Study L-750 November 15, 2013

Memorandum 2013-55

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Tribal Issues

Section 102(14) of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA") defines the term "state" to include a "federally recognized Indian tribe." This would make all of UAGPPJA's provisions applicable to federally recognized tribes, to the same extent that they apply to states.

In June 2013, the Commission released its Tentative Recommendation on *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* (hereafter, "Tentative Recommendation").[1] The Tentative Recommendation made no recommendation on whether the term "state" should include federally recognized Indian tribes. Instead, it specifically requested public comment on that issue.

The Commission received two letters commenting on the treatment of tribes under UAGPPJA. Those letters were reproduced and discussed in Memorandum 2013-45. At its October meeting, the Commission began, but did not complete, discussion of Memorandum 2013-45.[2] That discussion is continued in this memorandum. For convenience of reference, the comment letters are reproduced again. An email from Jedd Parr, of California Indian Legal Services is also attached. The contents of the Exhibit are as follows:

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

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

2. Minutes (Oct. 2013), p. 18.

This memorandum begins by discussing the general rules governing the jurisdiction of tribal courts and state courts, with regard to tribe members and matters arising on tribal lands. It concludes by discussing specific complications that would arise if the proposed law were applied to tribe members, and possible alternative approaches that would avoid or ameliorate those complications.

In researching the matters discussed in this memorandum, the staff consulted with King Hall Law Professor Katherine J. Florey about state and tribal court jurisdictional issues. We greatly appreciate her assistance.

As has been noted before, California law uses different terminology than UAGPPJA. The Commission's proposed law uses the California terminology.[3] For ease of reference and consistency with the proposed law, this memorandum also uses California terminology, even when discussing UAGPPJA.

The contents of this memorandum are organized as follows:

TRIBES AS "STATES" GENERALLY

In the Tentative Recommendation, the Commission requested comment on "whether to include a federally recognized Indian tribe in the definition of 'State' and, if not, what alternative treatment would be appropriate."[4]

3. Tentative Recommendation at 10-12.
4. Proposed Prob. Code § 1982 Note.

Neither the Judicial Council's Probate and Mental Health Advisory Committee and California Tribal Court/State Court Forum (hereafter "Advisory Committee and Forum") nor the Northern California Tribal Court Coalition directly addressed the question posed in the Tentative Recommendation. However, both groups clearly support the treatment of California tribes as "states" (subject to modifications of UAGPPJA to address the unique geographical and jurisdictional relationship between California and the tribes).[5] This implies that both groups generally support the notion that tribal courts should be afforded the same degree of comity that UAGPPJA would extend to sister states.

In the Tentative Recommendation, the Commission discussed the civil rights guarantees applicable to tribal courts and concluded that tribal courts appear to be "no less protective of individual rights than federal courts."[6] The Northern California Tribal Court Coalition makes a similar point:

> We understand that concerns have been expressed about due process protections available in tribal forums. It is true that there are limited remedies available to persons alleging a lack of due process protections in a tribal court proceeding. However, it does not necessarily follow that the due process protections themselves are limited. Both of the tribes in NCTCC that currently issue adult guardianship orders have due process protections built into their respective codes. In general, tribes have a strong interest in providing a fair forum for actions involving their members, since both the tribal governments responsible for enacting laws and the tribal courts responsible for applying them must answer to the tribal membership at election time. While concerns about limited due process in tribal courts are not new, they are not well-founded; a review in 2000 of all individual rights claims in reported tribal court decisions from 1986-1998 found such allegations to be "grossly overstated, if not entirely misplaced." In addition, while Congress did include many constitutional protections in the Indian Civil Rights Act, it chose to omit others for fear of interfering with tribal sovereignty.
>
> It should also be noted that, of the 38 states which have adopted the Act, only two have chosen to exclude tribes from the definition of "state." California has more Indian tribes within its borders than any state except Alaska, and in adopting a number of other uniform laws, it has chosen to include those tribes within the definition of "state." Those uniform acts address subjects wherein due process is every bit as significant a consideration as in the

5. *Id.* at 7 (proposed Prob. Code § 2042(a)).
6. *Id.* at 11.

> subject of this Act. We are not aware of any systemic problems arising from those inclusions.[7]

As a general matter, the staff recommends that federally recognized Indian tribes be treated as "states" for the purposes of UAGPPJA. This would extend to tribes the same comity afforded to sister states under the Act and would further uniformity. Language to implement this recommendation is attached for the Commission's consideration.[8]

Despite that general recommendation, there are some specific concerns about the application of UAGPPJA to tribes, which may warrant modification of the Act. Those concerns are discussed below.

STATE AND TRIBAL COURT CIVIL JURISDICTION

One of the key concerns of UAGPPJA is making clear which state has jurisdiction over a proposed conservatee. That issue is more complicated when the proposed conservatee is a member of an Indian tribe, because states and tribes can have overlapping geographical territories and concurrent civil jurisdiction (both on and off of tribal land).

The discussion that follows provides background on state and tribal court civil jurisdiction, with regard to tribe members and matters arising on tribal land.

Tribal Court Jurisdiction

Tribal Courts Have Jurisdiction on Tribal Land

As sovereigns, tribes have broad authority to regulate their own affairs: "Tribes have plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law."[9]

A tribe's right to self-government includes the authority to maintain a system of justice: "Unless this power is removed by explicit federal legislation or is given up by the tribe, either expressly or as a part of its coming under the protection of the United States, exclusive tribal judicial jurisdiction over reservation affairs is retained."[10]

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7. See Exhibit p. 13 (citations omitted).
8. See Attachment p. 1.
9. Jessup, *Cohen's Handbook of Federal Indian Law* § 4.01[1][b], at 211 (2012) (hereafter "Cohen's Handbook") (citations omitted).
10. *Cohen Handbook* § 4.01[2][d], at 218 (citations omitted).

Tribal jurisdiction to adjudicate matters arising on tribal land is broad, "encompassing all civil and criminal matters absent limitations imposed by lawful federal authority."[11] This includes the authority to appoint a conservator for a member who lacks capacity.[12]

Notwithstanding the foregoing, tribes generally do not have civil jurisdiction over *nonmembers* with respect to causes arising on tribal land.[13] There are two narrow exceptions to that general rule, neither of which would clearly encompass tribal court appointment of a conservator for a nonmember:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[14]

Tribal Courts Have Some Jurisdiction Over Members Living Outside Tribal Land

Tribes can generally exercise jurisdiction over their members who are *not* present on tribal land, solely as a consequence of membership:

> Tribal jurisdiction based on membership finds support in *United States v. Mazurie*, in which the Supreme Court observed that tribes are "unique aggregations possessing attributes over both their members and their territory." … The more closely a matter is related to core tribal interests, the stronger the case is for recognition of jurisdiction based on membership in the tribe. In addition to regulation of *domestic relations and probate matters*, such interests would include keeping peace among tribal members in tribal communities and regulation of traditional hunting and fishing activities.[15]

11. *Id.* at 219 (citations omitted).
12. *Id.* § 4.01[2][c], at 217 (citations omitted); 25 U.S.C. § 159 (indirectly recognizing tribal authority to appoint guardian for "incompetent" Indian).
13. Krakoff, *Tribal Civil Judicial Jurisdiction Over Nonmembers: A Practical Guide for Judges,* 81 Colo. L. Rev. 1187, 1216-21 (2010) (discussing *Nevada v. Hicks*, 533 U.S. 346 (2001)).
14. See Montana v. United States, 450 U.S. 544, 564-65 (1981) (citations omitted).
15. *Cohen Handbook* § 4.01[2][e] at 220 (citations omitted) (emphasis added).

For example, the Alaska Supreme Court upheld a tribal court's jurisdiction to adjudicate a child custody dispute involving a member who was living outside of tribal land.[16]

State Court Jurisdiction

Public Law 280 Grants California Nonregulatory Civil Jurisdiction Over Matters Arising on Tribal Land

As a default proposition, states do not have jurisdiction over tribal members on tribal land:

> The general approach to determining which government has jurisdiction is relatively simple in the case of tribal member Indians in Indian country. Unless there is a specific federal law stating otherwise, they are subject to exclusive tribal jurisdiction. Congress's plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law.[17]

However, as noted above, federal law can grant a state jurisdiction over tribal land. For our purposes, the most significant federal law establishing state jurisdiction on tribal land is Public Law 280.[18] Among other things, Public Law 280 mandates that certain states (including California) have jurisdiction over civil actions that involve a tribe member and arise on tribal land:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> | State of | Indian country affected |
> |---|---|
> | … | |
> | California | All Indian country within the State. |
> | …[19] | |

16. John v. Baker, 982 P.2d 738 (1999). The Indian Child Welfare Act (25 U.S.C. § 1901 *et seq.*) was not applicable to this case, because it involved a custody dispute between two divorcing tribe members. *Id.* at 746-47. See also *Cohen's Handbook* § 6.02[1] at 504-06 (citations omitted).

17. *Cohen's Handbook* § 6.01[1] at 489 (citations omitted); *Id.* 6.03[1][a] at 511-13 (citations omitted).

18. Codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360.

19. 25 U.S.C. § 1360(a).

Presumably, a conservatorship would "arise" on tribal land if the conservatee is a tribe member who lives on tribal land. A conservatorship might also fall within the scope of Public Law 280 jurisdiction if it authorizes the conservator to take action that affects property on tribal land or involves tribal institutions.

Limitations on Public Law 280 Jurisdiction

The civil jurisdiction granted by Public Law 280 is subject to two important limitations. First, it does not authorize

> the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; … regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or [the authority] to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.[20]

Second, the Supreme Court has held that the civil jurisdiction conferred by Public Law 280 does not include "regulatory" jurisdiction.[21] "[T]he court interpreted the scope of Public Law 280's delegation narrowly, treating the grant of civil jurisdiction as confined to private lawsuits such as those based on tort or contract claims."[22]

The Court later drew a distinction between civil "regulatory" laws (which are not applicable to Indian land under Public Law 280) and criminal "prohibitory" laws (which are applicable). For example, the court found that state laws regulating (but not prohibiting) bingo were civil regulatory laws and so could not be applied to tribal land.[23]

It seems clear that conservatorship law is not criminal law. But that leaves another, more difficult, question to be resolved: could *some elements* of conservatorship law be considered "regulatory" and therefore outside the scope of the civil jurisdiction conferred by Public Law 280?

