This defeats a major purpose of UAGPPJA: the avoidance of unnecessary and expensive duplicative legal proceedings. The burden should not be underestimated;

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[3] The American Bar Association Commission on Law and Aging has compiled charts showing various provisions of state statutes governing adult guardianships, including the definition of incapacity, the investigation procedure used to determine the protected person's needs and preferences, and the requirement to order a limited guardianship or conservatorship when such an order is feasible. All state law charts are available at: http://www.americanbar.org/groups/law_aging/resources/state_law-charts_updates.html.

[4] UAGPPJA § 302(c).

[5] UAGPPJA §§ 302(d) & (h).

[6] UAGPPJA § 302(f). The 90 day window for a review hearing also conforms to the 2013 National Probate Court Standards for interstate guardianships and conservatorships. *See* Standard 3.4.5 available at: http://www.ncpj.org/images/stories/pdfs/National_Probate_Court_Standards.pdf.

families already straining to provide care for a developmentally disabled adult often cannot bear the additional time and expense associated with a new legal proceeding.

The ULC urges the CLRC to consider whether California could accomplish the goal of supporting individuals with developmental disabilities while allowing its courts some discretion to accept transfers of conservatorships that are fully compliant with California law. Nothing in UAGPPJA prevents a court from ordering a new evaluation at one of the state's regional centers. However, a blanket prohibition on all conservatorship transfers involving developmentally disabled adults 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 UAGPPJA 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 UAGPPJA can be minimized and local practitioners are not likely to be confused by the use of the uniform terms.

Section 2001. Transfer of Conservatorship to Another State. The CLRC Tentative Recommendation would shift the burden of proof when an interested person objects to the transfer of a conservatorship. Under the standard language of UAGPPJA, the person who objects must establish that the transfer would be contrary to the interests of the protected adult.[7] 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.[8]

The ULC opposes this proposed change because it undermines the conservator's authority to act in the best interest of the conservatee. 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.

The UAGPPJA transfer procedure is likely to be used predominantly by conservators who are family members of the conservatee. The transfer is often necessitated by economic conditions, such as a job

[7] UAGPPJA §§ 301(d)(2) & 302(d)(1)
[8] Tentative Recommendation, p. 25, lines 16-22.

change or retirement to an area with a lower cost of living. Conservators who already bear the burden of caring for a loved one with special needs should not be forced to justify to the court that moving is in the conservatee's interests. The UAGPPJA procedure respects the authority of the conservator to determine whether a transfer is in the interest of the conservatee, while providing ample opportunity for any objecting party to show why the transfer should be denied.

Moreover, by relieving the objector of the burden to prove 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 UAGPPJA adequately protects the conservatee from a potentially harmful transfer and strongly recommends that the burden of proof should remain with the objector.

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.

Conclusion

The ULC commends the CLRC members and staff who have carefully considered the provisions of UAGPPJA and produced the Tentative Recommendation. Many of the proposed changes to the uniform act are worthwhile and we raise no objection. For the reasons stated above, the ULC strongly opposes only the following proposed changes:

- the exclusion of developmentally disabled adults from the scope of UAGPPJA's transfer provisions in Section 1981;
- the use of non-uniform definitions, rather than incorporation of California terminology into the uniform definitions of Section 1982; and
- the requirement that a petitioner requesting the transfer of a conservatorship prove to the satisfaction of the court that the transfer is in the conservatee's interest, rather than requiring an objector to prove that the proposed transfer is not in the conservatee's interest.

Thank you for your consideration. Please address any questions to:

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Date
August 21, 2013

To
California Law Revision Commission

From
Judicial Council of California's
Probate and Mental Health Advisory Committee,
Hon. Mitchell L. Beckloff, Chair

Subject
Comment on tentative recommendation of the California Law Revision Commission for adoption in California of a modified version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

Action Requested
Please review

Contact
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The Probate and Mental Health Advisory Committee, an advisory committee of the Judicial Council of California, submits this comment for your consideration in connection with the Commission's tentative recommendation for adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) in California as legislation that would be called the California Conservatorship Jurisdiction Act (CCJA).

The advisory committee recommends modification of proposed Probate Code section 2002, which prescribes the required procedure for acceptance in California of conservatorships sought to be transferred to California under Article 3 of the CCJA, and elimination of proposed Probate Code section 1851.1, concerning investigations by court investigators of conservatorship cases proposed for transfer to California under the CCJA.[1]

Transfers to California under the CCJA

The CCJA authorizes a conservator appointed by a court in a state that has adopted the UAGPPJA to transfer the proceeding to another adopting state if the conservatee has moved, or is likely to move, to the other state. Article 3 of the CCJA (§§ 2001 and 2002) would define and govern transfers of conservatorships from one state to another. Section 2001 would address transfers out of California, and section 2002 would apply when California is the transferee state.

