Study L-750 October 3, 2013

First Supplement to Memorandum 2013-44

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

This supplement continues the process of presenting and analyzing the comments on the Tentative Recommendation on the *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* (June 2013) (hereafter, "Tentative Recommendation"). It focuses on Article 3 of the proposed California Conservatorship Jurisdiction Act, which corresponds to Article 3 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"). That article addresses the problem of transfer: how to move what is known in California as a conservatorship from one state to another when such a move becomes necessary. Another supplement will focus on the remainder of the Tentative Recommendation (Articles 4 and 5, the uncodified provision, and the conforming revisions).

The following materials are referred to in the discussion and attached for Commissioners and other interested persons to consider:

ARTICLE 3. TRANSFER OF CONSERVATORSHIP

Article 3 of the proposed California Conservatorship Jurisdiction Act consists of two code sections: (1) proposed Probate Code Section 2001, which would specify the steps under California law for transferring a California conservatorship to another state, and (2) proposed Probate Code Section 2002, which would specify the steps under California law for accepting the transfer of a conservatorship from another state. We first discuss the comments on proposed Section 2001, and then turn to the comments on proposed Section 2002.

Proposed Probate Code Section 2001. Transfer of a California Conservatorship to Another State [UAGPPJA § 301]

Proposed Probate Code Section 2001 would specify the steps under California law for transferring a California conservatorship to another state. In particular, it would:

- Allow a California conservator to file a petition to transfer the conservatorship to another state. (§ 2001(a))
- Require the California court to hold a hearing on the petition to transfer the conservatorship. (§ 2001(c))
- Specify how to give notice of that hearing. (§ 2001(b))
- Direct the California court to issue an order (1) provisionally granting the transfer petition in specified circumstances, and (2) directing the petitioner to petition for acceptance of the conservatorship in the other state. (§ 2001(d), (e), (f))
- Direct the California court to issue a final order transferring the conservatorship upon receiving (1) a final order from the out-of-state court accepting the transfer from California, and (2) the documents required to terminate a conservatorship in California. (§ 2001(g))

The staff is only aware of a few new issues relating to this provision; they are discussed below.

Notice Requirement

Subdivision (b) of proposed Probate Code Section 2001 is a notice requirement:

> (b) Notice of a hearing on a petition under subdivision (a) must be given to the persons that would be entitled to notice of a hearing on a petition in this state for the appointment of a conservator.

As discussed at pages 5 and 8 of Memorandum 2013-46, **the staff recommends revising this provision and the corresponding Comment to make clear who is responsible for giving the required notice:**

> (b) ~~Notice~~ The petitioner must give notice of a hearing on a petition under subdivision (a). The petitioner must give that notice ~~must be given~~ to the persons that would be entitled to notice of a hearing on a petition in this state for the appointment of a conservator.
>
> **Comment.** Section 2001 ….

> Subdivision (b) corresponds to Section 301(b) of UAGPPJA. Revisions have been made to specify that the petitioner is responsible for giving the notice (*cf.* Ohio Rev. Code Ann. 2112.31(B)), and to conform to California practice, under which a party is required to give notice *of a hearing* on a motion or petition, not just notice of a *petition.*

These revisions would be a deviation from uniformity but would provide useful guidance that could prevent confusion and disruption of the transfer procedure. **Would the Commission like to make them?**

Provisionally Granting a Transfer Petition: Proper Standard for Overcoming an Objection

Subdivisions (d) and (e) of proposed Probate Code Section 2001 would specify the standard that a California court must apply when deciding whether to provisionally grant a petition to transfer a California conservatorship to another state. Among other things, those subdivisions would specify that when someone objects to such a transfer, the court may provisionally grant the transfer *only* if it determines that the transfer would *not* be contrary to the interests of the conservatee:

> (d) The court shall issue an order provisionally granting a petition to transfer a conservatorship of the person, and shall direct the conservator of the person to petition for acceptance of the conservatorship in the other state, if the court is satisfied that the conservatorship will be accepted by the court in the other state and the court finds all of the following:
>
> ….
>
> (2) An objection to the transfer has not been made or, *if an objection has been made, the court determines that the transfer would not be contrary to the interests of the conservatee.*
>
> ….
>
> (e) The court shall issue a provisional order granting a petition to transfer a conservatorship of the estate, and shall direct the conservator of the estate to petition for acceptance of the conservatorship in the other state, if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds all of the following:
>
> ….
>
> (2) An objection to the transfer has not been made or, *if an objection has been made, the court determines that the transfer would not be contrary to the interests of the conservatee.*
>
> ….
>
> **Comment.** Section 2001 ….

> Subdivision (d) corresponds to Section 301(d) of UAGPPJA, but modifies the procedure that applies if a person objects to transfer of a conservatorship of the person. In that circumstance, the objector does not bear the burden of establishing that the transfer would be contrary to the interests of the conservatee. Rather, the requirement of paragraph (d)(2) is satisfied only if the court determines that the transfer would not be contrary to the interests of the conservatee.
>
> Subdivision (e) corresponds to Section 301(e) of UAGPPJA, but modifies the procedure that applies if a person objects to transfer of a conservatorship of the estate. In that circumstance, the objector does not bear the burden of establishing that the transfer would be contrary to the interests of the conservatee. Rather, the requirement of paragraph (e)(2) is satisfied only if the court determines that the transfer would not be contrary to the interests of the conservatee.
>
> ….

(Emphasis added.)

This approach was suggested by the TEXCOM subgroup, which explained that it "appears to be a lesser burden of proof for the objector." Memorandum 2012-36, Exhibit p. 35; see also Memorandum 2013-9, Attachment p. 33. The TEXCOM subgroup also pointed out that New Jersey uses the approach in its version of UAGPPJA. See N.J. Stat. Ann. § 3B:12B-17.

The corresponding provisions in UAGPPJA take a different approach. They direct the court to provisionally grant a transfer petition *unless* the objector affirmatively establishes that the transfer *would be contrary* to the interests of the conservatee. See UAGPPJA § 302(d)(2) & (e)(2).

A Note in the Tentative Recommendation solicits input on which standard would be best:

> ☞ **Note.** Under Section 301(d)(2) of UAGPPJA, if a person objects to a transfer, the court must find that "*the objector has not established* that the transfer would be contrary to the interests of the incapacitated person …." (Emphasis added.) Section 301(e)(2) of UAGPPJA is similar.
>
> In contrast, proposed Section 2001(d)(2) would require the court to determine that the transfer would not be contrary to the interests of the conservatee. Proposed Section 2001(e)(2) is similar.
>
> The Commission seeks comment on any aspect of proposed Section 2001, but would especially appreciate

> input on which standard it should use in paragraphs (d)(2) and (e)(2).

In response, the ULC says it opposes the approach proposed in the Tentative Recommendation because it would "undermin[e] the conservator's authority to act in the best interest of the conservatee." Memorandum 2013-44, Exhibit p. 19; see also *id.* at Exhibit p. 15. 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." *Id.* at Exhibit p. 20; see also *id.* at Exhibit p. 15.

The ULC explains:

> 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 predominately by conservators who are family members of the conservatee. The transfer is often necessitated by economic conditions, such as a job 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.

Id. at Exhibit pp. 19-20 (emphasis in original); see also *id.* at Exhibit p. 15.

The ULC thus believes that a conservator should have some latitude to determine where the conservatee will live. As between an objector's view on that subject and the conservator's own view, the ULC thinks there should be a thumb on the scales in favor of the conservator: The burden of proof should be on the objector, not on the conservator.

The Alzheimer's Association takes the same position as the ULC. Its State Public Policy Director (Theresa Renken) explains: "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." *Id.* at Exhibit p. 30.

The ULC and the Alzheimer's Association thus seek to avoid overburdening the conservator, so that the conservator will be better able to help the conservatee. That view makes a certain degree of sense, but it is not the only way to look at the situation. Transferring a conservatorship from one state to another almost invariably will involve relocation of the conservatee to a new state. In determining what burden of proof should apply, it may be instructive to examine existing California policies on relocation of a conservatee, especially its policies on relocation of a conservatee to a new state.

Under existing California law, a conservator may establish the conservatee's residence anywhere within the state without court approval, so long as the conservator selects "the least restrictive appropriate residence … that is available and necessary to meet the needs of the conservatee, and that is in the best interests of the conservatee." Prob. Code § 2352(b). In making that selection, the conservator "shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate." Prob. Code § 2113. Further, "[i]t shall be presumed that the personal residence of the conservatee at the time of the commencement of the [conservatorship] proceeding is the least restrictive residence for the conservatee." Prob. Code § 2352.5. That presumption "may be overcome by a preponderance of the evidence." *Id.*

Relocation of the conservatee from California to another state, even on a temporary basis, requires court approval. Prob. Code § 2352(c). Again, the conservator is required to take into account the desires of the conservatee, and to select "the least restrictive appropriate residence … that is available and necessary to meet the needs of the conservatee, and that is in the best interests of the conservatee." Prob. Code §§ 2113, 2352(b), (e)(1). The Judicial Council's form for this situation (Form GC-090) specifically calls upon the court to find that fixing the residence of the conservatee outside of the State of California "is appropriate and in the best interests of that individual."

Existing California law thus (1) rebuttably presumes that a conservatee's personal residence at the commencement of a conservatorship proceeding is where the conservatee should live, and (2) requires a conservator to establish in court that relocating the conservatee to another state would be in the conservatee's interest. In short, existing law reflects a policy of requiring justification for relocation of a California conservatee to a new state, particularly if the conservatee's personal residence was in California when the conservatorship proceeding commenced.