> As with the regulatory/prohibitory distinction, courts have struggled with this regulatory/private civil action dichotomy. The dividing line is inevitably obscure, because adjudication of civil controversies normally entails the application of a body of legal

20. *Id.* (b).
21. Bryan v. Itasca, 426 U.S. 373, 384-85 (1976).
22. *Cohen's Handbook* § 6.04[3][b] at 541 (citations omitted).
23. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

> rules that regulate private conduct. Furthermore, some state regulation reflects public refinement or incorporation of private actions, such as nuisance or contract claims. Some of the most confounding cases have been initiated by state or local government entities, implicating state services such as civil commitment proceedings brought by mental health agencies; petitions by social services agencies to terminate parental rights; and suits by counties on behalf of children against their noncustodial parents to establish paternity, collect reimbursement for state welfare payments, and obtain future support. Courts have had to assess whether the civil suit is a mere appendage to an essentially regulatory proceeding, or whether it is more akin to a private lawsuit.[24]

For the most part, a proceeding for the appointment of a conservator seems more about protecting private rights than about the imposition of public regulatory policy. The court is simply determining whether a proposed conservatee has lost the capacity to care for himself or herself and is in need of assistance with such matters. Support for that view can be found in a Ninth Circuit opinion holding that child dependency proceedings are not "regulatory," because they adjudicate the private rights and status of an individual:

> At the heart of the dependency proceedings is a dispute about the status of the child, a private individual; the simple fact that the state steps in as a party does not transform what is an adjudicatory proceeding involving private parties into a regulatory proceeding. In short, child dependency proceedings are more analogous to the "private legal disputes" that fall under a state's Public Law 280 jurisdiction than to the regulatory regimes at issue in *Bryan* and *Cabazon*.[25]

That logic also applies to a proceeding to determine a person's rights and status under conservatorship law.

However, California conservatorship law does contain some specific provisions that regulate the *conservator's* actions, in order to protect the conservatee. For example, Probate Code Section 2365.5 requires that a conservator obtain court approval before placing a conservatee with dementia in a locked facility or administering certain medications to a conservatee with dementia. Is that provision regulatory? The staff did not find a clear answer.

> There is no neat, surgical way to separate regulatory matters from private civil suits for the purposes of Public Law 280. In matters susceptible to opposing conclusions, however, the Indian

24. *Cohen's Handbook* § 6.04[3][b] at 545 (citations omitted).
25. Doe v. Mann, 415 F.3d 1038, 1059 (9th Cir. 2005).

> law canons of construction suggest that courts should deny state jurisdiction.[26]

Whatever the scope of the civil jurisdiction conferred on state courts by Public Law 280, it is important to note that the state court's jurisdiction does not supplant the tribal court's jurisdiction. Instead, state and tribal court jurisdiction are concurrent.[27] The implications of concurrent jurisdiction are discussed more fully below.

California Has Civil Jurisdiction Over Tribe Members Who Reside in California but Outside of Tribal Land

When members of Indian tribes are outside of tribal land, they are "subject to nondiscriminatory state laws unless federal law provides otherwise."[28] The staff is not aware of any federal statute that would deprive a state court of conservatorship jurisdiction over a tribe member who is not on tribal land.

Provided that there are sufficient contacts between a tribe member and the State of California to establish personal jurisdiction,[29] California courts would have conservatorship jurisdiction over a tribe member living outside of tribal land.

Concurrent State and Tribal Court Jurisdiction

Given that both state and tribal courts may have jurisdiction over a proposed conservatee, both on and off tribal land, what is the relationship between state and tribal court jurisdiction? As noted above, it is *concurrent*. Therefore, a tribe member could be conserved in either jurisdiction (or potentially both).

This could lead to problems. It opens the door to a race to the forum of preference and potentially inconsistent outcomes in the different jurisdictions:

> In civil cases, concurrent tribal and state jurisdiction under Public Law 280 leads to the possibility of each disputant racing to litigate in the forum of choice. Public Law 280 does not give state courts the power to restrict the exercise of tribal jurisdiction, even when the first litigant to file chooses state court. If each sovereign is under some obligation to respect the judgments of the other, then the first forum to reach a judgment will determine the outcome, regardless of the duration or extent of completion of the parallel proceeding. If the sovereigns do not view themselves as under any

26. *Id.* at 547 (citations omitted).
27. *Cohen's Handbook,* § 6.04[3][c] at 555 (citations omitted).
28. *Id.* § 7.03[1][a][1] at 607 (citations omitted).
29. *Id.* § 7.03[1][b] at 609 (citations omitted).

> compulsion to respect one another's judgments, the litigants may be subjected to conflicting and mutually inconsistent orders.[30]

APPLICATION OF UAGPPJA JURISDICTIONAL CONCEPTS TO TRIBES

The jurisdictional rules provided in UAGPPJA are grounded on two general principles:

- *Jurisdiction should be based primarily on a proposed conservatee's territory of residence (i.e., the "home state").*[31] Only in unusual circumstances will a state other than the home state have jurisdiction.[32]
- *Jurisdiction should be exclusive (i.e., only one state at a time should have jurisdiction over a conservatorship).*[33] The only exception is for "special jurisdiction" authorized to address an emergency, to manage property within another state, or to facilitate completion of a transfer.[34]

For reasons discussed further below, those principles are not well-suited to the overlapping character of state and tribal court jurisdiction.

Overlapping Territory

Under UAGPPJA, the default rule is that a person's "home state" has jurisdiction.[35] The term "home state" is defined as follows:

> "Home state" means the state in which the [proposed conservatee] was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a [conservatorship order,] or, if none, the state in which the [proposed conservatee] was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.[36]

It seems clear that the definition of "home state" assumes that a person can only be "physically present" in one jurisdiction at a time. In other words, there will be no overlap between the geographical territory of two or more states and

30. *Id.* § 6.04[3][c] at 558 (citations omitted).
31. UAGPPJA § 203(1); proposed Prob. Code § 1993(a) ("A court of this state has jurisdiction to appoint a conservator for a proposed conservatee if this state is the proposed conservatee's home state."); UAGPPJA § 201(a)(2); proposed Prob. Code § 1991(a)(2) ("home state" defined).
32. UAGPPJA § 203(2); proposed Prob. Code § 1993(b)-(d).
33. UAGPPJA § 205; proposed Prob. Code § 1995.
34. UAGPPJA § 204; proposed Prob. Code § 1994.
35. UAGPPJA § 203(1); proposed Prob. Code § 1993(a).
36. UAGPPJA § 201(a)(2); proposed Prob. Code § 1991(a)(2).

there will only be one home state (at most) at a time. With regard to states, that assumption seems to be correct. The staff is not aware of any place that is within the geographical territory of more than one state.

But that assumption does not appear to be correct with regard to the overlapping geographical territory of tribes and states. A person who lives within the geographical territory of a tribe is also living within the geographical territory of the state that contains the tribe's land.[37] Thus, under UAGPPJA's definition of "home state," a person living on tribal land would have *two* home states.

The staff sees two significant ways in which having two home states would complicate UAGPPJA's jurisdictional rules:

(1) Under UAGPPJA, a "significant-connection state"[38] can obtain jurisdiction over a proposed conservatee if the home state declines to exercise jurisdiction because the significant-connections state is a more appropriate forum.[39] How would this work if there is more than one home state? Must both home states decline jurisdiction?

(2) UAGPPJA provides, as a default rule, that the "home state" has jurisdiction.[40] But UAGPPJA also provides that jurisdiction is *exclusive* (barring exceptions not relevant here). In other words, only one state can have primary jurisdiction at a time. How would those rules work when there are two home states?

Non-Territorial Basis for Overlapping Jurisdiction

As discussed above, UAGPPJA's jurisdictional rules look first to territorial considerations. As a default rule, a person's home state has conservatorship jurisdiction.[41]

But under existing law, a tribe may exercise its jurisdiction over a tribe member as a consequence of membership, *even if the member lives outside the*

37. See *Cohen's Handbook* § 14.02[2][3] at 937-38 ("tribal lands within the boundaries of state or organized territories are today considered to be geographically part of the respective state or territory") (citations omitted); *Id.* § 14.01[4] (Indians living on Indian land are also citizens of the states in which they reside) (citations omitted); *Id.* § 14.02[1] (Indians entitled to same rights and benefits as other state citizens) (citations omitted).

38. UAGPPJA § 201(a)(3) ("'Significant-connection state' means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available."); proposed Prob. Code § 1991(a)(3).

39. UAGPPJA § 203(2)(A); proposed Prob. Code § 1993(c).

40. UAGPPJA § 203(1); proposed Prob. Code § 1993(a).

41. *Id.*

geographical territory of the tribe.[42] When a tribe member lives off tribal land, both the tribe and the state in which the member resides could have jurisdiction.

Thus, the enactment of UAGPPJA (*combined with the enactment of equivalent tribal law*[43]) would make a major substantive change to existing state and tribal court jurisdiction. It would confer default jurisdiction on the state when a tribe member lives outside of tribal land, limiting the tribe's existing jurisdiction.[44] In order for the tribe to exercise its jurisdiction over such a member, the state court would need to expressly decline to exercise jurisdiction on the grounds that the tribe is the more appropriate forum.[45] (Alternatively, the tribal court could proceed without the state court declining jurisdiction, but doing so would be risky. The tribal court could lose jurisdiction at any time before the appointment of a conservator, if a similar petition were filed in state court or if any person entitled to notice were to file an objection to the tribal court proceeding.[46])

ALTERNATIVE APPROACHES TO ALLOCATING JURISDICTION

As discussed above, simply applying UAGPPJA to tribes, without modification, could produce problematic results.

The Advisory Committee and Forum propose an alternative approach.[47] In the discussion that follows, their proposal is referred to as "Territorial Exclusivity."

The discussion below also presents three other possible alternatives for the Commission's consideration ("State Deference," "Communication," and "Status Quo").

Territorial Exclusivity

As discussed above, UAGPPJA appears to assume that all states have non-overlapping geographical territories. That is not the case for a person residing within the geographical territory of a California tribe, as such land is also within the geographical territory of California.

With an exception discussed later in the memorandum,[48] the territorial exclusivity proposal seeks to eliminate concurrent state and tribal court

42. See *supra* note 15.
43. *Cohen's Handbook* § 7.02[1][a] at 599 ("Tribal court subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law.") (citations omitted).
44. UAGPPJA § 203(1); proposed Prob. Code § 1993(a).
45. UAGPPJA § 203(2)(A); proposed Prob. Code § 1993(c).
46. UAGPPJA § 203(2)(B); proposed Prob. Code § 1993(d).
47. See Exhibit pp. 8-9.

conservatorship jurisdiction, by dividing the state into non-overlapping state and tribal geographical territories. It would do so by modifying the definitions of "home state" and "significant-connection state," as follows:

- If a California tribe member lives on tribal land or in a California county that contains tribal land for the requisite period of time, the tribe would be the home state and California would be a significant-connection state.
- If a California tribe member lives anywhere else in California, California would be the home state and the tribe would be a significant-connection state.[49]

Under this approach, the tribe would have default jurisdiction over a member living on tribal land or in a county that contains the tribe's land. The state would have default jurisdiction over a member living anywhere else in California.

This proposed territorial division has obvious advantages. It would provide clear rules for determining which court, state or tribal, has default jurisdiction over a tribe member's conservatorship. There would be no situations where that default jurisdiction would overlap. When coupled with UAGPPJA's rule of exclusive jurisdiction, it would eliminate the possibility of "dueling" conservatorships being established in both state and tribal courts. It would also hew very closely to the approach taken by UAGPPJA.

Despite those advantages, the staff has some concerns about the proposal, which are discussed below.

Enactment of UAGPPJA Does Not Require Any Change to Concurrent Jurisdiction

The focus of this study is UAGPPJA. The only reason we are examining the law on tribal court jurisdiction is because there are apparent conflicts between that law and UAGPPJA. In order to make UAGPPJA workable in California, we need to resolve those conflicts.