The Judicial Council's Probate and Mental Health Advisory Committee has identified a number of concerns about the procedure described in section 2002 for courts in this state to accept transfers of conservatorships to California and the provisions in proposed new section 1851.1 concerning investigations of cases transferred here.

Section 2002 would require petitions by the conservator appointed in the transferor state for provisional and final orders of the California court accepting the transfer and appointing the conservator (or a substitute conservator if the original conservator is unqualified to act as a conservator in California). These petitions and orders would follow provisional and final orders in the transferor state authorizing the conservator to seek acceptance and appointment in this state and terminating the proceedings in the transferor state.

The advisory committee's most significant concern is that section 2002 would also require the court to determine—only after entry of the "final" order appointing the original conservator or a substitute and authorizing him or her to act in this state, and apparently not at a hearing—whether the conservatorship must be modified to conform to California law, including modification or elimination of powers of the newly-appointed conservator to conform those powers to California law.

Section 2002 also would not provide for the participation of court investigators until after entry of the "final" order appointing a conservator, but section 1851.1 would require an investigation in every case that is equivalent to both a full initial investigation at the commencement of a conservatorship proceeding before the appointment of a conservator and a full review investigation following a conservator's appointment and performance of fiduciary responsibilities. Section 2002 also would not authorize the appointment of California counsel for

[1] The Judicial Council's Policy Coordination and Liaison Committee (PCLC) authorized the Probate and Mental Health Advisory Committee to submit comments on this subject to the California Law Revision Commission. PCLC also authorized the Probate and Mental Health Advisory Committee and the California Tribal Court and State Court Forum, another advisory body to the Judicial Council, to jointly submit comments to the Commission on another part of the tentative recommendation on the UAGPPJA, which is being sent under separate cover.

the conservatee at any stage of the transfer procedure, and existing law is unclear at best concerning such authority.

The committee is also concerned that neither proposed section 2002 nor existing law provides for the appointment of a temporary conservator authorized to act in this state for the benefit of a conservatee who may already be present in California during the extended period of time between commencement and completion of the transfer procedure.

Proposal

In response to the concerns identified above, the Judicial Council's Probate and Mental Health Advisory Committee recommends that section 1851.1 be deleted from the Commission's tentative recommendation for adoption of the CCJA, and section 2002 be amended to:

1. Require a petition for a provisional order accepting a transfer under section 2002(a) to allege facts, not the mere conclusory statement of the petitioner, showing that the conservatorship is eligible for transfer and is not excluded by section 1981 (i.e., is not a limited conservatorship for a developmentally disabled adult or a mental health conservatorship under the Lanterman-Petris-Short Act);
2. Permit a petitioner under section 2002(a) also to concurrently apply for appointment of a temporary conservator under section 2250 if the action of a conservator is required before entry of a final order accepting the conservatorship. Such an application would be required to seek the appointment of a temporary conservator eligible for appointment in California and request only powers authorized for such appointments here (new § 2002(a)(4))[2];
3. Require the petition for a provisional order accepting the transfer to specify the terms of a proposed final order accepting the conservatorship, including any modifications required to conform the powers of the proposed conservator to the laws of this state (new § 2002(a)(5));
4. Require notice of the hearing on the petition for a provisional order accepting a transfer to be given as required for an initial general petition in California, except that notice would be required also to be given to the attorney for the conservatee in the transferor state and any attorney appointed for or appearing on his or her behalf in this state; and notice to the conservatee may be given by mail rather than by personal service of a citation (§ 2002(b));

[2] See section 1994 of the CCJA, which permits the appointment of temporary conservators under Probate Code section 2250 even though jurisdiction might not lie for a general appointment under section 1993 of the CCJA. But section 2250 authorizes the appointment of a temporary conservator only upon or after the filing of a petition for the appointment of a general conservator, an unlikely event in the apparent absence of jurisdiction. Section 2002(a)(4) would expressly clarify that a petition for acceptance of a transfer is the equivalent of a general petition for purposes of eligibility to seek the appointment of a temporary conservator.

5. Permit any person entitled to notice to object to the petition not only on the ground that the transfer would be contrary to the best interests of the conservatee, but also on the ground that the conservator is not eligible for appointment in this state and no substitute eligible for appointment in this state and willing to serve is identified (new § 2002(c));

6. Provide that the hearing on the petition is also a hearing on any objections;

7. Permit the discretionary appointment of counsel for the conservatee for the hearing on the petition for a provisional order under section 1470(a). Payment for the reasonable costs of appointed counsel fixed under section 1470(b) would be payable from the estate of the conservatee if the case is transferred (new § 2002(d));

8. Require the court to issue a provisional order on the petition unless:

   - The court determines, on evidence at the hearing, including the investigator's report under proposed new section 2002(f), that transfer of the proceeding would be contrary to the best interests of the conservatee; or

   - The court determines that the conservator is not eligible for appointment and no eligible and willing successor is identified.[3]

9. Require appointment of a court investigator before the hearing on the petition for the provisional order. The scope of the investigation would be left to the court's discretion. The report must be filed with the court and served on the persons identified in section 1826(*l*) (new § 2002(f)(1));