The approach suggested by the TEXCOM subgroup and proposed in the Tentative Recommendation seems consistent with that policy, because it would allow a transfer only if the court finds that the proposed transfer would not be contrary to the interests of the conservatee. In contrast, the ULC and the Alzheimer's Association are proposing to allow a transfer to go forward unless an objector is able to affirmatively establish that it would be contrary to the interests of the conservatee. That approach has some potential advantages, as the ULC and the Alzheimer's Association have explained. Given California's policy preferences as expressed in existing law, however, and the lack of any objection from those within or closely tied to the California court system, **the staff is currently inclined to stick with the approach used in the Tentative Recommendation.** We recognize that this is a difficult decision and **welcome further input on it, for the Commission to take into account in deciding how to proceed.**

Provisionally Granting a Transfer Petition: Participation of the Conservatee in Decision-Making Relating to Plans for Care and Services

In another memorandum for the upcoming meeting, the staff explains that Connecticut made several modifications of the UAGPPJA findings required to provisionally grant a transfer to another state. See Memorandum 2013-46, pp. 4, 5-6. Among other things, a Connecticut court must not only find that the plans for care and services of the conserved person are reasonable and sufficient, but must also find that such plans are "made after allowing the conserved person the opportunity to participate meaningfully in decision making in accordance with the conserved person's abilities…." Conn. Gen. Stat. Ann. § 45a-667p(d)(3).

The staff sees potential merit to that approach, because it is consistent with California's emphasis on accommodating the desires of the conservatee wherever reasonably possible. See, e.g., Prob. Code § 2113. It would, however, go against the interest in uniformity emphasized by the ULC and the Alzheimer's Association.

As noted in Memorandum 2013-46, **if the Commission is inclined to require such a finding, it could do so by revising proposed Probate Code Section 2001(d) and the corresponding comment as shown below:**

> (d) The court shall issue an order provisionally granting a petition to transfer a conservatorship of the person, and shall direct the conservator of the person to petition for acceptance of the conservatorship in the other state, if the court is satisfied that the conservatorship will be accepted by the court in the other state and the court finds all of the following:
>
> (1) The conservatee is physically present in or is reasonably expected to move permanently to the other state.
>
> (2) An objection to the transfer has not been made or, if an objection has been made, the court determines that the transfer would not be contrary to the interests of the conservatee.
>
> (3) Plans for care and services for the conservatee in the other state are reasonable and sufficient.
>
> (4) The conservatee had an opportunity to participate meaningfully, in accordance with the conservatee's abilities, in decision-making relating to the plans for care and services for the conservatee in the other state.
>
> **Comment.** Section 2001…
>
> Subdivision (d) corresponds to Section 301(d) of UAGPPJA, but modifies the procedure that applies if a person objects to transfer of a conservatorship of the person. In that circumstance, the objector does not bear the burden of establishing that the transfer would be contrary to the interests of the conservatee. Rather, the requirement of paragraph (d)(2) is satisfied only if the court determines that the transfer would not be contrary to the interests of the conservatee.
>
> Revisions have also been made to require a finding that the conservatee had an opportunity to participate meaningfully, in accordance with the conservatee's abilities, in decision-making relating to the plans for care and services for the conservatee in the other state. *Cf.* Conn. Gen. Stat. Ann. § 45a-667p(d)(3).

Would the Commission like to make such a change?

Proposed Probate Code Section 2002. Accepting Conservatorship Transferred From Another State [UAGPPJA § 302]

Proposed Probate Code Section 2002 would specify the procedure for accepting the transfer of a conservatorship (or comparable proceeding by another name) from another state to California. In particular, it would:

- Require an out-of-state conservator seeking transfer to petition a California court to accept the proceeding. The petition must include a certified copy of the other state's provisional order of transfer. The first page of the petition must state that the conservatorship is eligible for transfer and does not fall within the limitations of proposed Probate Code Section 1981, which would limit the scope of the California Conservatorship Jurisdiction Act. (§ 2002(a))
- Require the California court to hold a hearing on the petition to accept the proceeding. (§ 2002(c))
- Specify how to give notice of that hearing. (§ 2002(b))
- Direct the California court to issue an order provisionally granting the petition in specified circumstances. (§ 2002(d))
- Direct the California court to issue a final order accepting the proceeding and appointing a conservator upon receiving a final order from the out-of-state court approving the transfer to California. (§ 2002(e)(1))
- Make clear that a transfer to California would not become effective until the California court issues its final order accepting the proceeding and appointing a conservator. (§ 2002(e)(2))
- Specify the steps that must occur before the conservator of a transferred conservatorship can take action in California. (§ 2002(e)(2))
- Make clear 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." (§ 2002(e)(3), also known as the "When in Rome principle")
- Direct the California court to appoint a court investigator when it issues a final order accepting a transfer. The court investigator must promptly commence an investigation as specified in proposed Probate Code Section 1851.1. (§ 2002(e)(4))
- Direct the California court to determine, within 90 days after issuing a final order accepting a transfer, whether the conservatorship needs to be modified to conform to California law. If so, the court may take any step necessary to achieve compliance with California law. (§ 2002(f)(1))

- Direct the California court to review the conservatorship as provided in proposed Probate Code Section 1851.1 at the same time that it determines whether the conservatorship needs to be modified to conform to California law. (§ 2002(f)(2))
- Direct the California court to recognize the transferring court's conservatorship order (including the determination of the conservatee's incapacity and the appointment of the conservator), except in specified circumstances. (§ 2002(g))
- Make clear that if a California court denies a petition to accept a transfer, the denial does not prevent the out-of-state conservator from seeking to establish a conservatorship from scratch in a California court (assuming that court has jurisdiction). (§ 2002(h))

The Commission received lots of input on this provision, raising a variety of different issues. Some of the comments address details, or seek revisions that do not appear to be fundamentally inconsistent with policy choices that the Commission made in drafting the Tentative Recommendation. Other input asks the Commission to reconsider significant policy choices.

Of particular note, the Probate and Mental Health Advisory Committee of the Judicial Council (hereafter, "the Probate and Mental Health Advisory Committee") proposes to substantially revise proposed Section 2002 and to delete proposed Section 1851.1, which would specify the nature of the court investigation and review required by proposed Section 2002. See Memorandum 2013-44, Exhibit pp. 21-29. Among other things, the committee suggests that

- the court investigation and determination of whether the conservatorship conforms to California law should occur earlier in the transfer process than the Tentative Recommendation proposes. DRC makes a similar suggestion.
- the scope of court investigation should be more limited and more discretionary than the Tentative Recommendation proposes.

Those points go to the heart of the proposed transfer procedure, so we discuss them first. We then discuss the other comments relating to proposed Section 2002.

Sequencing of the Court Investigation, Review of the Conservatorship, and Conformity Determination

The Probate and Mental Health Advisory Committee's "most significant concern" is that proposed Section 2002 would

> 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* … — 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.

Memorandum 2013-44, Exhibit p. 22 (emphasis added). A related concern is that proposed Section 2002 "would not provide for the participation of court investigators until after entry of the 'final' order appointing a conservator." *Id.*

To address those concerns, the committee suggests the following alternative approach:

- "Require appointment of a court investigator before the hearing on the petition for the provisional order." *Id.* at Exhibit p. 24.
- "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 [certain persons] *before* entry of a final order accepting the transfer." *Id.* (emphasis in original).
- "Require the court to determine, within 60 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 …." *Id.* (footnote omitted).
- "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 …." *Id.* at Exhibit p. 25. There would be "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." *Id.*

To help the Commission and interested persons compare and contrast this approach with the one in the Tentative Recommendation, the staff has prepared the chart on the next page.

Tentative Recommendation

(1) An out-of-state conservator files a transfer petition in the out-of-state court. If certain requirements are met, that court issues a provisional order granting the transfer.

(2) The out-of-state conservator files a petition in a California court, asking that court to accept the proceeding. The California court holds a hearing on the petition. If certain requirements are met, the California court issues a provisional order accepting the transfer.

(3) Upon receiving the provisional order issued by the California court and any documents required to terminate the out-of-state proceeding, the out-of-state court issues a final order granting the transfer.

(4) Upon receiving the final order granting the transfer, the California court issues a final order accepting the proceeding and appointing a conservator. At the same time, the court appoints a court investigator, who must promptly commence an investigation of the conservatorship.

(5) After the California court issues a final order accepting the proceeding, the conservator must take an oath, file the required bond, and acknowledge receipt of certain information the court is required to provide. After all those steps occur and the clerk of the court issues the letters of conservatorship, the conservator can begin to function as such in California.

(6) The court investigator conducts the required investigation and prepares a report for the court.

(7) Not later than 90 days after issuing the final order accepting the transfer, the California court must determine whether the conservatorship needs to be modified to conform to California law. At the same time, the California court must review the conservatorship. The court is to hold a hearing on these matters (see proposed Prob. Code § 1851.1(b)(7) & (8), (c)).

Probate & Mental Health Advisory Committee

(1) Same as in Tentative Recommendation.

(2) The out-of-state conservator files a petition in a California court, asking that court to accept the proceeding.

(3) The California court appoints a court investigator, who conducts an investigation and prepares a report.

(4) The California court holds a hearing on the petition. If certain requirements are met, the California court issues a provisional order accepting the transfer.

(5) The California court orders a further investigation of the conservatorship.

(6) Not later than 60 days after issuing a provisional order accepting the transfer, the California court must determine whether the conservatorship will need to be modified to conform to California law. The court has discretion to require a hearing on that matter.

(7) Upon receiving the final order granting the transfer, the California court issues a final order accepting the proceeding and appointing a conservator.

(8) After the California court issues a final order accepting the proceeding, the conservator must take an oath, file the required bond, and acknowledge receipt of certain information the court is required to provide. In general, the conservator cannot begin to function as such in California until all those steps occur and the clerk of the court issues the letters of conservatorship.

Importantly, the Tentative Recommendation would not require a court investigation until after a California court issues a final order accepting a transfer. The Tentative Recommendation (p. 24, n.150) explains that "[i]t 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*." (Emphasis added.)

The Probate and Mental Health Advisory Committee does not expressly address that practical concern in its written comments. Its proposal does not describe the logistics of conducting the contemplated court investigations, nor does the proposal clearly specify where those investigations would take place: in the transferring state, in California, or in both places.