However, as discussed later in this memorandum, there is more than one way to reconcile UAGPPJA with the law governing tribal court jurisdiction. Importantly, that reconciliation does not *require* a change to existing law on tribal court jurisdiction. UAGPPJA could simply be conformed to accommodate the existing concurrent jurisdiction scheme.

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48. See "Gaps in Scope of State Jurisdiction Under Public Law 280," *infra*.
49. *Id.* (proposed Prob. Code § 2044(a)(1)-(2)).

Given that possibility, what justification would the Commission give for recommending a significant substantive change to the existing allocation of state and tribal court jurisdiction? If such a change is not necessary to the enactment of UAGPPJA, then it is a separate and severable policy proposal that needs to be justified on its own merits.

That gives the staff pause. The Commission has not been authorized to study the allocation of state and tribal court civil jurisdiction. Doing so as a minor adjustment in the UAGPPJA study might be overreaching our authority.

Moreover, the staff is concerned that this matter is arising so late in the Commission's study process, when the time remaining for further analysis, deliberation, and public input is short.

These are *process* concerns. The question is not whether it would be good policy to eliminate concurrent jurisdiction. Rather, the question is whether we are currently in a good position to address that issue at all, especially when it is not necessary that we do so.

Solution Dependent on Tribal Adoption

Another important consideration is that California has no authority to modify a tribe's jurisdiction. Consequently, in order for the territorial exclusivity rules to have their intended effect, California tribes would need to enact equivalent law.

A tribe that has not adopted equivalent law would continue to have the same jurisdiction that it has under existing law, including jurisdiction over tribe members who live outside of tribal lands. Thus, dueling conservatorships could continue to exist.

The staff also sees some potential for confusion if California were to adopt the territorial exclusivity approach and a tribe did not. Suppose that the tribe were to exercise jurisdiction where UAGPPJA would not recognize the tribe as having jurisdiction. Would California recognize the legitimacy of the tribal court's actions? Recall that UAGPPJA provides that it is the "exclusive basis" for determining conservatorship jurisdiction.[50]

Procedural Complication

Under the existing scheme of concurrent jurisdiction, a tribe member is free to file for a conservatorship in either state or tribal court.

50. UAGPPJA § 202; proposed Prob. Code § 1992.

But under the territorial exclusivity approach (if also enacted by a tribe), a tribe member filing a conservatorship petition could face an additional procedural hurdle. Before filing a petition in a "significant-connection" state, the person would first need to petition the home state to decline to exercise jurisdiction. (As noted earlier, there is also the option of simply proceeding in the significant-connection state without the assent of the home state.[51] But that would be risky. Proceedings could be derailed at any time before the appointment of a conservator, if a similar petition is filed in the home state or an interested person files an objection.)

Thus, a member of a California tribe who lives outside of tribal land would generally need to petition the state court (the home state) to decline jurisdiction, before the tribal court (the significant-connection state) could exercise its jurisdiction. The reverse would also be true. A tribe member living on tribal land would need to petition the tribal court to decline jurisdiction before a state court could exercise jurisdiction.

That would not be a huge burden, but it would be an additional burden that does not exist under current law. That would seem to be contrary to one of the goals of UAGPPJA, reducing the cost and burden of conservatorship proceedings that involve multiple jurisdictions.

Of course, the process of resolving dueling orders in both state and tribal courts would be even more burdensome. But the staff has not seen evidence that this is a significant problem in California at this time.

Diminished Member Choice

As noted above, the existing concurrent jurisdiction scheme gives tribe members the freedom to choose whether to file a conservatorship petition in state or tribal court. Under the territorial exclusivity approach (if also enacted by a tribe) that choice would be limited.

A tribe member could not file a conservatorship petition in the significant-connection state unless (a) the home state has expressly declined to exercise jurisdiction, or (b) no petition is filed in the home state and no interested person objects to the proceeding being filed in the significant connection state.

In both cases, the availability of the significant-connection state as a forum is contingent on factors beyond the petitioner's control. The home state may not agree to decline jurisdiction; a petition may be filed in the home state; or an

51. UAGPPJA § 203(2)(B); proposed Prob. Code § 1993(d).

interested person may object to the significant-connection state exercising jurisdiction. Under those circumstances, the tribe member would be effectively barred from filing in the significant-connection state. That would eliminate a choice that currently exists.

Compatibility with Public Law 280

As just discussed above, the territorial exclusivity approach (if also enacted by a tribe) could create situations in which a tribe member living on tribal land is foreclosed from filing a petition in state court. Nothing in Public Law 280 expressly allows for such limitations on state court jurisdiction. To the contrary, that law provides for state court civil jurisdiction on tribal lands "to the same extent that such State has jurisdiction over other civil causes of action."[52]

Would the limitations on state court jurisdiction discussed above be compatible with Public Law 280? Or would they be in conflict with federal law and perhaps preempted? The answer probably depends on the purpose of Public Law 280.

If the purpose of Public Law 280 is to ensure that Indians who live on tribal land have the same access to state courts as other residents of the state, then the imposition of a limitation on access to state courts might be in conflict with that purpose and preempted.

But if the purpose of Public Law 280 is merely to provide a supplement to tribal courts, filling any gaps in jurisdictional coverage so that tribe members will always have access to *some* court, then a rule that narrows state jurisdiction in favor of tribal jurisdiction may be compatible with Public Law 280.

The modern trend seems to be toward granting greater deference to tribes in recognition of tribal sovereignty.[53] However, the staff cannot rule out the possibility that a state statute narrowing state jurisdiction under Public Law 280 would be preempted.

Staff Recommendation

The staff recommends against the territorial exclusivity proposal. That approach would make a significant substantive change to existing law on the

52. 25 U.S.C. § 1360.

53. *Cohen's Handbook* § 6.04[3][c] at 560 ("Given the Indian Law canons of construction, and the subsequent development of congressional policies favoring tribal self-determination and tribal courts, it is proper to read Public Law 280 as incorporating a state exhaustion requirement where tribal courts exist.") (citations omitted).

allocation of state and tribal court jurisdiction. The staff does not believe that such a change should be made in this study. It is not clear that the Commission has been authorized to fundamentally reallocate state and tribal court jurisdiction, nor is it necessary to do so. If the Commission is interested in significantly reforming the allocation of state and tribal court civil jurisdiction, it would be prudent to request express legislative authorization.

Moreover, the staff is concerned that the Commission does not have enough information to decide whether territorial exclusivity is the best way to allocate state and tribal court conservatorship jurisdiction. Before making such a substantive change in the law, it might be best to conduct a fuller Commission study of the matter.

Despite recommending against the territorial exclusivity approach, the staff has drafted implementing language for the Commission's consideration.[54]

State Deference

Recognizing the difficulties that follow from concurrent state and tribal court civil jurisdiction (including the potential for a race to the courthouse and dueling inconsistent judgments), some jurisdictions have explored the possibility of affording a degree of deference to tribal courts.

There are at least three ways in which a deference rule might be framed, with varying degrees of force:

- Exhaustion of tribal remedies *required* (i.e., "Mandatory Deference").
- Deference to tribal jurisdiction required, *absent good reason to retain state jurisdiction* (i.e., "Presumptive Deference").
- Deference to tribal jurisdiction permissive, *if good reason exists to defer* (i.e., "Permissive Deference").

Those possibilities are discussed further, below.

Mandatory Deference

Federal courts generally require plaintiffs to exhaust available tribal remedies. Although that doctrine first arose in the context of cases determining tribal court jurisdiction, it now applies to other matters as well.[55]

54. See Attachment pp. 2-3.
55. *Cohen's Handbook* § 7.04[3] at 630-36 (citations omitted).

> The Ninth Circuit requires exhaustion in all cases relating to tribal affairs, including those that arise off-reservation and outside Indian country, even if no tribal court proceedings are pending, so long as there is a colorable argument that the tribal court has jurisdiction over the case.[56]

While this federal doctrine does not appear to govern state courts, some commentators have argued that states could (and should) adopt a similar exhaustion requirement:

> Even if the doctrine is not binding on state courts as a matter of federal common law, however, the same considerations of comity and efficiency that animate the federal exhaustion doctrine counsel in favor of state courts establishing an identical rule of deference. … Respect for an Indian nation's power of self-government implies that the tribe should have primary responsibility for activities that occur within its boundaries, and therefore a state court possessing concurrent jurisdiction under Public Law 280 should stay its hand pending exhaustion of tribal remedies.[57]

An exhaustion requirement has obvious advantages. It would provide a clear and easily administered rule and it would afford significant respect to tribal self-governance over an issue of core tribal concern (the welfare of tribe members with diminished decisionmaking capacity). It would also eliminate the possibility of dueling proceedings.

However, an exhaustion requirement would have some of the same disadvantages as the territorial exclusivity approach discussed above. Tribe members who wish to be conserved in state court would face additional procedural hurdles and could be barred from state court altogether under some circumstances. In addition, an exhaustion requirement would be fairly rigid, not allowing a state court to take relevant factors into account in deciding whether to defer (see discussion of "good cause" to retain jurisdiction, below).

Moreover, enactment of UAGPPJA does not require such a significant change to the law governing state and tribal court jurisdiction.

The staff recommends against requiring exhaustion of available tribal remedies before a California court can exercise its conservatorship jurisdiction on tribal land. Such a change in the law is not necessary for the enactment of UAGPPJA and seems too substantive to be made without clear authority and fuller Commission study than is practicable in the current study.

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56. *Id.* at 631 (citations omitted).
57. *Id.* § 6.04[3][c] at 560 (citations omitted).

Despite recommending against an exhaustion requirement, language to implement that approach is set out in the attachment for the Commission's consideration.[58]

Presumptive Deference

A less absolute approach to state deference to tribal court jurisdiction would be to require a state court to defer, unless there is a sufficiently good reason to retain jurisdiction. In other words, deference would be presumed, but that presumption could be rebutted for good cause.

The Indian Child Welfare Act (ICWA) takes this general approach with regard to jurisdiction over Indian children living outside of tribal land:[59]

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.[60]

What constitutes "good cause" for a state court to deny a petition to transfer? In 1979, the Bureau of Indian Affairs promulgated non-binding interpretive guidelines to assist state courts in applying ICWA. That guidance recognized the following "good causes" for a state court to decline to transfer a proceeding involving an Indian child who lives outside of tribal land:

- The tribe at issue does not have a tribal court to which the case could be transferred.
- The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
- The Indian child is over twelve years of age and objects to the transfer.
- The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

58. See Attachment p. 4.
59. Note that the Uniform Child Custody Jurisdiction and Enforcement Act is expressly subordinate to ICWA with regard to Indian child custody proceedings. See UCCJEA § 104(a); Fam. Code § 3404(a).
60. 25 U.S.C. § 1911(b).

- The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.[61]

As Mr. Parr points out,[62] California has codified those guidelines for use in certain Indian child custody proceedings.[63]

That approach seems to strike a more nuanced balance of competing interests than a strict exhaustion requirement. While it would still grant considerable deference to a tribal court, it would allow a state court to retain jurisdiction if there are good reasons to do so (e.g., undue delay, inconvenient forum, or the expressed wishes of the proposed conservatee).

It is also important to note that this ICWA provision allows either parent to block a transfer to tribal court. The staff is not sure how the parental right to block a transfer would translate into the conservatorship context. Because ICWA governs proceedings that could terminate parental rights, a child's parents have an unusually strong interest in the proceeding. It isn't clear that any third party has an equivalent interest in a proceeding to appoint a conservator.