10. If a provisional order is made, require a further investigation to be ordered and completed, and a report delivered to the court and mailed to the persons listed in section 1826(*l*) *before* entry of a final order accepting the transfer. The scope of this investigation would again be left to the court's discretion, but should be in the nature of a review investigation under section 1851 if the provisional order is for the appointment of the original conservator. If that order is for the appointment of a substitute conservator, the investigation should be in the nature of an initial investigation under section 1826 (new § 2002(f)(2));

[3] Current proposed section 2002(d)(3) would permit denial of a petition for a provisional order on the ground that no willing and eligible substitute conservator is proposed for appointment only when the original conservator is disqualified under California law. Revised section 2002 would authorize a denial on that ground also when the original conservator is disqualified under his or her own state's law, such as when he or she is a public administrator or public guardian/conservator in that state. See proposed section 2002(e)(2). Current proposed section 2002(d)(3) is continued unchanged in the revised section 2002 as section 2002(e)(3).

11. Require the court to determine, within 60[4] days after entry of a provisional order, whether, to what extent, and how, the original appointment order must be modified to conform to the law of this state, and permit the court to conduct a hearing to make that determination. The court would be authorized to strike or modify any provisions of the original appointment order and issue new Letters in conformity with the modified order (§ 2002(g)); and

12. Require the final order accepting the transfer to include any changes required in the appointment order to conform the conservator's powers to California law (§ 2002(h), a modified version of existing subdivision (e)). The only exception to the prohibition against taking action before issuance of the final order is the action of a temporary conservator that would be authorized under new section 2002(a)(4). There are no further orders after the final order accepting the transfer, which would appoint the conservator (or substitute) and fully authorize him or her to act in this state.

The legislative text of the proposal for modification of the CCJA recommended by the Probate and Mental Health Advisory Committee of the Judicial Council of California is attached at pages 6–9.

[4] The Commission draft features a 90 day period after entry of a "final" order within which the court is to conform the powers granted to the conservator in that order to California law. That time period is placed in brackets in the Commission draft, for discussion purposes and to solicit comments on the sufficiency of that period. The time for entry of a final order in California as transferee state under both the Commission proposal and that of the advisory committee will depend on the time necessary for the transferor state to enter its final order, which must be entered before the final order in the transferee state (per § 2002(e)(1) of the Commission draft and § 2002(h)(1) of the advisory committee's draft). The advisory committee is not wedded to a 60 day period if the Commission believes that a longer maximum time period should be required.

LEGISLATIVE PROPOSAL

Section 2002 of the Probate Code as proposed by the California Law Revision Commission as part of the California Conservatorship Jurisdiction Act (Chapter 8 of Part 3 of Division 4 of that code), California's version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) would be revised; and Section 1851.1 of that code, proposed by the commission as a revision to conform to the California Conservatorship Jurisdiction Act, would be deleted, as follows:

SEC. 1: Probate Code section 2002 would be revised to read as follows:

§ 2002. Accepting conservatorship transferred from another state [UAGPPJA § 302]

2002. (a)(1) To confirm transfer of a conservatorship transferred to this state under provisions similar to Section 2001, the conservator must petition the court in this state to accept the conservatorship.

(2) The petition must include a certified copy of the other state's provisional order of transfer.

(3) ~~On the first page of~~ The petition~~, the petitioner~~ must ~~state that~~ allege facts showing that the conservatorship is eligible for transfer and does not fall within the limitations of Section 1981.

(4) The petition may be accompanied by a petition for the appointment of a temporary conservator of the person, estate, or person and estate under Sections 1994 and 2250 if the petitioner or proposed conservator must take action in this state before the entry of a final order under subdivision (h). The petition must request the appointment of a temporary conservator eligible for appointment in this state, and must be limited to powers authorized for a temporary conservator appointed in this state. For purposes of Section 2250, the petition under this paragraph shall be treated for all purposes as having been filed at the same time as a petition for appointment of a conservator.

(5) The petition shall specify the terms of a proposed final order accepting the conservatorship under subdivision (h), including any modifications that may be required to conform the order appointing the conservator to the law of this state.

(b) Notice of a hearing on a petition under subdivision (a) must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a conservator in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state, except that notice to the conservatee may be given by mail, and notice must also be given to any attorney of record for the conservatee in the transferring state and to any attorney appointed or appearing for the conservatee in this state.

(c) Any person to whom notice must be given under subdivision (b) may object to the petition on the grounds that:

(1) The conservator is ineligible for appointment in this state and no replacement willing and eligible to serve in this state is identified; or

(2) Transfer of the proceeding would be contrary to the interests of the conservatee.

~~(c)~~(d) The court shall hold a hearing on a petition filed pursuant to subdivision (a) and any objections made pursuant to subdivision (c). The court may appoint private legal counsel for the conservatee under the provisions of Section 1470(a) for this hearing, and may fix the reasonable cost of compensation and expenses of counsel under the provisions of Section 1470(b), to be paid from the estate of the conservatee if the conservatorship is transferred to this state.