The staff discussed this matter, and the committee's proposed alternative approach, in a teleconference with Douglas Miller (Senior Attorney, Administrative Office of the Courts), who staffs the Probate and Mental Health Advisory Committee. He noted that if a conservatee, a conservator, or other significant source is located outside California during a court investigation, the investigator might have to adjust the investigative approach, such as by conducting an interview by phone or scheduling an interview when the subject visits California (*e.g.*, in connection with a court appearance). He said the committee firmly believes that delaying the court investigation and determination of conformity with California law until *after* acceptance of a transfer would be too late; the investigation should *precede* the transfer, so that the court can take the results of the investigation into account in deciding whether to accept the transfer and appoint the conservator to serve in California. To ask a court to accept a transfer and issue letters of conservatorship to a conservator *before* conducting any investigation struck the committee members as backwards, like closing the barn door after the horse has left the barn.

DRC has a somewhat similar view. It notes that the Tentative Recommendation (p. 23) takes a "middle ground" position on relitigation of capacity and the choice of conservator: Full relitigation would *not* be

required in every case transferred to California, but such relitigation would be allowed *if requested* in the normal manner that those issues can be revisited in any California conservatorship. DRC "feels that this middle ground position *needs further modification* to protect conservatees' rights." Memorandum 2013-44, Exhibit p. 8 (emphasis added).

Specifically, DRC "favor[s] the use of a court investigator early on in the transfer process to address the determination of capacity." *Id.* DRC explains:

> 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 ([Tentative] 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 ([Tentative] 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.

Id. at Exhibit pp. 8-9 (emphasis in original).

If the staff understands DRC's position correctly, DRC is not proposing that the Commission entirely abandon its "middle ground" position. Rather, DRC is focusing on the court investigation associated with a transfer, which the Commission deliberately structured to be "similar to the one that occurs when a new conservatorship is established in California," including the investigator's "specific findings concerning the conservatee's capacity." Tentative Recommendation, p. 24. DRC is suggesting that this court investigation and the court's post-investigation review occur earlier in the transfer process than the Tentative

Recommendation proposes. DRC does not appear to be saying that when the court conducts its review, it must routinely (1) presume that the transferring conservatee has capacity and (2) demand proof by clear and convincing evidence to overcome that presumption. Instead, DRC seems to implicitly accept that as in the Tentative Recommendation, those requirements would only apply if the need for a conservatorship is challenged. See proposed Prob. Code § 1851.1(f).

If the staff is understanding DRC correctly, then the suggestion being offered by both DRC and the Probate and Mental Health Advisory Committee is to resequence the transfer process, such that the court investigation, the follow-up court review, and the determination of conformity with California law would occur before, rather than after, the decision to accept a transfer. The staff sees both advantages and disadvantages to that suggestion.

With regard to the timing of the conformity determination, the suggested new approach would be a deviation from uniformity. See UAGPPJA § 302(f) ("Not later than [90] days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state."). The ULC and the Alzheimer's Association presumably would oppose the suggested new approach for that reason alone.

With regard to the timing of the court investigation and review, uniformity is not a consideration, because UAGPPJA does not call for a court investigation and review at any stage of the transfer process. As previously noted, however, the timing of the court investigation would have implications regarding the practicalities of the review, which might in turn affect its cost and effectiveness.

The timing of the court investigation might also affect the speed of the transfer procedure: If a court investigation must occur before a court accepts a transfer, the time interval between filing of a transfer petition in California and final acceptance of the transfer may be longer than if the court investigation occurs later. That might increase the likelihood that the conservator would have to move to California and seek a temporary conservatorship before the transfer becomes final, which in turn would make the transfer procedure more burdensome. That would be contrary to

the spirit of UAGPPJA, which is designed to help reduce expenses and save time while protecting persons and their property from potential abuse. See Uniform Law Commission, *Why States Should Adopt UAGPPJA, available at* http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAGPPJA; see also UAGPPJA Prefatory Note pp. 1, 4.

Notably, however, the Probate and Mental Health Advisory Committee suggests that the conformity determination occur "[n]ot later than [60] days after issuance of a provisional order" accepting a transfer. Memorandum 2013-44, Exhibit p. 28. That time limit would help to constrain the length of the court investigation and thus the likelihood that it will become necessary to seek a temporary conservatorship to facilitate a move.

There is also deep commonsense appeal to the idea that the court investigation should occur first, before the court authorizes a conservator (even a transferring conservator) to act in California. The staff suspects that this point will be persuasive in the Legislature and difficult to overcome.

Further, the members of the Probate and Mental Health Advisory Committee have great familiarity with the court investigation process. For example, the Chair is the Supervising Judge of the Probate Division of the Los Angeles Superior Court. If the committee members are apparently unconcerned about the practicalities of conducting a court investigation early in the transfer process, perhaps the Commission should show some deference to their judgment on the matter. In today's world with technologies such as Skype at hand, it might be feasible to conduct an effective investigation despite some long-distance logistical issues.

The staff is therefore **tentatively inclined to resequence the proposed transfer procedure as requested, along the general lines suggested by the Probate and Mental Health Advisory Committee (see the preceding chart).** We encourage thorough debate of this matter at the upcoming meeting, however, and we are very interested to hear further thoughts on it.

Until the Commission resolves this fundamental question of sequencing, it will be difficult to determine precisely how to word proposed Section 2002. For purposes of discussion, the staff nonetheless

presents a rough draft at the end of this memorandum, which incorporates our recommendations on all of the issues relating to that proposed provision.

Scope of Court Investigation

The sequencing of the transfer process is not the only key policy difference between the version of proposed Probate Code Section 2002 in the Tentative Recommendation and the version suggested by the Probate and Mental Health Advisory Committee. A second point of difference concerns the scope of court investigation.

The Tentative Recommendation calls for a single, post-transfer court investigation and a single written report. The scope of the investigation is specified in proposed Probate Code Section 1851.1, which is cross-referenced in proposed Section 2002(e)(4). Under Section 1851.1, the court investigator must comply with the same requirements that apply to a periodic review of a California conservatorship (i.e., the requirements of Probate Code Section 1850, which is reproduced at Exhibit pp. 4-5). See proposed Prob. Code § 2002(b)(1). In addition, the court investigator must comply with many, but not all, of the requirements that apply to a court investigation relating to a petition to establish a conservatorship (i.e., the requirements of Probate Code Section 1826, which is reproduced at Exhibit pp. 1-3). See proposed Prob. Code § 2002(b)(2)-(14).

In contrast, the Probate and Mental Health Advisory Committee proposes to require:

- An initial court investigation before the hearing on whether to provisionally accept the transfer. *The scope of this initial investigation would be left to the court's discretion.* See Memorandum 2013-44, Exhibit pp. 24 (item 9), 27 (proposed § 2002(f)(1)).
- Further court investigation after the California court provisionally accepts a 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." *Id.* at Exhibit p. 24 (item 10) (emphasis added). If the provisional order is for the appointment of a replacement conservator, "the investigation should be in the nature of an initial investigation under section 1826, issues of the conservatee's

> capacity excepted." *Id.* at Exhibit p. 27 (proposed § 2002(f)(2)).

Under either of the two proposed approaches, if the conservator seeks a temporary conservatorship while the transfer petition is pending, a court investigation complying with Probate Code Section 2250.6 (reproduced at Exhibit pp. 6-8) would also be necessary.

In sum, the Probate and Mental Health Advisory Committee is not only proposing to accelerate the timing of the court investigation, but it is also proposing to bifurcate the investigation, with some of the investigation occurring before the court decides whether to provisionally accept a transfer, and more investigation occurring afterwards. The committee further proposes to give the California court more discretion regarding the scope of the investigation than the Tentative Recommendation would provide. In addition, if the provisional order retains the original conservator, the committee's proposal would expressly call for a less extensive investigation than the Tentative Recommendation would require.

The concept of bifurcating the investigation would make sense if the Commission decides to resequence the transfer process as the committee requests. The investigation could commence shortly after the transfer petition is filed in California. The initial phase could focus on whether the requirements for provisionally accepting a transfer are met; further investigation could occur afterwards.

But what should be the total scope of the court investigation process? Should it be adjusted in the manner proposed by the Probate and Mental Health Advisory Committee? **In attempting to answer that question, the Commission should bear several points in mind.**

First, it is important to remember that the Tentative Recommendation seeks to put the transferred conservatee in a comparable position to a person whose conservatorship is originally established here in California. A transferred conservatee might not have received any court investigation when the out-of-state conservatorship was established, or might have received an investigation or court scrutiny that was less extensive than what is required for establishment of a conservatorship in California. By mandating a court investigation similar to an investigation for a petition to establish a conservatorship, the Tentative Recommendation would

ensure that the transferred conservatee receives the benefit of such an investigation.

Second, the Commission should bear in mind that the court investigation proposed in the Tentative Recommendation would not impose any new costs on the State of California and its court system in particular. Under existing law, an out-of-state conservatorship could not be transferred to California. Instead, relocating the conservatee to California would require the establishment of a new conservatorship from scratch, which would entail much the same kind of court investigation, and thus the same costs, as proposed in the Tentative Recommendation.

Finally, the Commission should remember that the out-of-state court might have carefully scrutinized the conservatee's situation when it established the out-of-state conservatorship, and that process might have been burdensome on the conservatee and those seeking to help the conservatee. UAGPPJA seeks to avoid wasteful duplication of effort and unnecessary expense; that is its main objective. Thus, it is important to carefully examine whether all of the steps of the court investigation proposed in the Tentative Recommendation are really needed. Likewise, the Commission should consider whether the California court should have any discretion to adjust the scope of the investigation on a case-by-case basis.

The staff encourages comments on these issues. Given the concerns that stakeholders have expressed throughout this study about protecting the rights of conservatees, we hesitate to recommend any relaxation of the requirements of the court investigation mandated by proposed Probate Code Sections 2002(e)(4) and 1851.1, particularly because those requirements appear to be acceptable to everyone except the Probate and Mental Health Advisory Committee.