Despite the flexibility of the presumptive deference approach, the staff still has some process concerns about recommending that approach. Although we would limit the rule to conservatorship jurisdiction, the issue still seems to be centered in Indian law policy, which we have not been authorized to study. And, as discussed above, any significant change to state and tribal court civil jurisdiction probably warrants fuller Commission study.

The staff has a mixed mind about whether to recommend a rule of presumptive deference. Nonetheless, language to implement such an approach is attached for the Commission's consideration.[64] In the attached language, the factors identified for determining whether there is good cause to retain jurisdiction are drawn from the UAGPPJA provision governing a court's decision to decline jurisdiction.[65] In the staff's view, those factors are better suited to the conservatorship context than factors drawn from the Indian Child Welfare Act.

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61. *BIA Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584-67,595 (November 26, 1979).
62. See Exhibit p. 14.
63. See Welf. & Inst. Code § 305.5(c)(2). See also, Fam. Code § 177.
64. See Attachment pp. 5-6.
65. See UAGPPJA § 206; proposed Prob. Code § 1996(b).

Permissive Deference

The least deferential approach to state deference would be to simply *permit* a state court to decline to exercise jurisdiction in a conservatorship proceeding, when the court finds good reason to do so. In exercising such discretion, a court could be required to consider relevant decisionmaking factors. That approach has been taken in at least two states, Wisconsin and Washington.

Wisconsin. In Wisconsin (which, like California, is a mandatory Public Law 280 state), the difficulties inherent in concurrent state and tribal court jurisdiction were brought to a head after protracted litigation produced inconsistent results in the state and tribal courts.[66]

> [T]he Supreme Court of Wisconsin initially refused to enforce a tribal judgment because of lack of coordination and consultation between the state and tribal courts over allocation of jurisdiction regarding two overlapping suits in tribal and state court. The Wisconsin high court then took the extraordinary action of remanding for a conference between the two court systems. Following remand, a state appellate court and the Chippewa tribal courts actually drafted and agreed to protocols. Even after availing themselves of the procedures and criteria set forth in the protocol, however, the two court systems still could not resolve their differences and neither would agree to withdraw its judgment. Accordingly, the Supreme Court of Wisconsin resumed jurisdiction over the case, invoked the doctrine of comity, and found that the state court should respect the tribal judgment.[67]

The Wisconsin Legislature later enacted a statute that grants a state trial court discretion to transfer a case to tribal court, where specified factors support the transfer:

> Discretionary transfer. When a civil action is brought in the circuit court of any county of this state, and when, under the laws of the United States, a tribal court has concurrent jurisdiction of the matter in controversy, the circuit court may, on its own motion or the motion of any party and after notice and hearing on the record on the issue of the transfer, cause such action to be transferred to the tribal court. The circuit court must first make a threshold determination that concurrent jurisdiction exists. If concurrent jurisdiction is found to exist, unless all parties stipulate to the transfer, in the exercise of its discretion the circuit court shall consider all relevant factors, including but not limited to:

66. See Teague v. Bad River Band of Lake Superior Chippewa Indians, 612 N.W.2d 709 (Wis. 2000).

67. *Cohen's Handbook* § 6.04[3][c] at 559 (citations omitted).

> (a) Whether issues in the action require interpretation of the tribe's laws, including the tribe's constitution, statutes, bylaws, ordinances, resolutions, or case law.
>
> (b) Whether the action involves traditional or cultural matters of the tribe.
>
> (c) Whether the action is one in which the tribe is a party, or whether tribal sovereignty, jurisdiction, or territory is an issue in the action.
>
> (d) The tribal membership status of the parties.
>
> (e) Where the claim arises.
>
> (f) Whether the parties have by contract chosen a forum or the law to be applied in the event of a dispute.
>
> (g) The timing of any motion to transfer, taking into account the parties' and court's expenditure of time and resources, and compliance with any applicable provisions of the circuit court's scheduling orders.
>
> (h) The court in which the action can be decided most expeditiously.
>
> (i) The institutional and administrative interests of each court.
>
> (j) The relative burdens on the parties, including cost, access to and admissibility of evidence, and matters of process, practice, and procedure, including where the action will be heard and decided most promptly.
>
> (k) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.[68]

Because that provision governs all concurrent civil jurisdiction, some of the specified factors would not be particularly relevant in a conservatorship proceeding.

Washington. In Washington, a court rule provides a simpler expression of the same concept:

> Indian Tribal Court; Concurrent Jurisdiction. Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, concurrent jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court may, if the interests of justice require, cause such action to be transferred to the appropriate Indian tribal court. In making such determination, the superior court shall consider, among other things, the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and the remedy available in such Indian tribal court.[69]

68. Wis. Stat. § 801.54(2).
69. Wash. Ct. R. 82.5(b).

Advantages and Disadvantages

Permissive deference would be consistent with one of the jurisdictional principles expressed in UAGPPJA: a court could decline to exercise its jurisdiction when it finds that another state would be the more appropriate forum.

Although permissive deference would not resolve the most difficult cases (where the state and tribal court disagree about the most appropriate forum), it could provide a straightforward mechanism for resolution of the easier cases. It would therefore likely do some good (without posing much, if any, risk of harm).

While it is true that UAGPPJA could be enacted without also enacting a rule of permissive deference, such a rule would seem to have a close enough connection to the general purpose of UAGPPJA to be an appropriate component of the current study. Because such a reform would have only a light effect on existing tribal jurisdiction law, the staff is not as concerned that the Commission would need separate authorization before recommending such a change. In a sense, all we would be doing is generalizing the principle that a state court can decline jurisdiction in appropriate circumstances. Moreover, because of the fairly modest effect of such a reform, the staff is not concerned that a full separate study of tribal jurisdiction law is necessary before recommending that approach. The matter seems straightforward enough to be decided based on the information now available.

The staff is slightly inclined toward including a permissive deference rule in the recommendation. Language to implement such a rule is included in the attachment, for the Commission's consideration.[70]

Communication

An even more modest reform would be to authorize a state court to communicate with a tribal court about jurisdictional issues, without specifying any particular outcome under the law. This would at least open a dialog that might lead to voluntary resolution of jurisdictional conflicts, before significant resources are expended.

Such a reform could be effected very simply by providing that a tribe is a "state" for the purposes of UAGPPJA's provision on communication between courts:

70. See Attachment pp. 7-8.

> [(a)] A court of this state may communicate with a court in another state concerning a proceeding arising under this [act]. The court may allow the parties to participate in the communication. [Except as otherwise provided in subsection (b), the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.
>
> (b) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record.][71]

Because this would implement a UAGPPJA provision, without changing existing tribal jurisdiction law in any way, the staff sees no special process concerns about the Commission recommending such a rule.

The effect of that approach could perhaps be bolstered slightly, by requiring that a petition to appoint a conservator indicate whether the proposed conservatee is known to be a member of a federally recognized Indian tribe. The petition could also indicate whether the proposed conservatee resides on tribal land or owns property on tribal land. This would alert the court that tribal jurisdiction might be an issue, and that it might be prudent to open communications with the tribal court.

The staff believes that the reforms described above would be beneficial and straightforward, are within the scope of the current study, and would not disrupt existing law on tribal jurisdiction. **We recommend that they be included in the proposed law.** Language to do so is included in the attachment, for the Commission's consideration.[72]

Status Quo

As discussed above, enactment of UAGPPJA does not *require* any change to the existing law on state and tribal court civil jurisdiction. An equally viable alternative would be to fully preserve existing law and make minor conforming changes to UAGPPJA.

While this approach would do nothing to address jurisdictional conflicts between state and tribal courts, it would completely avoid any concern about the Commission overreaching its authority or acting without sufficient study of the matter.

If the Commission does not agree with any of the staff recommendations set out above, preservation of the jurisdictional status quo would be a

71. UAGPPJA § 104; proposed Prob. Code § 1984.
72. See Attachment p. 9.

workable alternative. Proposed language to implement this approach is set out in the attachment, for the Commission's consideration.[73]

California Tribes and Tribes in Other States

Before turning to other issues, it is necessary to discuss whether the jurisdictional provisions of UAGPPJA (with whatever modifications the Commission decides to recommend) should apply differently to California tribes and tribes in other states.

The staff is inclined against drawing such a distinction.

While it is true that one particular type of jurisdictional overlap can only arise between California and California tribes (where the tribe member lives on tribal land within California), that is not the only basis for overlapping state and tribal court civil jurisdiction. As discussed earlier, with regard to core tribal interests (which might well include conservatorship), a tribe can have jurisdiction over a member who resides outside of tribal land. That principle does not appear to be limited to members who reside in the same state as the tribe. Thus, a tribe located outside California could probably exercise conservatorship jurisdiction over a member who lives in California.

This means that concurrent conservatorship jurisdiction can exist between a state court and a tribal court that is located in another state. Thus, to the extent that UAGPPJA is incompatible with concurrent state and tribal court jurisdiction, that problem is not limited to intra-state concurrent jurisdiction.

Although California undoubtedly has a special interest in cooperation and comity with tribes that are located within its boundaries, there is no legal reason to limit the scope of our reforms to California tribes (especially if doing so would create disparate legal outcomes without clear legal justification).

With the exception of the territorial exclusivity approach (which is only relevant to California tribes), all of the alternative approaches discussed above would seem to be just as appropriate when applied to tribes inside or outside of California.

73. See Attachment p. 10.

As discussed earlier, California court conservatorship jurisdiction on tribal land is derived from Public Law 280. When a California court exercises such jurisdiction, its authority is limited to the authority granted by that federal law.

Recall that Public Law 280 has two significant limitations on state court authority. It does not provide jurisdiction with regard to certain property matters. Nor does it confer civil "regulatory" jurisdiction. The staff is not sure of the precise boundaries of those limitations as they relate to conservatorship matters. But it is possible that there are some conservatorship matters that cannot be fully addressed by a California court when operating under Public Law 280 jurisdiction. For example, a California court probably lacks jurisdiction to approve the sale of real property on tribal land.

This means that a tribe member who lives on tribal land (or owns property located on tribal land) but is conserved in a California court might not be provided the full measure of protection that is available to other California conservatees.

Concurrent state and tribal court jurisdiction could be used to remedy that problem. If a tribe member is conserved in state court and the state court is concerned that it lacks jurisdiction to address some matters arising on tribal land, a concurrent conservatorship could be established in tribal court. The tribal court conservatorship could address any matters that are thought to be beyond state court jurisdiction. The two conservatorships would complement one another, providing the conservatee with the full range of necessary protections.

This is a good argument in favor of preserving the existing concurrent jurisdiction scheme. If, however, California were to instead adopt territorial exclusivity, it would be necessary to develop special exceptions to address the potential gaps in state court jurisdiction on tribal land.