~~(d)~~(e) The court shall issue an order provisionally granting a petition filed under subdivision (a) unless any of the following occurs:

(1) ~~An objection is made and~~ The court determines, on evidence introduced at the hearing, including the investigator's report referred to in paragraph (1) of subdivision (f), that transfer of the proceeding would be contrary to the interests of the conservatee.

(2) The court determines that, under the law of the transferring state, the conservator is ineligible for appointment in this state, and the transfer petition does not identify a replacement willing and eligible to serve in this state.

(3) The court determines that, under the law of this state, the conservator is ineligible for appointment in this state, and the transfer petition does not identify a replacement ~~who is~~ willing and eligible to serve in this state.

(4) The court determines that this chapter is inapplicable under Section 1981.

(f) (1) The court shall appoint a court investigator under Section 1454, who shall promptly commence an investigation into such matters as the court shall specify in the exercise of its discretion. The investigator shall report to the court in writing concerning the matters ordered by the court, and mail his or her report to the conservatee and the other persons listed in Section 1826(*l*).

(2) If the court makes a provisional order granting the petition for transfer under subdivision (e), it shall order a further investigation to be completed, filed with the court, and mailed to the persons listed in Section 1826(*l*) before entry of a final transfer order. The matters to be investigated shall be determined by the court in the exercise of its discretion, but if the provisional order is for retention of the conservator appointed by the court in the transferring state, the investigation shall be in the nature of a review investigation under Section 1851; if the provisional order is for the appointment of a replacement conservator, the investigation shall be in the nature of an initial investigation under Section 1826, issues of the conservatee's capacity excepted.

(g) (1) Not later than [60] days after issuance of a provisional order under subdivision (e), the court shall determine whether the final order accepting the proceeding and appointing the conservator under subdivision (h) must be modified to conform to the law of this state. The court may take any step necessary to achieve compliance with the law of this state, including striking or modifying any conservator powers that are not permitted under the law of this state, and issuing letters of conservatorship in conformity with the final order.

(2) The court may order a hearing on the determination required under (1).

~~(e)~~(h) (1) The court shall issue a final order accepting the proceeding and appointing the conservator as a conservator of the person, a conservator of the estate, or a conservator of the person and estate in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to Section 2001 transferring the proceeding to this state. The final order shall be modified from the appointing order in the transferring state as necessary to conform in all respects to an appointment order in a proceeding filed initially in this state. In appointing a conservator under this paragraph, the court shall comply with Section 1830.

(2) A transfer to this state does not become effective unless and until the court issues a final order under paragraph (1). Except as provided in paragraph (4) of subdivision (a) of this Section, a conservator may not take action in this state pursuant to a transfer petition unless and until the transfer becomes effective and all of the following steps have occurred:

(A) The conservator has taken an oath in accordance with Section 2300.

(B) The conservator has filed the required bond, if any.

(C) The court has provided the information required by Section 1835 to the conservator.

(D) The conservator has filed an acknowledgment of receipt as required by Section 1834.

(E) The clerk of the court has issued the letters of conservatorship.

(4) When a transfer to this state becomes effective, the conservatorship is subject to the law of this state and shall thereafter be treated as a conservatorship under the law of this state.

~~(4) When it issues a final order under paragraph (1), the court shall appoint a court investigator under Section 1454, who shall promptly commence an investigation under Section 1851.1.~~

~~(g) (1) Not later than [90] days after issuance of a final order accepting transfer of a conservatorship, the court shall determine whether the conservatorship needs to be modified to conform to the law of this state. The court may take any step necessary to achieve compliance~~

~~with the law of this state, including, but not limited to, striking or modifying any conservator powers that are not permitted under the law of this state.~~

~~(2) At the same time that it makes the determination required by paragraph (1), the court shall review the conservatorship as provided in Section 1851.1.~~

~~(g)~~(i) Except as otherwise provided by ~~Section 1851.1~~, Chapter 3 (commencing with Section 1860), Chapter 9 (commencing with Section 2650) of Part 4, and other law, when the court grants a petition under this section, the court shall recognize a conservatorship order from the other state, including the determination of the conservatee's incapacity and the appointment of the conservator.

~~(h)~~(j) The denial by a court of this state of a petition to accept a conservatorship transferred from another state does not affect the ability of any person ~~the conservator~~ to seek the conservator's appointment as conservator in this state under Chapter 1 (commencing with Section 1800) of Part 3 if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

SEC. 2: Probate Code section 1851.1 would be deleted.

alzheimer's association

the compassion to care, the leadership to conquer

September 13, 2013

California Law Revision Commission
c/o UC Davis School of Law
400 Mark Hall Drive
Davis, CA 95616

RE: CLRC Tentative Recommendation on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Thank you for the opportunity to provide comments on the CLRC tentative recommendation on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). The Alzheimer's Association appreciates all the work of the CLRC and their careful consideration of implementation in California. The Alzheimer's Association has been and continues to be a strong proponent of UAGPJJA implementation in all fifty states, as we believe it will help facilitate transitions of guardianships between states.