If those requirements would be unduly burdensome, however, perhaps some adjustment is in order. **It would be especially useful to receive input that specifically identifies which proposed requirements to eliminate (if any), or specifically explains how much discretion to give the court regarding the scope of the investigation.**

In addition, we note that proposed Probate Code Section 1851.1(c) would require a court reviewing a conservatorship from another state to "make an express finding on whether continuation of the conservatorship

is the least restrictive alternative for the protection of the conservatee." That language stems from Probate Code Section 1800.3(b), relating to the establishment of a conservatorship.

On re-reading Probate Code Section 1851.1, the staff began to worry about whether a court might construe that language to conflict with the Commission's "middle ground" position on relitigation of capacity. We therefore suggest that the Commission **consider relocating the language in question, as follows:**

> 1851.1. (a) When a court investigator is appointed pursuant to Section 2002, the investigator shall promptly commence an investigation of the transferred conservatorship.
>
> ….
>
> (c) The court shall review the conservatorship as provided in Section 2002. The conservatee shall attend the hearing unless the conservatee's attendance is excused under Section 1825. ~~In conducting its review, the court shall make an express finding on whether continuation of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.~~ The court may take appropriate action in response to the court investigator's report under this section.
>
> ….
>
> (f) The first time that the need for a conservatorship is challenged by any interested person or raised on the court's own motion after a transfer under Section 2002, whether in a review pursuant to this section or in a petition to terminate the conservatorship under Chapter 3 (commencing with Section 1860), the court shall presume that there is no need for a conservatorship. This presumption is rebuttable, but can only be overcome by clear and convincing evidence. <u>The court shall make an express finding on whether continuation of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.</u>

Content of a Petition to Accept a Transfer (§ 2002(a)(2), (3))

In addition to the comments on the key issues discussed above, the Commission received a number of other suggestions regarding proposed Section 2002. Those suggestions are discussed below. The discussion roughly tracks the steps in the transfer procedure, starting with the preparation of a petition to accept a transfer.

The Probate and Mental Health Advisory Committee makes two suggestions regarding the content of a petition to accept a transfer. First, it urges the Commission to

> [r]equire 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).

Memorandum 2013-44, Exhibit p. 23 (emphasis added); see also *id.* at Exhibit p. 26.

To the staff's understanding, the committee's suggestion is entirely consistent with the Commission's intent. However, the Tentative Recommendation apparently does not express that intent clearly enough to prevent confusion. In particular, proposed Section 2002(a)(3) says:

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

The Commission's intent in requiring such information on the first page of the petition was to draw attention to and facilitate compliance with the limitations of Section 1981, which would make the proposed legislation inapplicable to certain situations (e.g., a proceeding involving involuntary mental health care).

By requiring such information on the first page of the petition, the Commission did *not* mean to excuse the petitioner from alleging supporting facts in the body of the petition. But the Probate and Mental Health Advisory Committee appears to have interpreted proposed Section 2002(a)(3) to mean that the petition does not need to include any factual allegations.

That problem could be cured by revising proposed Section 2002(a)(3) along the following lines:

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

If the Commission makes that revision, **it should also make a conforming change in the proposed Comment:**

> **Comment.** Section 2002 is similar to ….
>
> Paragraphs (1) and (2) of subdivision (a) correspond to Section 302(a) of UAGPPJA. Paragraph (3) of subdivision (a) provides guidance on the content of a petition under this section. The first sentence of that paragraph serves to facilitate compliance with Section 1981 (scope of chapter).

Would the Commission like to make these revisions?

The Probate and Mental Health Advisory Committee also suggests that a petition to accept a transfer "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.*" Memorandum 2013-44, Exhibit p. 23 (item 3) (emphasis added); see also *id.* at Exhibit p. 26 (proposed § 2002(a)(5)). In other words, the committee proposes to require the petitioner to (1) include a proposed final order accepting the conservatorship, and (2) specify *in that order* how to modify the conservatorship to conform to California law.

Requiring the petitioner to include a proposed final order seems like a good idea. It also seems reasonable to require the petitioner to specify how to modify the conservatorship to conform to California law. But requiring the petitioner to *put such information into the final order* would only make sense if the Commission decides to accelerate the timing of the conformity determination as the committee proposes (see the above discussion of "Sequencing of the Court Investigation, Review of the Conservatorship, and Conformity Determination"). Otherwise, the final order accepting the conservatorship would precede the conformity determination, so it could not include the court's conclusions regarding modifications necessary to conform the conservatorship to California law.

Regardless of which sequencing approach the Commission decides to use, however, **the following requirement could be added to proposed Section 2002(a):**

> (4) The petition shall specify any modifications necessary to conform the conservatorship to the law of this state, and the terms of a proposed final order accepting the conservatorship.

Would the Commission like to add such a provision?

Concurrent Petition for a Temporary Conservatorship

The Probate and Mental Health Advisory Committee is "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 … between commencement and completion of the transfer procedure." Memorandum 2013-44, Exhibit p. 23. The committee proposes to "[p]ermit 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." *Id.* (item 2).

The committee further comments that proposed Probate Code Section 1994 in the Tentative Recommendation

> permits the appointment of temporary conservators under Probate Code section 2250 even though jurisdiction might not lie for a general appointment under [proposed Probate Code Section 1993 in the Tentative Recommendation]. 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. [The committee's proposed 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.

Id. n.2.

The committee's comments about temporary conservators raise a couple of issues. First, should proposed Section 2002 explicitly state that a conservator seeking a transfer to California can concurrently seek a temporary conservatorship in California? **The staff sees no harm in including such a statement,** as it would be consistent with the Commission's intent. The statement could be placed in a new paragraph of proposed Section 2002(a), as follows:

> (5) A petition under this section may be accompanied by a petition for the appointment of a temporary conservator under Section 1994 and Chapter 3 (commencing with Section 2250) of Part 4. The petition for the appointment of a temporary conservator 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 in this state.

Would the Commission like to include a statement along these lines?

Second, the committee proposes that when a petition for a temporary conservatorship is filed together with a petition to accept a transfer, it should not be necessary for the petitioner to also file a petition for a general conservatorship (as is normally required when filing a petition for a temporary conservatorship). The committee reasons that a petition for a general conservatorship would be "an unlikely event in the apparent absence of jurisdiction."

However, in the transfer situation, a lack of jurisdiction may merely stem from the rule that "[e]xcept as otherwise provided in Section 1994, a court that has appointed a conservator consistent with this chapter *has exclusive and continuing jurisdiction* over the proceeding until it is terminated by the court or the appointment expires by its own terms." Proposed Prob. Code § 1995 (emphasis added). In other words, another state may have exclusive jurisdiction *simply because it made the original appointment of a conservato*r, even though California would now have jurisdiction if a conservatorship did not already exist (e.g., if the conservatee has no home state, the out-of-state relative who served as conservator can no longer care for the conservatee, and the conservatee has a child in California who would be willing to assume that responsibility if the conservatee moves to California). Moreover, once an out-of-state court issues a provisional order to transfer a conservatorship to California, jurisdiction would in any event exist under proposed Probate Code Section 1994(a)(3), which would give a court special jurisdiction to appoint a conservator "for a conservatee for whom a provisional order to transfer a proceeding from another state has been issued …."

The staff is thus unconvinced that lack of jurisdiction is a sound reason for excusing a petitioner for a temporary conservatorship from simultaneously seeking a general conservatorship. But there might be another reason for excusing that step: preparation of a petition for a general conservatorship is burdensome and it is precisely the kind of burden that the ULC sought to eliminate through UAGPPJA.

On several occasions, the Commission previously considered the possibility of eliminating the requirement that a petition for a temporary conservatorship be accompanied by a petition for a general conservatorship when jurisdiction is based on proposed Probate Code Section 1994(a)(1) (special jurisdiction in emergency when proposed conservatee is physically present in California). *See, e.g.*, Memorandum 2013-9, Attachment pp. 24, 54-57; Minutes (April 2013), pp. 7-8; Memorandum 2013-26, Attachment pp. 75-78. The Commission changed its mind on this issue more than once, but eventually decided to retain the requirement of an accompanying petition for a general conservatorship. See Minutes (June 2013), p. 7. If the staff remembers correctly, the Commission reached that decision after Jennifer Wilkerson of the TEXCOM subgroup explained that the content of a petition for a general conservatorship is useful in resolving a petition for a temporary conservatorship.

Now, however, the Probate and Mental Health Advisory Committee is proposing something slightly different from what the Commission previously considered. The committee is suggesting that the requirement of a petition for a general conservatorship be excused only when jurisdiction is based on proposed Section 1994(a)(1) *and* a transfer petition is pending, which can *substitute for* the petition for a general conservatorship. In other words, it is proposing to treat a petition for acceptance of a transfer *as the equivalent* of a petition for a general conservatorship for purposes of the provisions governing appointment of a temporary conservator.

That strikes the staff as a good idea, because the petition for acceptance of a transfer probably will contain much of the same information that a petitioner would have to include in a petition for a general conservatorship. Any significant disparity could be remedied by adjusting the required content of the transfer petition.

If the Commission agrees with the committee's proposed approach, **it could implement the concept by adding another sentence to suggested new paragraph (5) shown above:**

> (5) A petition under this section may be accompanied by a petition for the appointment of a temporary conservator under Section 1994 and Chapter 3 (commencing with Section

2250) of Part 4. The petition for the appointment of a temporary conservator 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 in this state. For purposes of Chapter 3 (commencing with Section 2250) of Part 4, the court shall treat a petition under this section as the equivalent of a petition for a general conservatorship.

Would the Commission like to take this step?

Notice Requirements (§ 2002(b))

Subdivision (b) of proposed Section 2002 specifies the notice requirements for a hearing on a petition to accept the transfer of a conservatorship:

> (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.

This provision is the same as UAGPPJA Section 302(b), except it uses California terminology and requires notice of a hearing on a transfer petition rather than notice of the petition itself.