That is the approach recommended by the Advisory Committee and Forum. They propose two changes to UAGPPJA:

> (1) Expressly provide that California courts and California tribal courts can use the UAGPPJA transfer process to transfer less than all of a conservator's powers (while retaining jurisdiction over the powers that are not transferred).[74]

74. See Exhibit p. 10.

(2) Revise the provision on exclusive jurisdiction (proposed Probate Code Section 1995) to allow for concurrent state and tribal court jurisdiction, but only where there has been a transfer of less than all of a conservator's powers.[75]

That strikes the staff as overly complex. **A much simpler approach would be to preserve the existing concurrent jurisdiction scheme.**

If, however, the Commission decides to recommend the proposed territorial exclusivity approach, then some adjustments would need to be made. In that case, the simplest approach would be to make clear that concurrent state and tribal court conservatorship are permitted, so long as the powers granted by the two jurisdictions do not overlap.[76] For example, the state court could appoint a conservator with no authority to address matters arising on tribal land and the tribal court could appoint a conservator whose authority is restricted to matters arising on tribal land.

It isn't clear that partial transfers between state and tribal courts are necessary to address the problem discussed above. Complementary state and tribal court conservatorships could simply be created de novo, without any need for a transfer. Moreover, it is not clear that a state court could "transfer" powers that it does not possess. For example, if a state court lacks jurisdiction to adjudicate matters involving property on tribal land, how could it transfer such authority to the tribal court?

REGISTRATION OF TRIBAL ORDERS

If tribes are treated as "states," tribal courts would be subject to Article 4 of the proposed law,[77] allowing for the registration of another state's conservatorship orders in California (for the purpose of requiring recognition of the powers granted in the registered order, subject to the requirements and limitations of California law).

However, the Advisory Committee and Forum has pointed out one aspect of the proposed registration provisions that would not work correctly if applied to tribal courts orders.[78] Under the proposed law, a registered order of another state *is not effective if the conservatee resides in California*.[79] As discussed below, that

75. See Exhibit p. 9.
76. See the proposed revision to Prob. Code § 1995; Attachment p. 3.
77. Proposed Prob. Code §§ 2011-2016.
78. Exhibit p. 2.
79. Proposed Prob. Code § 2014(a)-(b).

limitation may not be appropriate when applied to a tribe member residing in California.

The proposed residence-based limitation makes sense when applied to the courts of other *states*. Under UAGPPJA's jurisdictional provisions, it is the state in which a person resides (the person's "home state") that has the greatest claim to conservatorship jurisdiction. A state has strong jurisdictional ties to a person living within its territorial boundaries and has a strong interest in applying its policies to protect its own citizens. When a conservatorship is moved from one state to another, the former home state's policy interest in the conservatee weakens and the policy interest of the new home state strengthens. In that scenario, it is appropriate to transfer the conservatorship to the state with the strongest jurisdictional ties. Registration should not be used to avoid transferring a conservatorship to the conservatee's new home state.

The situation is different for members of tribes. If a tribe member is living on tribal land, it seems clear that the tribe has the strongest jurisdictional ties. The fact that the tribe member is also residing within California does not diminish or trump the tribe's jurisdictional interest. In this situation, the staff sees no good reason to expect that the conservatorship will be transferred to state court. Consequently, there is no good reason to preclude registration of the tribal court's orders.

The same logic applies, though perhaps with less force, when a tribe member is residing in California but outside of tribal land. Recall that a tribal court can assert jurisdiction over its members as members, with respect to matters of core tribal concern, *regardless of whether they live on tribal land*. Thus, if a tribe member lives in California, but outside of tribal land, both California courts and the tribal court could exercise concurrent jurisdiction. In that scenario, it is not clear that the state has any greater jurisdictional claim than the tribe. If not, then there is no reason to preclude registration of a tribal court order.

However, it is possible that a tribal court's jurisdictional ties to a member could become attenuated if that member moves off tribal land, especially if the member moves a great distance and does not maintain meaningful ties to the tribe. So, for example, if a tribe member moved from Florida to California and did not have any remaining family ties to the tribe, one could argue that California has a stronger jurisdictional interest than the Florida tribe. Moreover, as a practical matter, California would be much better situated to supervise the conservatorship than a court located thousands of miles away. Under those facts,

it might make sense to expect that the conservatorship be transferred to California. This could perhaps justify application of the residence-based limitation on registration of the tribal court's orders.

For the reasons discussed above:

(1) *It seems clear that the residence-based contingency on the effect of registration should not apply to a member of a California tribe living on tribal land.* In that situation the tribe has a very strong claim to jurisdiction and there is no reason to encourage a transfer to California state court.

(2) *The same logic applies, with slightly reduced force, with regard to a member of a California tribe who is living in California but outside of tribal land.* While California has a strong jurisdictional interest in such person, there is also a good argument for California extending comity to the concurrent jurisdiction of tribes within its boundaries. Thus, there still seems to be little reason for the tribal conservatorship to be transferred to California state court. Retention of tribal court jurisdiction seems proper. This undercuts the justification for a residence-based contingency on the effect of a registered tribal court conservatorship.

(3) *There is a good argument for extending the same treatment to a tribal conservatorship in another state.* That is, the residence-based contingency should not apply to the registration of conservatorship orders of a tribal court located outside of California. *But there seems to be a legitimate counter-argument,* that a tribe's ties to a member who has moved to another state are so attenuated that there is good reason to prefer that the tribal conservatorship be transferred to the new home state.

The staff recommends that the residence-based contingency in the proposed law on registration be made inapplicable to the court orders of a California tribe. Language to implement that approach is attached for the Commission's consideration.[80]

The staff makes no recommendation on whether the same treatment should be extended to the courts of tribes located outside of California. For that reason, the attached language includes bracketed material, which could be included or omitted depending on the Commission's decision on this point.

80. See Attachment pp. 11-12.

Whatever decisions the Commission makes in connection with the issues discussed in this memorandum, it will be necessary to add explanatory language to the preliminary part of the draft recommendation.

We are hoping to finalize the recommendation this year, for introduction of implementing legislation in 2014. This would be more difficult if the recommendation were not approved until the February 2014 meeting.

In the past, when the Commission has been in similar situations, it has sometimes delegated authority to the staff to draft language for inclusion in the preliminary part of the recommendation, subject to the review and approval of the Chair. This would allow the staff to distribute final approved copies of the recommendation in December, when meeting with possible bill authors. **Does the Commission wish to follow that practice in this case?**

Respectfully submitted,

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Executive Director

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MEMORANDUM

Date
August 22, 2013

Action Requested
Please review

To
California Law Revision Commission

Deadline
N/A

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

California Tribal Court/State Court Forum,
Hon. Richard C. Blake, Cochair, and
Hon. Dennis M. Perluss, Cochair

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Subject
Comment on Tentative Recommendation of the California Law Revision Commission for Adoption in California of a Modified Version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

The Judicial Council of California's Probate and Mental Health Advisory Committee (advisory committee) and the California Tribal Court/State Court Forum (forum) submit this comment for your consideration in connection with the California Law Review Commission's (Commission) tentative recommendation for adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) in California as legislation that would be called the California Conservatorship Jurisdiction Act (CCJA).

The advisory committee and the forum recommend modification of the CCJA in two respects. This memorandum addresses the first modification, a joint recommendation of both the advisory committee and the forum, would add a new Article 6 to the Commission's recommended

legislation, consisting of Probate Code sections 2041–2046. Article 6 would modify the application of the CCJA to California state courts and California Indian tribal courts concerning conservatorships of members of California tribes.

Proposed Article 6

The current draft of the CCJA would treat tribal courts of all federally-recognized Indian tribes—both inside and outside California—as courts of sister states. The proposal assumes that every "state" has a territory that is unique and exclusive. Under the proposed act, presumptive "home state" jurisdiction is based upon an individual's physical presence in that state's territory for a certain period of time. The proposal presumes that an individual can have only one "home state" at a time, and that he or she cannot be present in two "states" at the same time. The draft does not address the situation in which one "state" is contained within another "state," or in which one of the "states" does not have a territory (i.e., that a federally-recognized Indian tribe does not have a reservation or any other tribal area or tribally-owned or -controlled land).

The "home state" analysis in the proposed CCJA provisions is not sufficient to address jurisdictional issues between California state and tribal courts. The proposed law does not determine, define, or specify what geographic area is within a tribal "state's" boundaries. Because California tribal areas, however defined, are located within the state of California, a conservatee or proposed conservatee who is physically present in tribal areas could have two "home states" simultaneously for the purposes of CCJA's jurisdictional analysis. Additionally, the registration process contemplated in the legislation (CCJA, Art. 4, §§ 2011–2016[1]) is questionable in cases involving California tribes and the State of California because registration is unavailable for conservatees present within the state where appointment orders are to be registered, and any member of a California tribe present in tribal areas is also present within California. Finally, tribal court jurisdiction may extend to tribal members who are not physically present on tribal lands. Tribes provide services to and may exercise jurisdiction over their members living outside their lands.

Nothing in the Commission's draft of the CCJA would address these unique jurisdictional issues. That failure could lead to uncertainty and unnecessary jurisdictional confusion and conflicts between state courts and tribal courts in this state. These jurisdictional issues affecting conservatorships subject to the proposed CCJA involving California tribes and California state courts are complicated by California's status as a "Public Law 280" state, in which civil jurisdiction of state courts is extended to some matters involving individual Indians on tribal lands, but is merely concurrent with rather than superior to tribal court civil jurisdiction in those matters. Other parts of state court civil jurisdiction are not extended to Indian tribal areas by Public Law 280, specifically, direct jurisdiction over tribes, internal tribal matters, and property owned, controlled, or held in trust for tribes or tribal members.

[1] Unless otherwise specified, all references to code sections are to current or proposed sections of the Probate Code.

Proposal

The forum and the advisory committee recommend that proposed Article 6 be added to the CCJA. It would apply only to interactions between California tribal and state courts with respect to the subject matter of the CCJA and the UAGPPJA generally. It would not apply to or affect interactions between California state courts and other state courts or tribal courts in other states, or California tribal courts and state or tribal courts outside California. The format of Article 6 would adhere to the CCJA, in that its provisions identify which portions of the latter law would and would not apply and, as to those portions that do apply, would specify any modifications in their application. Key features of proposed Article 6 are:

- General—generally the provisions of the CCJA concerning the types of conservatorships covered and allocation of jurisdiction and cooperation and communication between courts would apply to California tribal courts whether or not the tribes adopt the UAGGJA, the CCJA, similar provisions, or Article 6 as stand-alone legislation.

- Jurisdiction—with respect to the courts of tribes with lands in California, the "home state" analysis under the CCJA would be modified to recognize the tribe as a "home state" whenever a proposed conservatee is a tribal member who is present in a county where the tribe has tribal lands, whether or not he or she is present on those lands. Tribal lands are defined in Article 6 by reference to the definition of "Indian Country" in federal law. In these cases, California would be a "significant connection" state. For tribal members who live outside of counties where the tribe has tribal lands, the tribe would be a "significant connection state" and California would be the presumed "home state." This jurisdictional scheme would apply whether or not the tribe in question had adopted CCJA or Article 6.

- Registration—whether or not they adopt CCJA or Article 6, California tribes would be able to register conservatorship orders of their courts coming within the scope of CCJA in California state courts of appropriate counties. Registration would confer the authority of the conservator appointed in the tribal court to act in the receiving jurisdiction (California) and to exercise all powers granted in the appointing jurisdiction (tribal court) that are not prohibited under California state law. State courts could register appointment orders in tribal courts of tribes that adopt the CCJA, the UAGPPJA, or Article 6. This limitation of registration to courts of states that have adopted the CCJA comes from that law itself, not from any provision of Article 6. That article would modify another feature of the uniform law concerning registration. Under the CCJA, a conservator may not register a court's order appointing a conservator in another state if the conservatee is presently located in the other state. This prohibition would not apply to registration of California tribal court orders in California state courts even though the conservatees are present within California as well as within a tribe's tribal land.