We share the concerns expressed by Mr. Ben Orzeske of the Uniform Law Commission, specifically regarding proposed language to Sections 2001 and 2002. We believe that the best interests of conservatees should be protected; however, we are concerned that shifting the burden of proof to the person requesting the transfer will burden the conservator and slow the transfer process.

Overall we request that the proposed legislation closely align with the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act as possible. The UAGPPJA can only be successful if all states involved have adopted a uniform language.

Again, we thank you for the careful considerations that the CLRC has given this issue as it pertains to California. We believe this process has done much to bring California closer to becoming a UAGPPJA adopter. If you have any questions, I can be reached at the number below or trenken@alz.org.

Thank you,

Theresa M. Renken
State Public Policy Director

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California State Public Policy Office

California State Association of
Public Administrators, Public Guardians
and Public Conservators

9-2-13

The California State Association of Public Administrators, Public Guardians and Public Conservators (CAPAPGPC) has reviewed the California Law Revision Commission Tentative Recommendation on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) and has the following comments.

Public Guardians/Public Conservators investigate referrals for LPS and Probate conservatorships. If a conservatorship is necessary and there are no viable alternatives to conservatorship, Public Guardians/Public Conservators will serve in the capacity of the court appointed conservator. Changes to the conservatorship laws are central to the operations of Public Guardians/Public Conservators statewide and acceptance of UAGPPJA has the potential to impact these offices.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act recognizes the importance of conservatorships in meeting the needs of individuals who are unable to provide for their basic needs of food, clothing and shelter; manage their finances or both. UAGPPJA recognizes the mobility of the population and the need for a streamlined process for transferring a conservatorship and a registration procedure to facilitate the recognition of a conservatorship that was established in another state. CAPAPGPC agrees there is a need for these procedures and processes, particularly if it means a current conservator from another state can continue to serve in that capacity if relocating to California.

CAPAPGPC would like to point out that in a time of increased financial constraints at the State level and particularly with Superior Court Administration, courts have increasingly referred matters to the Public Guardian/Public Conservator for investigation even though the courts have their own investigators. PG/PC's frequently find themselves with court orders to investigate private conservators who fail to complete their duties appropriately or who have not completed court accountings. While PG/PC's certainly understand the nature of financial cutbacks and dwindling resources it is not appropriate for these matters to be referred to PG/PC's as if the Public Guardian was a substitute court investigator. The court has investigators who are specifically designated to perform these functions. The Omnibus Conservatorship Reform Act of 2006 imposed new restrictions on court investigators and Public Guardians regarding the review of conservatorship matters but the courts were able to have these

mandates suspended because funding never materialized. Public Guardians received no new funding for the new mandates (which were not suspended for PG) and yet are increasingly being utilized by the courts as a substitute for their reduced court investigation resources.

The Law Revision Commission states that transferred conservatorships will be investigated by Superior Court investigators. While we appreciate this direction, CAPAPGPC wants clear language in the law to state that investigation of the transferred conservatorships are the sole responsibility of the Superior Court investigators. We do not want these cases to be shifted to Public Guardians/Public Conservators for investigation.

Furthermore, in the event a conservator seeking to transfer the conservatorship to California is found inappropriate to serve under the stricter rules of California law, CAPAPGPC does not want these cases shifted to Public Guardians/Public Conservators to serve in the capacity of conservator. These cases should be returned to the original state in which the conservator was determined appropriate to serve in that capacity.

In the area of registration, CAPAPGC finds this an intriguing prospect because Public Guardians/Public Conservators are currently required to do ancillary estates to manage the real and personal property of conservatees that is located in another state. It appears, but CAPAPGPC would like confirmation, that registration may be used as a substitute for ancillary proceedings in those states that have adopted UAGPPJA. If that understanding is correct, this would be beneficial to the conservatee estates.

If the Commission has any questions regarding these comments, please feel free to contact Connie Draxler, Deputy Director, Office of Public Guardian, Los Angeles County, 213-974-0407.

Sincerely,

Lori Scott

President Ca State Association of Public Administrators, Public Guardians, and Public Consevators

TRUSTS & ESTATES SECTION
THE STATE BAR OF CALIFORNIA

September 12, 2013

Damian D. Capozzola, Chair
Brian Hebert, Executive Director
California Law Revision Commission
4000 Midlefield Road, Room D-2
Palo Alto CA 94303-4739

also delivered by email to:commission@clrc.ca.gov

Re: ***Comments on Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act***

Dear Commissioners and Mr. Hebert:

The Executive Committee of the Trusts & Estates Section of the State Bar of California ("TEXCOM") respectfully submits the following comments in regard to the Tentative Recommendation released by the California Law Revision Commission ("CLRC") in June 2013.