Like proposed Section 2001(b) (discussed earlier in this memorandum), this provision does not specify who must give the required notice. **The staff recommends that this point be clarified.**

In addition, the Probate and Mental Health Advisory Committee suggests some revisions relating to the manner of giving notice, as follows:

> (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 in the transferring state and to any attorney appointed or appearing for the conservatee in this state.

Memorandum 2013-44, Exhibit p. 26; see also *id.* at Exhibit p. 23.

The committee does not explain why it proposes to permit notification of the conservatee by mail rather than by personal service of a citation under Probate Code Section 1823. Presumably, it is trying to make the transfer process a little less burdensome on the petitioner. **Preparation of a citation under Section 1823 may not make sense in this context,** because the statutorily-specified content of the citation concerns establishment of a conservatorship rather than transfer of a conservatorship. **But the requirement of personal service on the conservatee, rather than service by mail, still strikes the staff as appropriate.**

As for service on the "attorney of record in the transferring state and … any attorney appointed or appearing for the conservatee in this state," **the staff agrees that proposed Section 2002(b) should expressly require service on those persons.** We assume that the committee considers such language necessary because a proposed conservatee generally does not have an attorney at the time a conservatorship proceeding commences, and Probate Code Sections 1822 and 1823 do not require notice to any attorney for the conservatee.

The staff's various recommendations on subdivision (b) of proposed Section 2002 could be implemented as follows:

> (b) ~~Notice~~ The petitioner must give 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 petitioner must also give notice 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. The ~~notice must be given~~ petitioner must give the notice in the same manner as notice is required to be given in this state, except that notice to the conservatee shall be given by personal service of the petition instead of by a citation.
>
> ….
>
> **Comment.**… Subdivision (b) corresponds to Section 302(b) of UAGPPJA. Revisions have been made to specify that the petitioner is responsible for giving the notice, and to conform to California practice, under which a party is required to give notice *of a hearing* on a motion or petition, not just notice *of a petition.* Revisions have also been made to eliminate the necessity of a citation and make clear that all attorneys for the conservatee must receive notice.

….

Appointment of Counsel

The Probate and Mental Health Advisory Committee says that proposed Section 2002 "would not authorize the appointment of California counsel for the conservatee at any stage of the transfer procedure, and existing law is unclear at best concerning such authority." Memorandum 2013-44, Exhibit pp. 22-23. The committee proposes to "[p]ermit the discretionary appointment of counsel for the conservatee for the hearing on the petition for a provisional order under section 1470(a)." *Id.* at Exhibit p. 24. The committee further proposes that "[p]ayment 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 …." *Id.* The committee would implement these concepts by adding a sentence to proposed Section 2002 stating: "The court may appoint private legal counsel for the conservatee under the provisions of Section 1470(a) for this hearing [i.e., the hearing on whether to provisionally grant a petition for acceptance of a transfer], 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." *Id.* at Exhibit p. 27.

The committee is correct that proposed Section 2002 does not refer to appointment of counsel. However, paragraph (a)(4) calls for an investigation under Section 1851.1, which would, among other things, require the investigator to:

> (9) Inform the conservatee of the right to be represented by legal counsel if the conservatee so chooses, and to have legal counsel appointed by the court if the conservatee is unable to retain legal counsel.
>
> (10) Determine whether the conservatee wishes to be represented by legal counsel and, if so, whether the conservatee has retained legal counsel and, if not, the name of an attorney the conservatee wishes to retain.
>
> (11) If the conservatee has not retained legal counsel, determine whether the conservatee desires the court to appoint legal counsel.
>
> (12) Determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee in any case where the conservatee does not plan to retain legal

> counsel and has not requested the appointment of legal counsel by the court.

The Commission's proposal thus clearly contemplates that the conservatee would have a right to counsel in connection with the proposed post-transfer review of the conservatorship, which would take place at the same time that the court determines whether the conservatorship needs to be modified to conform to California law (see proposed Section 2002(f)).

Further, Probate Code Section 1470 give a court broad discretion to appoint counsel for a conservatee or proposed conservatee:

> 1470. (a) The court may appoint private legal counsel for … a conservatee, or a proposed conservatee in any proceeding under this division if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.
>
> (b) If a person is furnished legal counsel under this section, the court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel. The sum may, in the discretion of the court, include compensation for services rendered, and expenses incurred, before the date of the order appointing counsel.
>
> (c) The court shall order the sum fixed under subdivision (b) to be paid:
>
> (1) If the person for whom legal counsel is appointed is an adult, from the estate of that person.
>
> ….

In addition, Probate Code Section 1471 makes the appointment of counsel mandatory in certain circumstances:

> 1471. (a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interest of such person in the following proceedings under this division:
>
> (1) A proceeding to establish a conservatorship or to appoint a proposed conservator.
>
> (2) A proceeding to terminate the conservatorship.
>
> (3) A proceeding to remove the conservator.
>
> (4) A proceeding for a court order affecting the legal capacity of the conservatee.

(5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.

(b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of such person in any proceeding listed in subdivision (a) if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.

(c) In any proceeding to establish a limited conservatorship, ….

Probate Code Section 1472 provides guidance on payment for counsel appointed pursuant to Section 1471.

Given these existing provisions on appointment of counsel in conservatorship cases, **the staff does not see a need to refer to appointment of counsel in proposed Section 2002 as the Probate and Mental Health Advisory Committee suggests.** Section 1470 appears *sufficient by itself* to give the court discretion to appoint counsel for the conservatee in any aspect of a conservatorship case if the conservatee has no counsel and the appointment would be helpful to resolution of the matter or is necessary to protect the conservatee's interests. If proposed Section 2002 were to expressly authorize appointment of counsel under Section 1470 in connection with the hearing on whether to provisionally grant a petition for acceptance of a transfer, the lack of such a specific authorization elsewhere (in other parts of proposed Section 2002, or in other code provisions) might create an implication that appointment of counsel under Section 1470 would be inappropriate in those contexts.

Instead of including the language suggested by the Probate and Mental Health Advisory Committee, the staff suggests two other steps. First, **Section 1471 should be amended to make clear that it applies to a transfer of a conservatorship:**

1471. (a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in

> the particular matter, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interest of such person in the following proceedings under this division:
>
> (1) A proceeding to establish or transfer a conservatorship or to appoint a proposed conservator.
>
> ….
>
> **Comment.** Section 1471 is amended to make clear that it applies when a conservatorship is transferred under the California Conservatorship Jurisdiction Act (Sections 1980-2024).

This treatment appears appropriate, because a proceeding to transfer a conservatorship calls for appointment of a conservator in a new state and establishment of a conservatorship in a new state (albeit without full relitigation of those matters). Section 1471(a)(1) already encompasses a "proceeding to establish a conservatorship or to appoint a proposed conservator," so it seems reasonable to also include transfer of a conservatorship.

Second, the staff recommends **referring to Sections 1470, 1471, 1472, and proposed Section 1851.1(b)(9)-(12) in the Comment to proposed Section 2002, along the following lines:**

> **Comment.** Section 2002 is similar to Section 302 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. For limitations on the scope of this chapter, see Section 1981 & Comment. For guidance regarding the fee for filing a petition under this section, see Gov't Code § 70655. For rules governing appointment of counsel, see Sections 1470-1472; see also Section 1851.1(b)(9)-(12).

Hearing on Whether to Provisionally Accept a Transfer (§ 2002(c))

Proposed Section 2002(c) says that "[t]he court *shall* hold a hearing on a petition" for acceptance of a transfer. (Emphasis added.) The Comment points out:

> Subdivision (c) corresponds to Section 302(c) of UAGPPJA, but a hearing under subdivision (c) is mandatory in every case. *If there is no opposition to a transfer petition, the court may place the matter on the consent calendar.*

(Emphasis added.)

In comments submitted just before the Commission's June meeting, the ULC objected to that approach, requesting that "a hearing on the petition for transfer should be optional at the discretion of the court, as it is in the uniform Act." Third Supplement to Memorandum 2013-26, Exhibit p. 4 (reproduced in Memorandum 2013-44, at Exhibit p. 15). The ULC explained:

> 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.

Id. The Commission deferred consideration of the ULC's comments, deciding to treat them as comments on the Tentative Recommendation. Minutes (June 2013), p. 14.

Since then, the ULC has submitted a new set of comments, which do not include any objection to proposed Section 2002(c). See Memorandum 2013-44, Exhibit pp. 17-20. The new comments focus on three proposed UAGPPJA deviations; the ULC says those are the only deviations it strongly opposes. *Id.* at Exhibit p. 20.

It is thus unclear to the staff whether the ULC continues to object to proposed Section 2002(c). To the extent that it does, **we recommend that the Commission stick with its current approach,** which was suggested by the TEXCOM subgroup. As explained in the Tentative Recommendation (pp. 19, 25), requiring a hearing on every transfer petition

> would afford interested persons a relatively easy means to voice objections; they would not have to bear the burden of figuring out how to request a hearing. If there are no objections to a transfer petition, the court could place the matter on the consent calendar.

Standard for Issuing an Order Provisionally Accepting a Transfer (§ 2002(d))

Proposed Section 2002(d) would establish the following standard for a California court to provisionally accept the transfer of a conservatorship:

(d) 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 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.

(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.

Commenters raise several issues relating to this provision.

First, the ULC and the Alzheimer's Association express concern because the provision would deviate from uniformity regarding the burden of proof when an objection is raised. As the Comment explains:

> **Comment.** … Paragraph (1) of subdivision (d) corresponds to Section 302(d)(1) of UAGPPJA, but modifies the procedure that applies if a person objects to transfer of a conservatorship of the person. In that circumstance, the objector does not bear the burden of establishing that the transfer would be contrary to the interests of the conservatee. Rather, the requirement of paragraph (d)(1) is satisfied only if the court determines that the transfer would not be contrary to the interests of the conservatee.

This issue is closely similar to the one discussed above in connection with proposed Section 2001(d)(2) and (e)(2). **Whatever the Commission decides to do regarding proposed Section 2001(d)(2) and (e)(2), it probably should take the same approach in proposed Section 2002(d).**

Second, the Probate and Mental Health Advisory Committee proposes to revise the provision as follows:

~~(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~~ 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 ….