- Transfer—Under the CCJA and the UAGPPJA generally, in order to transfer proceedings between jurisdictions, both jurisdictions must have enacted the UAGPPJA or state equivalent. Article 6 would apply this equally to California tribes. In order to take advantage of the transfer provisions, a tribe would have to adopt some form of law equivalent to the CCJA as a whole, or Article 6 alone. Article 6, enacted alone, would apply only to California tribes as defined in the Article and the State of California.

  Unique to relations between California state courts and tribal courts of California tribes, the proposal would permit transfer of only a portion of the proceedings. For example, a conservator appointed in a state court concerning a conservatee tribal member living in a county containing tribal land could transfer the powers of conservator of the person to the tribal court, while retaining the powers of an estate conservator in the state court. Similarly, the court of a tribe that had adopted Article 6 could transfer the powers of an estate conservator to manage a conservatee's real estate located outside tribal lands to the state court, while maintaining jurisdiction over the conservator of the person of a tribal-member conservatee living in the county where the tribe has tribal land.

A copy of the proposed legislation that would enact Article 6 follows this memorandum, at pages 7 through 12.

Background

Tribal Courts and Populations in California

According to the 2010 Census, 5.2 million U.S. residents reported being American Indian/Alaska Native (AI/AN)-alone or in combination with some other race, and more than 2.9 million reported being AI/AN-alone. Among counties in the United States, Los Angeles County had the highest population of AI/AN-alone in 2000 (76,988). In 2010, California had the largest population of AI/AN-alone (362,801). California represented 12 percent of the total AI/AN-alone population in the United States. California had more than 720,000 AI/AN citizens (alone or in combination with another race) residing in both rural and urban communities. Although California has the largest tribal population in the United States, it has very little tribal land. As of 2005, only 3 percent of California's AI/AN population lived on a reservation or rancheria.

There are currently 110 federally recognized Indian tribes in California and 78 entities petitioning for recognition. Tribes in California currently have nearly 100 separate reservations or rancherias. There are also a number of individual Indian trust allotments. These lands are "Indian Country" as defined under federal law (18 U.S.C. § 1151), and a different jurisdictional scheme applies there. For Indians and Indian Country there are special rules that govern state and local jurisdiction. There may also be federal and tribal laws that apply. As sovereigns, tribes have legal jurisdiction over both their citizens and their lands.

There are estimated to be more than 300 tribal courts in the United States. Many of them appoint adult guardians or conservators. In 2012, 39 of 110 federally recognized California tribes (36 percent) either have a tribal court or access to a tribal court through an inter-tribal court coalition. This is a significant increase from 2002, when only 10 California tribes reported having a tribal court.

At least eight of these court systems, including the Intertribal Court of Southern California, report dealing with cases involving adult guardianship/conservatorship and protection of vulnerable adults. These courts reported that they issue orders concerning their tribal members who live both on and off reservation. They report that to date their orders have been recognized by institutions and agencies both on and off the reservation. In addition, the Northern California Tribal Courts Coalition (NCTCC) reports that protection of vulnerable adults is a priority area that the NCTCC courts have identified for expansion of their services.

Tribal and state jurisdictional issues

As a general matter of federal law, state courts have no jurisdiction to adjudicate guardianship/conservatorship-like proceedings involving Indians in Indian Country. Federal and tribal courts have exclusive jurisdiction over these cases. (See, e.g., *Guardianship of Sasse* (1985) 363 N.W.2d 209.)

In California this jurisdictional scheme is altered due to the civil provisions of Public Law 280 (codified at 28 U.S.C. § 1360) which grants California "jurisdiction over civil causes of action between Indians or to which Indians are parties. . . that arise in [Indian Country] to the same extent that such State has jurisdiction over other civil causes of action. . . ."

There are, however, limits to the application of Public Law 280. Specifically in adjudicating such matters subsection (c) of the law provides:

> Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Subsection (b) of Public Law 280 places the following limitations on the exercise of the state court's jurisdiction:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in

> probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

This means that state courts may be limited in their ability to protect important assets of tribal members. For instance, a state court has no jurisdiction to issue an order concerning the use or occupation of tribal lands or other real or personal property held in trust by the federal government for the benefit of tribes or individual Indians.

Public Law 280 did not divest tribes and tribal courts of any of their jurisdiction; it merely made the exercise of some of that jurisdiction concurrent with the exercise of civil jurisdiction by state courts in disputes between individual Indians or in cases in which individual Indians are parties. Tribes and tribal courts within California maintain the full scope of their jurisdiction over their members and their territory. A tribal court's subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law (*Fisher v. Dist. Ct.* (1976) 424 U.S. 382). Tribes and tribal courts may exercise jurisdiction over tribal members both on and off tribal lands. Under federal and tribal law, tribal jurisdiction over tribal members is not limited to physical presence or residence on tribal trust lands. A tribal court must have both personal and subject matter jurisdiction before it can hear a case, but tribal membership is generally sufficient to grant general personal jurisdiction over an individual wherever the individual resides. Tribes and tribal courts are generally committed to providing tribal members equal access to tribal courts whether they reside on or off the reservation.

Source of this proposal

The proposed Article 6 is the product of a collaborative effort of the Judicial Council's Probate and Mental Health Advisory Committee and the California Tribal Court/State Court Forum.

Attachments

1. Proposed Article 6 of the California Conservatorship Jurisdiction Act pages 7-12.

Article 6 (commencing with Section 2041) of Chapter 8 of Part 3 of Division 4 of the Probate Code would be added, to read:

SEC.1. Article 6 (commencing with Section 2041) of Chapter 8 of Part 3 of Division 4 of the Probate Code is added, to read:

Article 6. Special Provisions Applicable to California State Trial Courts and Tribal Courts of Indian Tribes with Tribal Land Located in the State of California

§ 2041 Definitions

For purposes of this Article,

(a) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community that is recognized as eligible for the special programs and services provided by the United States to Indian tribes because of their status as Indians, and which administers justice under its inherent authority or the authority of the United States.

(b) "Tribal land" means land that is, with respect to a specific Indian tribe and individual members of that tribe, "Indian country" as defined in 18 U.S.C. § 1151.

(c) "Tribal court" is a unit of an Indian tribal justice system that complies with the requirements of the *Indian Civil Rights Act* (25 U.S.C. § 1302, et seq.), and exercises jurisdiction over proceedings under tribal law and custom that would be identified in the UAGPPJA as adult guardianships and protective proceedings, and in this Code as conservatorships, subject to the limitations provided in Section 1981.

(d) "California tribe" is an Indian tribe with tribal land located in the State of California.

(e) "UAGPPJA" is the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, adopted by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in 2007. The California state law version of UAGPPJA is Chapter 8 of Part 3 of Division 4 of this Code, including this Article 6, also known as the California Conservatorship Jurisdiction Act. See Section 1980(b).

(f) "Adopting California tribe" is a California tribe that has adopted the provisions of this Article 6, or provisions that are substantially similar, as stand-alone legislation or tribal government equivalent, or as part of the tribe's adoption of UAGPPJA.

§ 2042 General

(a) All provisions of Articles 1–5 of this Chapter, Sections 1980–2024 of this code, and the uncodified section of the enacting legislation concerning operative dates, apply to California state courts respecting their interactions with tribal courts of California tribes or adopting California tribes as "states" under UAGPPJA, except as modified or otherwise provided in this Article.

(b) Depending on the context, the phrases "other state" and "another state" include a California tribe or, with respect to transfer provisions of Section 2045, an adopting California tribe, as defined in subsections (d) and (f) of Section 2041.

§ 2043 Application of Article 1, General Provisions, to California Tribes and State of California

The following provisions of Article 1 of this Chapter, General Provisions, apply to California tribes and the State of California as specified below:

(a) Section 1981, Limitations on scope of chapter 8, includes tribal court equivalents of listed California state proceedings.

(b) Section 1982, Definitions, are modified or supplemented by the definitions in Section 2041.

(c) Section 1983, International application of chapter, does not apply.

(d) In Sections 1984 and 1985, Communication between courts and Cooperation between courts, the phrase "this state" refers to the State of California, and the phrases "another state" and "that state" refer to California tribes.

(e) In Section 1986, Taking testimony in another state, the phrase "another state" refers to California tribes.

§ 2044 Application of Article 2, Jurisdiction, to California Tribes and State of California

The following provisions of Article 2 of this Chapter, Jurisdiction, define the application to California tribes and adopting California tribes of that article by the courts of the State of California as specified below:

(a) Section 1991, Definitions and significant connection factors, with the following modifications:

(1) "Home state:"

(A) Means a California tribe of which a proposed conservatee is a member if he or she was physically present for the time provided in that section in any county of the State of California within which the tribe has tribal land.

(B) Means the State of California if a proposed conservatee who is a member of a California tribe was physically present for the time provided in that section in a county of the State of California in which his or her tribe does not have tribal land.

(2) "Significant connection state:"

(A) A California tribe is a "significant-connection state" with respect to all situations described in (1) in which it is not a "home state."

(B) The State of California is a "significant-connection state" with respect to all situations described in (1) in which it is not a "home state."

(b) Section 1992, exclusive basis, with the following modification:

Article 2, as modified by this Article 6, provides the exclusive basis for determining whether the court of a California tribe or a California state court has jurisdiction to appoint a conservator of the person, a conservator of the estate, or a conservator of the person and estate, of a member of the tribe.

(c) Section 1993, jurisdiction, with the following modification:

If the proposed conservatee is a member of a California tribe, the phrase "a court of this state," means a tribal court of the tribe or a California state court, depending on where the proposed conservatee was physically present for a qualifying time period provided in Section 1991(a)(2).

(d) Section 1994, special jurisdiction, with the following modification:

The phrase "at the request of the court of the home state" in subdivision (b) refers to the court of a California tribe.

(e) Section 1995, exclusive and continuing jurisdiction, with the following modification:

Exclusive jurisdiction as between a tribal court of an adopting California tribe and a California state court is subject to the authority of such courts to transfer a portion only of jurisdiction between them, as provided in Article 4 as modified by Section 2045.

(f) Section 1996, appropriate forum, with the following modification:

The phrase "court of another state" refers to a tribal court of a California tribe.

(g) Section 1997, jurisdiction declined by reason of conduct, with the following modification:

The phrases "court of another state having jurisdiction," and "court of any other state" refers to a tribal court of a California tribe.

(h) Section 1998, notice of proceeding, with the following modification:

The phrase "home state of the proposed conservatee," refers to a California tribe.

(i) Section 1999, proceedings in more than one state, with the following modification:

The phrases "another state" and "other state" refers to a California tribe.

§ 2045 Application of Article 3, Transfer of Conservatorship, to Adopting California Tribes and State of California

The following provisions of Article 3 of this Chapter, Transfer of Conservatorship, apply to adopting California tribes and the State of California:

(a) Section 2001, Transfer of conservatorship to another state, with the following modifications:

(1) The phrases "another state" and "other state" refers to an adopting California tribe.