These comments were approved by a vote (31 in favor, 0 opposed) of TEXCOM. Since the beginning of the CLRC's study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (hereinafter "UAGPPJA" or "the Uniform Act"), representatives of TEXCOM have presented comments in writing and at public CLRC meetings, as well as in informal discussions with CLRC staff counsel. TEXCOM remains available to continue working with the interested stakeholders on this matter, offering its experience and expertise in this area of the law.

Comment no. 1: Recommended Summary Procedure for Court to "decline to exercise jurisdiction"

Under UAGPPJA, a person's "home state" has primary jurisdiction and a "significant connection" state may issue an order only if the home state has "declined to exercise jurisdiction." TEXCOM attorneys have already begun to see confusion arising from the language of the Uniform Act in determining how a California Court may act to decline jurisdiction, as necessary for another state to move forward with a protective proceeding.

The Uniform Act does not specify a procedure, stating only that the Court declining jurisdiction shall "dismiss or stay the proceeding." The issue then is: what should a petitioner file to obtain a court's order declining to exercise jurisdiction so that the other matter may proceed?
In one case, a Nevada court was unwilling to grant a guardianship [conservatorship] for a new resident for whom Nevada was not yet her "home state" without an order from a California court

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declining to exercise jurisdiction. Because no procedure is specified in the Act, it was necessary for the Nevada petitioner to file the documents required for a full California conservatorship, just to have the petition "dismissed" before the Nevada court would act.

Under the Tentative Recommendation incorporating this section of UAGPJJA, the only option is to file a proceeding for the court in the "home state" to "either dismiss or stay":

> **§ 1996. Appropriate forum 1 [UAGPPJA § 206]**
> 1996. (a) A court of this state having jurisdiction under Section 1993 to appoint a conservator may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.
>
> (b) If a court of this state declines to exercise its jurisdiction under subdivision (a), **it shall either dismiss or stay the proceeding**. The court's order dismissing or staying the proceeding **shall be in a record** and shall expressly state that the court declines to exercise its jurisdiction because a court of another state is a more appropriate forum. The court may impose any condition the court considers just and proper. . . *[emphasis added]*

TEXCOM recommends allowing this issue to be raised more efficiently by a single petition, with the proposed addition of the underlined language shown here:

> **§ 1996. Appropriate forum**
> 1996. (a) A court of this state having jurisdiction under Section 1993 to appoint a conservator may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum. <u>The issue of appropriate forum may be raised upon petition of party, the court's own motion, or request of another court</u>.
>
> (b) If a court of this state declines to exercise its jurisdiction under subdivision (a), <u>it shall grant the petition</u> and either dismiss or stay any <u>pending conservatorship</u> proceeding. The court may impose any condition the court considers just and proper . . .

It would be unduly burdensome and costly to both the parties and courts to require a full Conservatorship proceeding be initiated for the court to "dismiss or stay", especially since the proposed conservatee is no longer in this state when this situation arises. We believe that the court's review of a petition offers protection to the proposed conservatee while making a minimal change in the language of the uniform law that will promote substantial economy and efficiency in application of the Act.

If the legislation were to include our proposal, we would urge the Judicial Council to adopt a form petition to determine appropriate forum for jurisdiction in conservatorship proceedings.

<u>Comment no. 2:</u> **Proposal to include expanded Notice provisions, and 120 day expiration of a foreign Registered Order**

Article 4 of UAGPPJA outlines a procedure for registration of another state's conservatorship order, so that the out-of-state conservator may be authorized to perform acts within this state. While UAGPPJA offers many benefits for creating uniformity of conservatorship jurisdiction laws among the states, the registration provisions are of great concern to TEXCOM.

The UAGPPJA registration provisions address the problem of interstate recognition when a conservator needs to take action in another state. This may include situations such as seeking out-of-state medical care for a conservatee, or selling property held in another state.

Far more than in other states, conservatorship laws in California afford higher protections for the civil and due process rights of individuals. For example, California law requires a personal visit by the court investigator before appointment of a conservator in every case. Also, before removing a conservatee from his or her personal residence, the conservator must overcome the presumption that the current home is the "least restrictive appropriate residence" suitable for the conservatee's needs. Probate Code section 2352.5.

To avoid having to meet these standards, a conservator may instead attempt to use registration of another court's order as an "end run" around California's stricter laws for someone who currently resides in or intends to move to this state. In that instance, a petition to transfer the conservatorship using the procedure under UAGPPJA Article 3 should be required. Acknowledging these concerns, the Commission has previously recommended modifications of UAGPPJA's registration provisions, such as to prohibit use of the registration procedure when the conservatee is a resident of this state. (See Minutes of 10-18-2012 CLRC meeting at pp 5-6.)