Memorandum 2013-44, Exhibit p. 27.

The committee's suggested revisions to paragraph (d)(1) would be a deviation from uniformity, but the staff **sees merit to eliminating the requirement of an objection.** If the court, acting on its own motion, determines that transfer of the proceeding would be contrary to the interests of the conservatee, it should not be required to provisionally accept the transfer.

The staff is not convinced, however, that paragraph (d)(1) should expressly require the court's determination to be based "on evidence introduced at the hearing." The necessary evidence might be presented before, rather than at, the hearing. Moreover, if the Commission included such a statement in this provision, it would also have to include similar language in numerous other places to avoid creating an implication that the court determinations required by those provisions do not have to be based on evidence presented to the court. **We think it would be best not to include any such language.**

Turning to paragraph (d)(2), the committee's suggested revisions relate to a conservator who is ineligible *under the law of the transferring state* to serve in California. The Probate and Mental Health Advisory Committee's proposed new approach, allowing a California court to provisionally accept transfer of a proceeding with such a conservator if a satisfactory replacement is available, would conflict with a policy decision carefully considered by the Commission.

Specifically, the corresponding UAGPPJA provision would wholly preclude a transfer if the existing conservator is ineligible for appointment in the new state. See UAGPPJA § 302(d). According to former ULC representative Eric Fish, if the existing conservator is ineligible to serve in the new state, the court currently supervising the conservatorship should replace the existing conservator before a transfer petition is filed.

After much discussion, the Commission took a different approach. As the staff explained in suggesting it:

> [I]f the existing conservator would be ineligible to serve in California *due to the law of the transferring jurisdiction*, the eligibility problem would have to be cured by the court in that jurisdiction before the California court could provisionally approve the transfer. In contrast, if the existing conservator would be ineligible to serve in California *due to California law,* the California court could provisionally approve the transfer so long as the transfer petition identifies a replacement who is willing and eligible to serve in California. **The underlying concept is that an eligibility issue would have to be resolved by the court best-situated to make the determination: The transferring court would handle ineligibility that is based on the law of the transferring state, and the California court would handle ineligibility that is based on California law.**

Memorandum 2013-9, Attachment pp. 37-38 (italics in original; boldface added).

For the reasons previously given, **the staff continues to think that approach is a good idea.** The Probate and Mental Health Advisory Committee does not offer an explanation for its suggested alternative approach. Perhaps the logic of the Commission's proposed approach should be explained more clearly. That could perhaps be done by **adding a new sentence to footnote 164 in the preliminary part of the Tentative Recommendation, as follows:**

> 164/ If the existing conservator was ineligible, *under the law of the transferring state,* to serve in California, the California court could not provisionally approve the transfer. See proposed Prob. Code § 2002(d)(2) & Comment *infra.* The court supervising the proceeding in the transferring state would have to replace the conservator before transferring the proceeding. *Id.*
>
> In contrast, if the existing conservator was ineligible, *under California law,* to serve in California, the California court could provisionally approve the transfer, so long as the transfer petition identifies a replacement who is willing and eligible to serve in California. See proposed Prob. Code § 2002(d)(3) & Comment *infra.*
>
> The underlying concept is that an eligibility issue would have to be resolved by the court best-situated to make the determination: The transferring court would handle ineligibility that is based on the law of the transferring state, and the California court would handle ineligibility that is based on California law.

Would the Commission like to make this change?

The California State Association of Public Administrators, Public Guardians, and Public Conservators ("CAPAPGPC") raises a third issue relating to proposed Section 2002(d). It says:

> [I]n 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.

Memorandum 2013-44, Exhibit p. 32.

CAPAPGPC appears to be concerned about potential "dumping" of persons who require a public conservator but lack ties to California, which might drain CAPAPGPC's resources and divert funds from those with California roots. That concern is understandable in light of recent events involving persons bussed to California from Nevada.

But proposed Section 2002 would not permit such "dumping." If a public conservator in another state seeks to transfer the conservatorship to California, the California court would be able to reject the transfer under proposed Section 2002(d)(3), because the public conservator from the other state would be ineligible for appointment in California and there would not be any willing and eligible replacement. As the ULC explains:

> The drafters [of UAGPPJA] specifically did not try to design the [transfer] procedures in Article 3 for the difficult problems that can arise in connection with a transfer when the guardian or conservator is ineligible to act in the second state, a circumstance that can occur when a financial institution is acting as conservator *or a government agency is acting as guardian*. Rather, the procedures in Article 3 are designed for the typical case where the guardian or conservator is legally eligible to act in the second state.

UAGGPJA Article 3 General Comment (emphasis added). Thus, **proposed Section 2002 already addresses the concern that CAPAPGPC raises; no revision appears necessary in response to that concern.**

Objections

The Probate and Mental Health Advisory Committee proposes to add a new subdivision to proposed Section 2002, which would 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.

Memorandum 2013-44, Exhibit pp. 26-27.

Aside from the interest in uniformity, the staff does not see any downside to expressly stating that "[a]ny person to whom notice must be given under subdivision (b) may object to the petition." However, **the potential grounds for objection should mirror the permissible grounds for denying the petition,** which are stated in proposed Section 2002(d). If the Commission decides to stick with its current, bifurcated approach to an ineligible conservator, any new provision expressly permitting objections should conform to that approach. The staff has included some possible language in the rough, comprehensive redraft of proposed Section 2002 at the end of this memorandum (see subdivision (c)).

When the Conservator Can Begin to Act in California (§ 2002(e)(2))

Paragraph (e)(2) of proposed Section 2002 would make clear which steps must happen before the conservator of a transferred conservatorship can begin to function as a California conservator:

> (2) A transfer to this state does not become effective unless and until the court issues a final order under paragraph (1). 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.

DRC supports the inclusion of this provision. It explains that "limiting the authority of the court appointee until the transfer is complete and effective … is prudent and consistent with legal protections in California." Memorandum 2013-44, Exhibit p. 7.

The Probate and Mental Health Advisory Committee suggests a slight modification of the provision. Specifically, the committee would like to make clear that a person who has been appointed as a temporary conservator in California can begin to function in the state even though a transfer petition is pending. *See id.* at Exhibit p. 28.

Such a clarification is not strictly necessary, because proposed Section 2002(e)(2) only precludes a conservator from taking action in California "pursuant to a transfer petition" without satisfying the specified requirements. The provision says nothing about whether that person may take action pursuant to a court order granting a temporary conservatorship.

Nonetheless, the committee's suggested clarification might help to prevent confusion. **The concept could be implemented by inserting a new paragraph after proposed Section (e)(2), which would state:**

> Paragraph (2) does not preclude a person who has been appointed as a temporary conservator pursuant to Chapter 3 (commencing with Section 2250) of Part 4 from taking action in this state pursuant to the order establishing the temporary conservatorship.

When in Rome Principle (§ 2002(e)(3))

Proposed Section 2002(e)(3) states an important rule, which we have been referring to as the "When in Rome Principle":

> (3) 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.

DRC expresses strong support for this principle. Memorandum 2013-44, Exhibit p. 7. No commenter opposes or criticizes the principle in any way; **it clearly should be left intact**.

However, paragraph (e)(3) would be an appropriate place to add the clarification that California Advocates for Nursing Home Reform ("CANHR") requests regarding the need for compliance with the special statutory requirements for exercise of dementia powers. See Memorandum 2013-44, pp. 10-13 & Exhibit pp. 1-2. **The staff suggests the following language:**

> (3) 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. If a law of this state, including, but not limited to, Section 2356.5, mandates compliance with special requirements to exercise a particular conservatorship power or take a particular step, the conservator of a transferred conservatorship may not exercise that power or take that step without first complying with those special requirements.

Would the Commission like to make this revision?

Responsibility for Conducting the Court Investigation (§ 2002(e)(4))

Paragraph (e)(4) of proposed Section 2002(e)(2) would direct the court to appoint a court investigator to conduct the investigation discussed earlier in this memorandum. CAPAPGPC raises an issue that requires resolution regardless of what the Commission decides about the timing of that investigation.

In particular, CAPAPGPC is concerned that courts will assign the investigative tasks to its members, instead of to court investigators. It explains:

> [I]n 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.*

Memorandum 2013-44, Exhibit pp. 31-32 (emphasis added).

The staff has many questions about the situation that CAPAPGPC describes. For example, are courts ordering public conservators to perform any of the investigation tasks specified in Probate Code Section 1826, relating to establishment of a conservatorship? If so, what authority are those courts relying on? Similarly, are courts ordering public conservators to perform any of the investigation tasks specified in Probate Code Sections 1850 and 1851, relating to review of a conservatorship? If so, what authority are those courts relying on? **It would be helpful to have more information about the situation, including specific examples.**

From CAPAPGPC's description, the problem in question is not limited to the UAGPPJA context but is much broader, involving many different types of court investigations. **The staff is hesitant to address the problem piecemeal in the context of UAGPPJA.**

Before making any specific recommendation, however, we would like to learn more about what is actually happening. **We encourage CAPAPGPC and other interested persons to submit relevant materials; we will also make efforts to gather such materials ourselves.**

Hearing on Conformity Determination (§ 2002(f))

Subdivision (f) of proposed Section 2002 would require a court to conduct a post-transfer review of the conservatorship, and to simultaneously determine whether the conservatorship needs to be modified to conform to California law:

> (f)(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.

The Probate and Mental Health Advisory Committee says that the conformity determination required by this provision is "apparently not at a hearing." Memorandum 2013-44, Exhibit p. 22. That view is understandable, because the provision does not refer to any hearing or include any notice requirement.