(2) A petitioner may request, and the court of this state may order, provisionally and finally, transfer of all or less than all of the authority or powers of the conservator to the tribal court of an adopting California tribe. In the event of a transfer of less than all authority or powers of the conservator, the court of a transferring state shall continue supervision of the administration of the functions or powers not transferred.

(b) Section 2002, Accepting conservatorship transferred from another state, with the following modifications:

(1) The phrases "other state" and "transferring state" refers to an adopting California tribe.

(2) If the proposed transfer is from the tribal court of an adopting California tribe and is of less than all authority or powers of the conservator, the court shall communicate with the tribal court under Section 1984 before it makes an order striking or modifying the powers of the conservator that would change the division of authority or powers made by the order of the tribal court.

§ 2046 Application of Article 4, Registration and Recognition of Orders from Other States

The following provisions of Article 4 of this Chapter, Registration and Recognition of Orders from Other States, apply to California tribes and the State of California:

(a) Sections 2011, Registration of order appointing conservator of person; 2012, Registration of order appointing conservator of estate; and 2013, Registration of order appointing conservator of person and estate, with the following modifications:

(1) The phrases "another state," and "other state," refers to a California tribe.

(2) A conservator of the person, estate, or person and estate appointed in a tribal court of a California tribe for a conservatee who is a member of that tribe may register the appointment in a California state court in an appropriate county under sections 2011, 2012, or 2013, whether or not the tribe has adopted this Article or UAGPPJA.

(3) A conservatorship proceeding filed in a tribal court of a California tribe is not a conservatorship proceeding in this state for purposes of Sections 2011, 2012, and 2013.

(b) Section 2014, Effect of registration; and 2015, Good faith reliance on registration, with the following modifications:

(1) The phrases "another state," refers to a California tribe.

(2) The conservatee under a conservatorship filed in a tribal court of a California tribe who resides in a county within California in which the tribe has tribal land is considered to be residing outside the State of California; the conservator may attest to that fact; and a third person cannot receive actual notice to the contrary because the tribal land of that tribe is within California.

(3) If a conservator appointed by a tribal court of a California tribe for a conservatee who is a member of that tribe, resides within tribal land of that tribe, he or she is not a nonresident of California for purposes of Section 2014, and is not subject to any conditions imposed on nonresident parties.

(c) Section 2016, Recordation of registration documents, with the following modification:

(1) A county recorder of any county of this state may record registrations of tribal court appointment orders of California tribes in California state courts, and a county recorder of a county where tribal land of an adopting California tribe is located may record registrations of California state court appointment orders in that tribe's tribal court.

§ 2047, Application of Article 5, Miscellaneous Provisions

The following provisions of Article 5 of this Chapter, Miscellaneous Provisions, apply to California tribes and the State of California:

(b) Section 2022, Court rules and forms, with the following modification:

The Judicial Council shall develop versions of the registration cover sheet described in Section 2022(b) and the attestation form described in Section 2015(a)(3) suitable for filing in California state courts concerning registration of conservatorship orders from tribal courts of California tribes.

EMAIL FROM NORTHERN CALIFORNIA TRIBAL COURT COALITION (9/15/13)

The Northern California Tribal Court Coalition ("NCTCC") offers this comment in response to the Commission's tentative recommendation regarding California's proposed adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (the "Act"). The NCTCC is a coalition of the tribal courts of five federally-recognized Indian tribes – the Hoopa Valley Tribe, the Karuk Tribe, the Smith River Rancheria, the Trinidad Rancheria, and the Yurok Tribe. These tribes have a combined membership of more than 12,000 tribal citizens.

The NCTCC supports the proposal of the Tribal Court/State Court Forum, dated August 22, 2013. The Forum's proposed addition to the Act is a workable solution to a number of issues which may arise when two sovereigns both potentially have jurisdiction over an adult guardianship proceeding.

We understand that concerns have been expressed about due process protections available in tribal forums. It is true that there are limited remedies available to persons alleging a lack of due process protections in a tribal court proceeding.[1] However, it does not necessarily follow that the due process protections themselves are limited. Both of the tribes in NCTCC that currently issue adult guardianship orders have due process protections built into their respective codes. In general, tribes have a strong interest in providing a fair forum for actions involving their members, since both the tribal governments responsible for enacting laws and the tribal courts responsible for applying them must answer to the tribal membership at election time. While concerns about limited due process in tribal courts are not new, they are not well-founded; a review in 2000 of all individual rights claims in reported tribal court decisions from 1986-1998 found such allegations to be "grossly overstated, if not entirely misplaced."[2] In addition, while Congress did include many constitutional protections in the Indian Civil Rights Act,[3] it chose to omit others for fear of interfering with tribal sovereignty.[4]

It should also be noted that, of the 38 states which have adopted the Act, only two have chosen to exclude tribes from the definition of "state." California has more Indian tribes within its borders than any state except Alaska,[5] and in adopting a number of other uniform laws, it has chosen to include those tribes within the definition of "state."[6] Those uniform acts address subjects wherein due process is every bit as significant a consideration as in the subject of this Act. We are not aware of any systemic problems arising from those inclusions.

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[1] *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.
[2] M. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham Law Review 479, 582 (2000).
[3] 25 U.S.C. § 1301 *et seq*.
[4] See generally section 14.04[2] of F. S. Cohen, *Cohen's Handbook of Federal Indian Law*, 2012 edition.
[5] 77 Fed. Reg. 47868.
[6] Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (Fam. Code § 6400 *et seq*.); Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code § 3400 *et seq*.); Uniform Interstate Family Support Act (Fam. Code § 4900 *et seq*.); Foreign Country Money Judgment Act (C.C.P. § 1713 *et seq*.); Interstate and International Depositions and Discovery Act (C.C.P. § 2029.100 *et seq*.).

EMAIL FROM JEDD PARR, CALIFORNIA INDIAN LEGAL SERVICES (NOVEMBER 13, 2013)

I attended the Commission's Oct. 10th meeting in Davis on behalf of the Northern California Tribal Court Coalition. During the discussion of tribal issues, I suggested that the Commission should consider an approach similar to that taken in Indian child welfare cases. In such cases, while a state court may initially have jurisdiction over an Indian child, even (in PL 280 states) one domiciled on a reservation, there is a preference for tribal courts to deal with such internal matters should they wish to do so.

Unfortunately, there wasn't enough time to go into further detail. What I had in mind was something similar to the provisions of Welfare and Institutions Code section 305.5 (incorporated into the Family Code at section 177). Section 305.5 provides that where a tribal court wishes to assume jurisdiction over an Indian child welfare case, the state court shall defer to the tribal court, and shall transfer jurisdiction unless a party opposing tribal jurisdiction demonstrates good cause not to do so. Some possible grounds for establishing good cause are listed in section 305.5 and also in Rule of Court 5.483.

I see from the minutes recently posted for the Oct. 10th meeting that your staff will be preparing a memo which includes an examination of the jurisdictional rules under the UCCJEA. May I suggest that a process similar to that described by Welfare and Institutions Code section 305.5 also be examined? I am not certain that using the UCCJEA as a model would necessarily solve the "dueling jurisdictions" problem, and I believe that problem to be among the most likely to tax the limited resources of state courts, tribal courts, and conservators alike.

If you or your staff would like to discuss this suggestion at all, or how it could be applied in practice, I would be happy to do so. Thank you.

Sincerely,

Jedd Parr, Staff Attorney
California Indian Legal Services

TRIBES AS STATES

Prob. Code § 1982. Definitions [UAGPPJA § 102]

1982. In this chapter:

…

(m) Notwithstanding Section 74, "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

☞ **Staff Note.** The provision above deletes the brackets that had surrounded "a federally recognized Indian tribe" in the Tentative Recommendation.

TERRITORIAL EXCLUSIVITY

☞ **Staff Note.** The proposed legislation below assumes that the definition of "state" in proposed Probate Code Section 1982(m) includes a federally recognized Indian tribe.

Prob. Code § 1991 (amended). Definitions and significant connection factors [UAGPPJA § 201]

1991. (a) In this article:

(1) "Emergency" means a circumstance that likely will result in substantial harm to a proposed conservatee's health, safety, or welfare, and for which the appointment of a conservator of the person is necessary because no other person has authority and is willing to act on behalf of the proposed conservatee.

(2) ~~"Home~~ Except as provided in paragraphs (4) and (5), "home state" means the state in which the proposed conservatee was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a conservatorship order, or, if none, the state in which the proposed conservatee was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

(3) ~~"Significant-connection~~ Except as provided in paragraphs (4) and (5), "significant-connection state" means a state, other than the home state, with which a proposed conservatee has a significant connection other than mere physical presence and in which substantial evidence concerning the proposed conservatee is available.

(4) If a proposed conservatee is a member of a California Indian tribe who resides in California, on the tribe's land or in a county that contains the tribe's land, the tribe is the "home state" and California is a "significant-connection state."

(5) If a proposed conservatee is a member of a California Indian tribe who resides in California but does not reside on the tribe's land or in a county that contains the tribe's land, the tribe is a "significant-connection state" and California is the "home state."

(6) "California Indian Tribe" means a federally recognized Indian tribe with tribal land located in California that has a court system that exercises jurisdiction over proceedings that are substantially equivalent to conservatorship proceedings.

(7) A "tribe's land" and "tribal land" means land that is, with respect to a specific Indian tribe and the members of that tribe, "Indian country" as defined in 18 U.S.C. § 1151.

(b) In determining under Section 1993 and subdivision (e) of Section 2001 whether a proposed conservatee has a significant connection with a particular state, the court shall consider all of the following:

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

(2) The length of time the proposed conservatee at any time was physically present in the state and the duration of any absence.

(3) The location of the proposed conservatee's property.

(4) The extent to which the proposed conservatee has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

Comment. Subdivision (a) of Section 1991 is similar to Section 201(a) of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) ("UAGPPJA"). Revisions have been made to ~~conform~~ :

(1) Conform to California terminology for the proceedings in question. See Section 1982 & Comment (definitions); see also Section 1980 Comment.

(2) Establish non-overlapping "home state" territory for state and tribal courts in California.

Subdivision (b) is similar to Section 201(b) of 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.

Prob. Code § 1995 (amended). Exclusive and continuing jurisdiction [UAGPPJA § 205]

1995. (a) Except 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.

(b) Notwithstanding subdivision (a), if a court of this state has appointed a conservator for a member of a California Indian tribe, a court of that tribe may also appoint a conservator for the member, to exercise powers that were not granted to the conservator appointed in the court of this state.

Comment. Section 1995 is similar to Section 205 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) ("UAGPPJA"). Revisions have been made to ~~conform~~ :

(1) Conform to California terminology for the proceedings in question. See Section 1982 & Comment (definitions); see also Section 1980 Comment.

(2) Permit concurrent state and tribal court jurisdiction in California, so long as the powers granted by the courts do not overlap.

For limitations on the scope of this chapter, see Section 1981 & Comment.

MANDATORY DEFERENCE

☞ **Staff Note.** The proposed legislation below assumes that the definition of "state" in proposed Probate Code Section 1982(m) includes a federally recognized Indian tribe.