While the modifications of UAGPPJA made to date provide some additional protections, these modifications may not be enough to prevent using registration to avoid complying with California law when someone moves to this state. TEXCOM recommends even stronger provisions to protect the interests of conservatees, who are disabled or frail elderly adults:

1) Requiring notice to interested persons of the application for registration of the order in another state; and

2) Limiting the time a registered order will remain effective to 120 days, unless extended by the court.

1) Requirement of Notice

When a conservator appointed in another state seeks to act in California, UAGPPJA requires notice only to "the appointing court." Would this notice prevent using registration to avoid complying with California law when someone moves to this state? Requiring additional notice would allow the persons who know the conservatee, the conservator, and the circumstances of the proposed registration to voice any concerns about the request to register and act as conservator in California.

The Tentative Recommendation appropriately prohibits use of registration for a conservatee who resides in this state. We agree with this addition to the Act. However, effective enforcement of this protection is possible only with additional notice of the application for registration to the conservatee and other interested parties, with the opportunity to object.

We also agree that a mandatory court hearing to review every application for registration is unnecessary. Instead, our proposed revision to section 2014 (see CLRC Memorandum 2013-26 2nd Supplement) is similar to the required notice of registration for an out-of-state child custody order under the Uniform Child Custody Jurisdiction and Enforcement act (UCCJEA). See California Family Code Section 3445 and Judicial Council form FL-580 ("Registration of Out-of-State Custody Order").

The TEXCOM proposal includes the following additional notice requirement as one of the requirements for registration:

> § 2014. Application to Register
> . . . (b) Notice of the application to register shall be given not less than 15 days prior to the registration to the following:
> (1) The appointing court in the other state;
> (2) The persons who would be entitled to notice of a petition for the appointment of a conservator in the appointing state; and
> (3) The persons who would be entitled to notice of a petition for the appointment of a conservator in this state.

The required notice would include the following advisements:

> § 2014
> . . . (c)(2) That a person seeking to object to the proposed registration must submit an objection to the conservator before the date shown on the notice, or before the registration, whichever is later.
>
> (d) If an objection is received, the registration may proceed only with court authorization. If no timely objection is received, the conservator may apply to register the conservatorship order in the superior court of any appropriate county of this state.

This type of notice directly from the personal representative, without a required court filing, is used elsewhere in the Probate Code, specifically the 'notice of proposed action' procedure under the Independent Administration of Estates Act (IAEA). Probate Code sections 10580 et seq.

We see this minimal notice provision as giving interested parties the opportunity to object when registration of an out-of-state order may be intended for a purpose not in the conservatee's best interest. For example, if a family member objected to a care plan involving placement in a California facility, or to the sale of a conservatee's long-time residence in this state, the conservator would be required to obtain court authorization to proceed with registration.

It is likely in the vast majority of cases that registration would proceed without objection. By requiring additional notice to those who may have concerns, there is a much greater likelihood of discovering those situations where a conservator is intending to use the registration procedure to avoid California's more restrictive protections for conservatees in this state.

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2) **Expiration of Registered Order**

The second additional protection against mis-use of the registration process is a proposed 120-day expiration for registered orders when California has jurisdiction as either a home state or a significant connection state. Under these definitions (section 1991), the conservatee would have been a California resident within the preceding six (6) months, or have family or other significant ties to this state. These two (2) situations present the greatest likelihood of a conservatee returning back to California or having a personal residence in this state, with the conservator seeking to rely on registration of the order obtained in another state rather than properly transferring the conservatorship proceeding back to this state.

Once an order is registered, there is essentially no further court supervision. It is thus possible for a conservator of an out-of-state conservatee to register an order here, then move the conservatee to this state and use the registered order to operate here indefinitely. This could happen to even well-intentioned but unknowing conservators.

TEXCOM's proposed revision to section 2015 would terminate the effectiveness of a registered order after 120 days in these matters, unless extended by the court. This assures that the registered order is effective for a limited time, and thus may not be used as a substitute for acting as conservator in this state.

Our proposed revision is based on a similar addition to UAGPPJA as enacted in **Connecticut**:

> Sec. 21. (NEW) (Effective October 1, 2012) (a) On registration in this state under section 19 of this act of a conservator of the person order from another state or under section 20 of this act of a conservator of the estate order from another state, the conservator may exercise in this state all powers authorized in the order of appointment, except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the conservator is not a resident of this state, subject to any conditions imposed on nonresident parties. **The registration of a conservator of the person order under section 19 of this act shall lapse one hundred twenty days after such registration, except that the registration may be extended for good cause for an additional one hundred twenty days by the court of probate in this state having jurisdiction over the location within this state where the person under the conservator of the person order resides, is domiciled or is located.**

Unlike the broader Connecticut provision, the TEXCOM proposal would limit the automatic expiration after 120 days to cases where the conservatee has strong ties to California as a "home state" or significant connection state". Such a provision would allow a conservator to take the immediate actions needed such as for sale of a property, or obtaining medical care for the conservatee. By including a 120 day expiration, the registered order could not, however, be used as a long term substitute for complying with California's conservatorship laws, particularly if the conservatee has moved back or intends to return to this state.