But the view is inconsistent with the Commission's intent, as evidenced by the following language in proposed Probate Code Section 1851.1, which is cross-referenced in proposed Section 2002(f)(2):

> (b) In conducting an investigation and preparing a report under this section, the court investigator shall do all of the following:
>
> ….
>
> (7) Inform the conservatee of the right to attend the hearing under subdivision (c).
>
> (8) Determine whether it appears that the conservatee is unable to attend the hearing and, if able to attend, whether the conservatee is willing to attend the hearing.
>
> ….
>
> (c) The court shall review the conservatorship as provided in Section 2002. The conservatee shall attend the hearing unless the conservatee's attendance is excused under Section 1825. In conducting its review, ….

Regardless of whether the Commission decides to resequence the transfer process, it should **revise proposed Section 2002 to make more clear that a hearing on the conformity determination is required.** We suggest some specific language below, in our rough, comprehensive redraft of proposed Section 2002 (see paragraph (h)(3)).

Combined Redraft of Proposed Section 2002

For discussion purposes, the staff presents the redraft of proposed Section 2002 shown below, which incorporates all of the staff's recommendations made in this memorandum:

> **§ 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 the conservatorship does not fall within the limitations of Section 1981. The body of the petition must allege facts showing that this chapter applies and the requirements for transfer of the conservatorship are satisfied.
>
> (4) The petition shall specify any modifications necessary to conform the conservatorship to the law of this state, and the terms of a proposed final order accepting the conservatorship.
>
> (5) A petition under this section may be accompanied by a petition for the appointment of a temporary conservator under Section 1994 and Chapter 3 (commencing with Section 2250) of Part 4. The petition for the appointment of a temporary conservator 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 in this state. For purposes of Chapter 3 (commencing with Section 2250) of Part 4, the court shall treat a petition under this section as the equivalent of a petition for a general conservatorship.
>
> (b) The petitioner must give notice of a hearing on a petition under subdivision (a) 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 petitioner must also give notice 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. The petitioner must give the notice in the same manner as notice is required to be given in this state, except that notice to the conservatee shall be given by personal service of the petition instead of by a citation.

(c) Any person to whom notice must be given under subdivision (b) may object to the petition on one or more of the following grounds:

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

(2) Under the law of the transferring state, the conservator is ineligible for appointment in this state.

(3) 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) This chapter is inapplicable under Section 1981.

(d) Promptly after the filing of a petition under subdivision (a), the court shall appoint an investigator under Section 1454. The investigator shall promptly commence a preliminary investigation of the conservatorship, which focuses on the matters described in subdivision (f).

(e) The court shall hold a hearing on a petition filed pursuant to subdivision (a).

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

(1) The court determines 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.

(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.

(g) If the court issues an order provisionally granting the petition, the investigator shall promptly commence an investigation under Section 1851.1.

(h)(1) Not later than 60 days after issuance of an order provisionally granting the petition, 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.

(3) The conformity determination and the review required by this subdivision shall occur at a hearing, which shall be noticed as provided in subdivision (b).

(i)(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. 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). 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.

(3) Paragraph (2) does not preclude a person who has been appointed as a temporary conservator pursuant to Chapter 3 (commencing with Section 2250) from taking action in this state pursuant to the order establishing the temporary 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. If a law of this state, including, but not limited to, Section 2356.5, mandates compliance with special requirements to exercise a particular conservatorship power or take a particular step, the conservator of a transferred conservatorship may not exercise that power or take that step without first complying with those special requirements.

(j) 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.

(k) 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 the conservator to seek 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.

Comment. Section 2002 is similar to Section 302 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. For limitations on the scope of this chapter, see Section 1981 & Comment. For guidance regarding the fee for filing a petition under this section, see Gov't Code § 70655. For rules governing appointment of counsel, see Sections 1470-1472; see also Section 1851.1(b)(9)-(12).

Paragraphs (1) and (2) of subdivision (a) correspond to Section 302(a) of UAGPPJA. Paragraphs (3) and (4) of that subdivision provide guidance on the content of a petition under this section. The first sentence of paragraph (3) serves to facilitate compliance with Section 1981 (scope of chapter). Paragraph (5) of subdivision (a) makes clear that an out-of-state conservator may simultaneously seek a transfer under this section and a temporary conservatorship under Sections 1994 and 2250-2258.

Subdivision (b) corresponds to Section 302(b) of UAGPPJA. Revisions have been made to specify that the petitioner is responsible for giving the notice, and to conform to California practice, under which a party is required to give notice *of a hearing* on a motion or petition, not just notice *of a petition*. Revisions have also been made to eliminate the necessity of a citation and make clear that all attorneys for the conservatee must receive notice.

Subdivision (c) specifies the permissible grounds for objecting to a petition under this section.

Subdivision (d) directs the court to appoint an investigator, to help it determine whether to provisionally accept the transfer.

Subdivision (e) corresponds to Section 302(c) of UAGPPJA, but a hearing under subdivision (e) is mandatory in every case. If there is no opposition to a transfer petition, the court may place the matter on the consent calendar.

Paragraph (1) of subdivision (f) corresponds to Section 302(d)(1) of UAGPPJA, but modifies the procedure that applies if a person objects to transfer of a conservatorship. In that circumstance, the objector does not bear the burden of

establishing that the transfer would be contrary to the interests of the conservatee. Rather, the requirement of paragraph (f)(1) is satisfied only if the court determines that the transfer would not be contrary to the interests of the conservatee.

Paragraphs (2) and (3) of subdivision (f) correspond to Section 302(d)(2) of UAGPPJA. Revisions have been made to differentiate between: (1) a conservator who is ineligible, *under the law of the transferring state,* to serve in California (e.g., a public guardian who, under the law of another jurisdiction, is only authorized to act in that jurisdiction) and (2) a conservator who is ineligible, *under California law,* to serve in California. In the former situation, paragraph (f)(2) precludes the California court from provisionally granting the transfer. If the proceeding is to be transferred to California, the transferring court must first replace the existing conservator with one who would be authorized to act beyond the boundaries of the transferring state. In contrast, if the existing conservator is ineligible due to California law, the transfer can proceed so long as the transfer petition identifies a replacement who is willing and eligible to serve in California. See paragraph (f)(3).

Paragraph (4) of subdivision (f) is necessary to reflect the limitations on the scope of this chapter. See Section 1981 & Comment (scope of chapter).

Subdivision (g) directs the court-appointed investigator to further investigate the conservatorship if the court provisionally accepts the transfer. For details of this investigative process, see Section 1851.1 (investigation & review of out-of-state conservatorship).

Paragraph (1) of subdivision (h) corresponds to Section 302(f) of UAGPPJA, but the court is to undertake the conformity determination before it issues a final order accepting a transfer, rather than afterwards. In addition, the paragraph expressly authorizes the court to take any steps necessary to conform a conservatorship to California law, including elimination or reduction of the conservator's powers.

Paragraph (2) of subdivision (h) directs the court to review the conservatorship at the same time that it determines whether the conservatorship "needs to be modified to conform to the law of this state" under paragraph (1) of subdivision (h). For details of this review process, see Section 1851.1 (investigation & review of out-of-state conservatorship).

Paragraph (3) of subdivision (h) makes clear that the required conformity determination and review must occur at a hearing. If there is no opposition to a transfer petition, the court may place the matter on the consent calendar.

Paragraph (1) of subdivision (i) corresponds to Section 302(e) of UAGPPJA. A second sentence is included to make clear that a final order accepting a proceeding and appointing the conservator to serve in California must meet the same requirements as an order appointing a conservator in a proceeding that originates in California.

Paragraph (2) of subdivision (i) makes clear that a transfer to California does not become effective until the California court enters a final order accepting the conservatorship and appointing the conservator in California. Absent some other source of authority (e.g., registration of the conservatorship under Article 4), the conservator cannot begin to function here as such until the transfer becomes effective *and* all five of the enumerated follow-up steps have occurred.

Paragraph (3) of subdivision (i) makes clear that a person who has been appointed as a temporary conservator in California can begin to function in the state even though a transfer petition is pending.

Paragraph (4) of subdivision (i) 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.

Subdivision (j) corresponds to Section 302(g) of UAGPPJA, but there are limitations on the comity accorded to the transferring court's determination of capacity and choice of conservator. See Sections 1851.1 (investigation & review of transferred conservatorship), 1860-1865 (termination of conservatorship), 2650-2655 (removal of guardian or conservator).

Subdivision (k) corresponds to Section 302(h) of UAGPPJA.

If proposed Section 2002 is revised in the manner shown above, proposed Section 1851.1(a) should be revised to read: "when a court issues an order provisionally granting a petition under Section 2002, the investigator appointed under Section 2002 shall promptly commence an investigation under this section."

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

PROBATE CODE SECTION 1826

1826. Regardless of whether the proposed conservatee attends the hearing, the court investigator shall do all of the following:

(a) Conduct the following interviews:

(1) The proposed conservatee personally.

(2) All petitioners and all proposed conservators who are not petitioners.

(3) The proposed conservatee's spouse or registered domestic partner and relatives within the first degree. If the proposed conservatee does not have a spouse, registered domestic partner, or relatives within the first degree, to the greatest extent possible, the proposed conservatee's relatives within the second degree.

(4) To the greatest extent practical and taking into account the proposed conservatee's wishes, the proposed conservatee's relatives within the second degree not required to be interviewed under paragraph (3), neighbors, and, if known, close friends.

(b Inform the proposed conservatee of the contents of the citation, of the nature, purpose, and effect of the proceeding, and of the right of the proposed conservatee to oppose the proceeding, to attend the hearing, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel.

(c) Determine whether it appears that the proposed conservatee is unable to attend the hearing and, if able to attend, whether the proposed conservatee is willing to attend the hearing.

(d) Review the allegations of the petition as to why the appointment of the conservator is required and, in making his or her determination, do the following:

(1) Refer to the supplemental information form submitted by the petitioner and consider the facts set forth in the form that address each of the categories specified in paragraphs (1) to (5), inclusive, of subdivision (a) of Section 1821.

(2) Consider, to the extent practicable, whether he or she believes the proposed conservatee suffers from any of the mental function deficits listed in subdivision (a) of Section 811 that significantly impairs the proposed conservatee's ability to understand and appreciate the consequences of his or her actions in connection with any of the functions described in subdivision (a) or (b) of Section 1801 and identify the observations that support that belief.