ARTICLE 6. FEDERALLY RECOGNIZED INDIAN TRIBE

Prob. Code § 2031 (added). "Indian tribe with jurisdiction"

2031. For the purposes of this article, "Indian tribe with jurisdiction" means a federally recognized Indian tribe that has a court system that exercises jurisdiction over proceedings that are substantially equivalent to conservatorship proceedings.

Comment. Section 2031 is new.

Prob. Code § 2032 (added). Tribal court jurisdiction

2032. Article 2 (commencing with Section 1901) does not apply to a proposed conservatee who is a member of an Indian tribe with jurisdiction.

Comment. Section 2032 is new.

Prob. Code § 2033 (added). Exhaustion of tribal remedies

2033. (a) If a petition for the appointment of a conservator has been filed in a court of this state and a conservator has not yet been appointed, any person entitled to notice of a hearing on the petition may move to dismiss the petition on the grounds that the proposed conservatee is a member of an Indian tribe with jurisdiction. The petition shall state the name of the Indian tribe.

(b) If, after communicating with the named tribe, the court of this state finds that the proposed conservatee is a member of an Indian tribe with jurisdiction, it shall grant the motion to dismiss. In granting the petition, the court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a conservator be filed promptly in the tribal court.

(c) Notwithstanding subdivision (b), the court shall not dismiss the petition if the tribal court expressly declines to exercise its jurisdiction with regard to the proposed conservatee.

Comment. Section 2033 is new.

The second sentence of subdivision (b) is similar to the fourth sentence of Section 1996(b).

PRESUMPTIVE DEFERENCE

☞ **Staff Note.** The proposed legislation below assumes that the definition of "state" in proposed Probate Code Section 1982(m) includes a federally recognized Indian tribe.

ARTICLE 6. FEDERALLY RECOGNIZED INDIAN TRIBE

Prob. Code § 2031 (added). "Indian tribe with jurisdiction"

2031. For the purposes of this article, "Indian tribe with jurisdiction" means a federally recognized Indian tribe that has a court system that exercises jurisdiction over proceedings that are substantially equivalent to conservatorship proceedings.

Comment. Section 2031 is new.

Prob. Code § 2032 (added). Tribal court jurisdiction

2032. Article 2 (commencing with Section 1901) does not apply to a proposed conservatee who is a member of an Indian tribe with jurisdiction.

Comment. Section 2032 is new.

Prob. Code § 2033 (added). Presumptive deference to tribal court jurisdiction

2033. (a) If a petition for the appointment of a conservator has been filed in a court of this state and a conservator has not yet been appointed, any person entitled to notice of a hearing on the petition may move to dismiss the petition on the grounds that the proposed conservatee is a member of an Indian tribe with jurisdiction. The petition shall state the name of the Indian tribe.

(b) If, after communicating with the named tribe, the court of this state finds that the proposed conservatee is a member of an Indian tribe with jurisdiction, it shall grant the motion to dismiss unless it finds good cause to deny the motion. If the petition is granted, the court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a conservator be filed promptly in the tribal court.

(c) In determining whether there is good cause to deny the motion, the court may consider all relevant factors, including, but not limited to, the following:

(1) Any expressed preference of the proposed conservatee.

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

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

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

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

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

(7) The nature and location of the evidence.

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

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

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

(11) The timing of the motion, taking into account the parties' and court's expenditure of time and resources.

(d) Notwithstanding subdivision (b), the court shall not dismiss the petition if the tribal court expressly declines to exercise its jurisdiction with regard to the proposed conservatee.

Comment. Section 2033 is new.

The second sentence of subdivision (b) is similar to the fourth sentence of Section 1996(b).

The factors listed in paragraphs (c)(1)-(10) are drawn from Section 1996(c). Paragraph (c)(11) is similar to a factor considered in determining whether to transfer a child custody case to tribal court under 25 U.S.C. § 1911(b). See also Welf. & Inst. Code § 305.5(c)(2)(B).

PERMISSIVE DEFERENCE

☞ **Staff Note.** The proposed legislation below assumes that the definition of "state" in proposed Probate Code Section 1982(m) includes a federally recognized Indian tribe.

ARTICLE 6. FEDERALLY RECOGNIZED INDIAN TRIBE

Prob. Code § 2031 (added). "Indian tribe with jurisdiction"

2031. For the purposes of this article, "Indian tribe with jurisdiction" means a federally recognized Indian tribe that has a court system that exercises jurisdiction over proceedings that are substantially equivalent to conservatorship proceedings.

Comment. Section 2031 is new.

Prob. Code § 2032 (added). Tribal court jurisdiction

2032. Article 2 (commencing with Section 1901) does not apply to a proposed conservatee who is a member of an Indian tribe with jurisdiction.

Comment. Section 2032 is new.

Prob. Code § 2033 (added). Permissive deference to tribal court jurisdiction

2033. (a) If a petition for the appointment of a conservator has been filed in a court of this state and a conservator has not yet been appointed, any person entitled to notice of a hearing on the petition may move to dismiss the petition on the grounds that the proposed conservatee is a member of an Indian tribe with jurisdiction. The petition shall state the name of the Indian tribe.

(b) If, after communicating with the named tribe, the court of this state finds that the proposed conservatee is a member of an Indian tribe with jurisdiction, it may grant the motion to dismiss if it finds that there is good cause to do so. If the petition is granted, the court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a conservator be filed promptly in the tribal court.

(c) In determining whether there is good cause to grant the motion, the court may consider all relevant factors, including, but not limited to, the following:

(1) Any expressed preference of the proposed conservatee.

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

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

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

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

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

(7) The nature and location of the evidence.

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

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

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

(11) The timing of the motion, taking into account the parties' and court's expenditure of time and resources.

(d) Notwithstanding subdivision (b), the court shall not dismiss the petition if the tribal court expressly declines to exercise its jurisdiction with regard to the proposed conservatee.

Comment. Section 2033 is new.

The second sentence of subdivision (b) is similar to the fourth sentence of Section 1996(b).

The factors listed in paragraphs (c)(1)-(10) are drawn from Section 1996(c). Paragraph (c)(11) is similar to a factor considered in determining whether to transfer a child custody case to tribal court under 25 U.S.C. § 1911(b). See also Welf. & Inst. Code § 305.5(c)(2)(B).

COMMUNICATION

☞ **Staff Note.** The proposed legislation below assumes that the definition of "state" in proposed Probate Code Section 1982(m) includes a federally recognized Indian tribe.

Prob. Code § 1821 (amended). Content of petition to appoint conservator

1821. …

(k) The petition shall state, so far as is known to the petitioner, whether or not the proposed conservatee is a member of a federally recognized Indian tribe. If so, the petition shall state the name of the tribe, the state in which the tribe is located, whether the proposed conservatee resides on tribal land, and whether the proposed conservatee is known to own property on tribal land. For the purposes of this subdivision, "tribal land" means land that is, with respect to a specific Indian tribe and the members of that tribe, "Indian country" as defined in 18 U.S.C. § 1151.

Comment. Section 1821 is amended to provide that the petition include specified information about a proposed conservatee who is known to be a member of a federally recognized Indian tribe.

ARTICLE 6. FEDERALLY RECOGNIZED INDIAN TRIBE

Prob. Code § 2031 (added). "Indian tribe with jurisdiction"

2031. For the purposes of this article, "Indian tribe with jurisdiction" means a federally recognized Indian tribe that has a court system that exercises jurisdiction over proceedings that are substantially equivalent to conservatorship proceedings.

Comment. Section 2031 is new.

Prob. Code § 2032 (added). Tribal court jurisdiction

2032. Article 2 (commencing with Section 1901) does not apply to a proposed conservatee who is a member of an Indian tribe with jurisdiction.

Comment. Section 2032 is new.

STATUS QUO

☞ **Staff Note.** The proposed legislation below assumes that the definition of "state" in proposed Probate Code Section 1982(m) includes a federally recognized Indian tribe.

ARTICLE 6. FEDERALLY RECOGNIZED INDIAN TRIBE

Prob. Code § 2031 (added). "Indian tribe with jurisdiction"

2031. For the purposes of this article, "Indian tribe with jurisdiction" means a federally recognized Indian tribe that has a court system that exercises jurisdiction over proceedings that are substantially equivalent to conservatorship proceedings.

Comment. Section 2031 is new.

Prob. Code § 2032 (added). Tribal court jurisdiction

2032. Article 2 (commencing with Section 1901) does not apply to a proposed conservatee who is a member of an Indian tribe with jurisdiction.

Comment. Section 2032 is new.

REGISTRATION

☞ **Staff Note.** The proposed legislation below assumes that the definition of "state" in proposed Probate Code Section 1982(m) includes a federally recognized Indian tribe.

Prob. Code § 2017 (added). [California] tribal court documents

2017. Notwithstanding any other provision of this article:

(a) A conservatorship order of a court of a federally recognized Indian tribe [located in California] can be registered under Section 2011, 2012, or 2013, regardless of whether the conservatee resides in California.

(b) The effect of a conservatorship order of a court of a federally recognized Indian tribe [located in California], which is registered under Section 2011, 2012, or 2013, is not contingent on whether the conservatee resides in California.

(c) Paragraphs (3) and (4) of subdivision (a) of Section 2015 do not apply to a conservatorship order of a court of a federally recognized Indian tribe [located in California].

Comment. Section 2016 provides that the residence-based limitations on registration of a conservatorship order, in Sections 2011, 2012, 2013, and 2015, do not apply to a conservatorship order of a court of a federally recognized Indian tribe [located in California].

Prob. Code § 2023 (amended). Court rules and forms

2023. (a) On or before January 1, 2016, the Judicial Council shall develop court rules and forms as necessary for the implementation of this chapter.

(b) The materials developed pursuant to this section shall include, but not be limited to, both of the following:

(1) A cover sheet for registration of a conservatorship under Section 2011, 2012, or 2013. The cover sheet shall explain that a proceeding may not be registered under Section 2011, 2012, or 2013 if the proceeding relates to a minor. The cover sheet shall further explain that a proceeding in which a person is subjected to involuntary mental health care may not be registered under Section 2011, 2012, or 2013. The cover sheet shall require the conservator to initial each of these explanations. The cover sheet shall also include a prominent statement that the conservator of a conservatorship registered under Section 2011, 2012, or 2013 is subject to the law of this state while acting in this state, is required to comply with that law in every respect, including, but not limited to, all applicable procedures, and is not authorized to take any action prohibited by the law of this state. ~~In addition,~~ Except as provided in subdivision (c), the cover sheet shall also prominently state that the registration is effective only while the conservatee resides in another jurisdiction and does not authorize the conservator to take any action while the conservatee is residing in this state. Directly beneath these statements, the cover sheet shall include a signature box in which the conservator attests to these matters.

(2) The form required by paragraph (3) of subdivision (a) of Section 2015. If the Judicial Council deems it advisable, this form may be included in the civil cover sheet developed under paragraph (1).

(c) The materials prepared pursuant to this section shall be consistent with Section 2017.

Comment. Section 2023 directs the Judicial Council to prepare any court rules and forms that are necessary to implement this chapter before it becomes operative.

Subdivision (c) requires that the materials prepared by the Judicial Council be consistent with Section 2017, relating to the registration of a conservatorship order of a court of a federally recognized Indian tribe [in California].