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Comment no. 3: **Suggestion for Further Clarity re: Authority to Act based on Registered Order**

Another important issue concerning the registration provisions of UAGPPJA is the extent of a foreign conservator's authority to act in this state after registering another state's order of appointment. The Uniform Act, as included in section 2014(a) of the Tentative Recommendation, directs that, upon registration, an out-of-state conservator may:

> " . . . exercise in any county of this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties."[1]

To expand and clarify this provision, the Tentative Recommendation released by CLRC includes proposed new Probate Code section 2023 (which was not part of UAGPPJA as originally drafted):

> **§ 2023. Court rules and forms**
> 2023. (a) On or before January 1, 2016, the Judicial Council shall develop court rules and forms as necessary for the implementation of this chapter.
> (b) The materials developed pursuant to this section shall include, but not be limited to, both of the following: (1) A cover sheet for registration of a conservatorship under Section 2011, 2012, or 2013. The cover sheet shall explain that a proceeding may not be registered under Section 2011, 2012, or 2013 if the proceeding relates to a minor. The cover sheet shall further explain that a proceeding in which a person is subjected to involuntary mental health care may not be registered under Section 2011, 2012, or 2013. The cover sheet shall require the conservator to initial each of these explanations. **The cover sheet shall also include a prominent statement that the conservator of a conservatorship registered under Section 2011, 2012, or 2013 is subject to the law of this state while acting in this 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 the law of this state.** In addition, the cover sheet shall prominently state that the registration is effective only while the conservatee resides in another jurisdiction and does not authorize the conservator to take any action while the conservatee is residing in this state. Directly beneath these statements, the cover sheet shall include a signature box in which the conservator attests to these matters. *(emphasis added).*

We suggest that the registration sections more clearly state the duties of an out-of-state conservator who may be unfamiliar with California conservatorship laws, such as the restrictions

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[1] The new law will thus be a statute expressly authorizing a foreign conservator to act, as required under California Code of Civil Procedure § **1913:**

(a) Subject to subdivision (b), the effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced in this state by an action or special proceeding.

(b) The authority of a guardian, conservator, or committee, or of a personal representative, does not extend beyond the jurisdiction of the government under which that person was invested with authority, except to the extent expressly authorized by statute.

and required procedures before selling a conservatee's personal residence under Probate Code sections 2450(b), 2352.5, 2541 and 2591.5. Likewise, an out-of-state conservator may be required to obtain authorization from a California court to sell personal property of a Conservatee (Probate Code sections 2540(a), 2545). A court determination of whether the conservatee lacks capacity to give informed consent for planned medical treatment in this state may also be necessary under Probate Code section 1880.

TEXCOM agrees with the emphasis added by new Section 2023 of the Tentative Recommendation. We suggest that this section provide additional clarity by: 1) including a reference in Section 2014 to the additional requirements in new Section 2023; and 2) listing specifically the actions for which an order by a California court must be obtained. We note that the foreign conservator will likely retain local counsel to assure compliance with California's conservatorship laws and procedures, at additional cost to the conservatee.

The difficulty in informing foreign conservators as to the breadth of how an out-of-state registered order may be used, and enforced, for transactions in this state demonstrates TEXCOM's serious concerns about the potential mis-use of the registration process to avoid court oversight. The conservatees in these matters most likely have significant connections to California. Reasonable efforts should be made to assure fair treatment in transactions involving these conservatees' interests in this state, including court supervision when required under California laws.

DISCLAIMER:

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Respectfully submitted,

Jennifer L. Wilkerson
Trusts and Estates Executive Committee, ("TEXCOM")
State Bar of California

Cc: Charlotte Ito, TEXCOM Chair *(by email)*
Bart Schenone, TEXCOM Vice-Chair *(by email)*

MARYLAND CODE ANNOTATED, ESTATES & TRUSTS § 13.5-102

13.5-102. (a) Subject to subsection (b) of this section, a court of this State may treat a foreign country as if the country were a state for the purpose of applying Subtitles 1, 2, 3, and 5 of this title.

(b) Unless a court of this State finds by a preponderance of the evidence that a foreign country applies and follows substantive and procedural due process consistent with the practices and policies of the State of Maryland, the court:

(1) May not request a court in the foreign country to issue an order or hold a hearing;

(2) May not decline to exercise jurisdiction if, by declining jurisdiction in this State, a court in the foreign country may obtain jurisdiction;

(3) May not dismiss or stay a proceeding in this State requested or ordered by a court in the foreign country;

(4) May not determine that a court in the foreign country is an appropriate forum;

(5) May decline to comply with notice requirements of the foreign country or this title;

(6) May proceed with the case if this State is otherwise an appropriate forum;

(7) May not issue an order or provisional order to transfer a guardianship or conservatorship to the foreign country; and

(8) May not recognize under any provision of law a guardianship or conservatorship order from the foreign country.