(e) Determine whether the proposed conservatee wishes to contest the establishment of the conservatorship.

(f) Determine whether the proposed conservatee objects to the proposed conservator or prefers another person to act as conservator.

(g) Determine whether the proposed conservatee wishes to be represented by legal counsel and, if so, whether the proposed conservatee has retained legal

counsel and, if not, the name of an attorney the proposed conservatee wishes to retain.

(h) Determine whether the proposed conservatee is capable of completing an affidavit of voter registration.

(i) If the proposed conservatee has not retained legal counsel, determine whether the proposed conservatee desires the court to appoint legal counsel.

(j) Determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the proposed conservatee in any case where the proposed conservatee does not plan to retain legal counsel and has not requested the appointment of legal counsel by the court.

(k) Report to the court in writing, at least five days before the hearing, concerning all of the foregoing, including the proposed conservatee's express communications concerning both of the following:

(1) Representation by legal counsel.

(2) Whether the proposed conservatee is not willing to attend the hearing, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator.

(l) Mail, at least five days before the hearing, a copy of the report referred to in subdivision (k) to all of the following:

(1) The attorney, if any, for the petitioner.

(2) The attorney, if any, for the proposed conservatee.

(3) The proposed conservatee.

(4) The spouse, registered domestic partner, and relatives within the first degree of the proposed conservatee who are required to be named in the petition for appointment of the conservator, unless the court determines that the mailing will result in harm to the conservatee.

(5) Any other persons as the court orders.

(m) The court investigator has discretion to release the report required by this section to the public conservator, interested public agencies, and the long-term care ombudsman.

(n) The report required by this section is confidential and shall be made available only to parties, persons described in subdivision (*l*), persons given notice of the petition who have requested this report or who have appeared in the proceedings, their attorneys, and the court. The court has discretion at any other time to release the report, if it would serve the interests of the conservatee. The clerk of the court shall provide for the limitation of the report exclusively to persons entitled to its receipt.

(*o*) This section does not apply to a proposed conservatee who has personally executed the petition for conservatorship, or one who has nominated his or her own conservator, if he or she attends the hearing.

(p) If the court investigator has performed an investigation within the preceding six months and furnished a report thereon to the court, the court may order, upon

good cause shown, that another investigation is not necessary or that a more limited investigation may be performed.

(q) Any investigation by the court investigator related to a temporary conservatorship also may be a part of the investigation for the general petition for conservatorship, but the court investigator shall make a second visit to the proposed conservatee and the report required by this section shall include the effect of the temporary conservatorship on the proposed conservatee.

(r) The Judicial Council shall, on or before January 1, 2009, adopt rules of court and Judicial Council forms as necessary to implement an expedited procedure to authorize, by court order, a proposed conservatee's health care provider to disclose confidential medical information about the proposed conservatee to a court investigator pursuant to federal medical information privacy regulations promulgated under the Health Insurance Portability and Accountability Act of 1996.

(s) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes 2006 until the Legislature makes an appropriation identified for this purpose.

PROBATE CODE SECTION 1850

1850. (a) Except as provided in subdivision (b), each conservatorship initiated pursuant to this part shall be reviewed by the court as follows:

(1) At the expiration of six months after the initial appointment of the conservator, the court investigator shall visit the conservatee, conduct an investigation in accordance with the provisions of subdivision (a) of Section 1851, and report to the court regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances. The court may, in response to the investigator's report, take appropriate action including, but not limited to:

(A) Ordering a review of the conservatorship pursuant to subdivision (b).

(B) Ordering the conservator to submit an accounting pursuant to subdivision (a) of Section 2620.

(2) One year after the appointment of the conservator and annually thereafter. However, at the review that occurs one year after the appointment of the conservator, and every subsequent review conducted pursuant to this paragraph, the court may set the next review in two years if the court determines that the conservator is acting in the best interest interests of the conservatee. In these cases, the court shall require the investigator to conduct an investigation pursuant to subdivision (a) of Section 1851 one year before the next review and file a status report in the conservatee's court file regarding whether the conservatorship still appears to be warranted and whether the conservator is acting in the best interests of the conservatee. If the investigator determines pursuant to this investigation that the conservatorship still appears to be warranted and that the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances, no hearing or court action in response to the investigator's report is required.

(b) The court may, on its own motion or upon request by any interested person, take appropriate action including, but not limited to, ordering a review of the conservatorship, including at a noticed hearing, and ordering the conservator to present an accounting of the assets of the estate pursuant to Section 2620.

(c) Notice of a hearing pursuant to subdivision (b) shall be provided to all persons listed in subdivision (b) of Section 1822.

(d) This chapter does not apply to either of the following:

(1) A conservatorship for an absentee as defined in Section 1403.

(2) A conservatorship of the estate for a nonresident of this state where the conservatee is not present in this state.

(e) The amendments made to this section by the act adding this subdivision shall become operative on July 1, 2007.

(f) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes 2006 until the Legislature makes an appropriation identified for this purpose.

PROBATE CODE SECTION 2250.6

2250.6. (a) On or after the filing of a petition for appointment of a guardian or conservator, any person entitled to petition for appointment of the guardian or conservator may file a petition for appointment of:

(1) A temporary guardian of the person or estate or both.

(2) A temporary conservator of the person or estate or both.

(b) The petition shall state facts which establish good cause for appointment of the temporary guardian or temporary conservator. The court, upon that petition or other showing as it may require, may appoint a temporary guardian of the person or estate or both, or a temporary conservator of the person or estate or both, to serve pending the final determination of the court upon the petition for the appointment of the guardian or conservator.

(c) If the petitioner is a private professional conservator under Section 2341 or licensed under the Professional Fiduciaries Act, Chapter 6 (commencing with Section 6500) of Division 3 of the Business and Professions Code, the petition for appointment of a temporary conservator shall include both of the following:

(1) A statement of the petitioner's registration or license information.

(2) A statement explaining who engaged the petitioner or how the petitioner was engaged to file the petition for appointment of a temporary conservator and what prior relationship the petitioner had with the proposed conservatee or the proposed conservatee's family or friends, unless that information is included in a petition for appointment of a general conservator filed at the same time by the person who filed the petition for appointment of a temporary conservator.

(d) If the petition is filed by a party other than the proposed conservatee, the petition shall include a declaration of due diligence showing both of the following:

(1) Either the efforts to find the proposed conservatee's relatives named in the petition for appointment of a general conservator or why it was not feasible to contact any of them.

(2) Either the preferences of the proposed conservatee concerning the appointment of a temporary conservator and the appointment of the proposed temporary conservator or why it was not feasible to ascertain those preferences.

(e) Unless the court for good cause otherwise orders, at least five court days before the hearing on the petition, notice of the hearing shall be given as follows:

(1) Notice of the hearing shall be personally delivered to the proposed ward if he or she is 12 years of age or older, to the parent or parents of the proposed ward, and to any person having a valid visitation order with the proposed ward that was effective at the time of the filing of the petition. Notice of the hearing shall not be delivered to the proposed ward if he or she is under 12 years of age. In a proceeding for temporary guardianship of the person, evidence that a custodial parent has died or become incapacitated, and that the petitioner is the nominee of

the custodial parent, may constitute good cause for the court to order that this notice not be delivered.

(2) Notice of the hearing shall be personally delivered to the proposed conservatee, and notice of the hearing shall be served on the persons required to be named in the petition for appointment of conservator. If the petition states that the petitioner and the proposed conservator have no prior relationship with the proposed conservatee and has not been nominated by a family member, friend, or other person with a relationship to the proposed conservatee, notice of hearing shall be served on the public guardian of the county in which the petition is filed.

(3) A copy of the petition for temporary appointment shall be served with the notice of hearing.

(f) If a temporary guardianship is granted ex parte and the hearing on the general guardianship petition is not to be held within 30 days of the granting of the temporary guardianship, the court shall set a hearing within 30 days to reconsider the temporary guardianship. Notice of the hearing for reconsideration of the temporary guardianship shall be provided pursuant to Section 1511, except that the court may for good cause shorten the time for the notice of the hearing.

(g) Visitation orders with the proposed ward granted prior to the filing of a petition for temporary guardianship shall remain in effect, unless for good cause the court orders otherwise.

(h)(1) If a temporary conservatorship is granted ex parte, and a petition to terminate the temporary conservatorship is filed more than 15 days before the first hearing on the general petition for appointment of conservator, the court shall set a hearing within 15 days of the filing of the petition for termination of the temporary conservatorship to reconsider the temporary conservatorship. Unless the court otherwise orders, notice of the hearing on the petition to terminate the temporary conservatorship shall be given at least 10 days prior to the hearing.

(2) If a petition to terminate the temporary conservatorship is filed within 15 days before the first hearing on the general petition for appointment of conservator, the court shall set the hearing at the same time that the hearing on the general petition is set. Unless the court otherwise orders, notice of the hearing on the petition to terminate the temporary conservatorship pursuant to this section shall be given at least five court days prior to the hearing.

(i) If the court suspends powers of the guardian or conservator under Section 2334 or 2654 or under any other provision of this division, the court may appoint a temporary guardian or conservator to exercise those powers until the powers are restored to the guardian or conservator or a new guardian or conservator is appointed.

(j) If for any reason a vacancy occurs in the office of guardian or conservator, the court, on a petition filed under subdivision (a) or on its own motion, may appoint a temporary guardian or conservator to exercise the powers of the guardian or conservator until a new guardian or conservator is appointed.

(k) On or before January 1, 2008, the Judicial Council shall adopt a rule of court that establishes uniform standards for good cause exceptions to the notice required by subdivision (e), limiting those exceptions to only cases when waiver of the notice is essential to protect the proposed conservatee or ward, or the estate of the proposed conservatee or ward, from substantial harm.

(*l*) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes 2006 until the Legislature makes an appropriation identified for this purpose.