Study L-750 September 25, 2012

Memorandum 2012-40

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Comparison of California Law on Elective Review of a Conservatorship and Related Issues

Prior memoranda in this study have described specific elements of California conservatorship law, to aid in assessing the potential consequences of adopting the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA") in California. See, e.g., Memorandum 2011-31 (*Comparison of California Conservatorship Law with Comparable Law in Neighboring States*) and the Second Supplement to Memorandum 2011-31 (*Comparison of California Law on Periodic Review of a Conservatorship with Comparable Law in Neighboring States*).

This memorandum first examines California law governing "elective" review of a conservatorship (i.e., review that is initiated by motion of the court or the petition of an interested person, rather than occurring automatically as a result of laws mandating periodic review).

Next, the memorandum summarizes the law on elective review of a conservatorship in the states neighboring California.

Finally, the memorandum discusses how elective review could address some policy concerns about the effect of transferring a conservatorship to California under UAGPPJA.

Note that this memorandum focuses on what is known informally as a "Probate Code conservatorship" or simply a "probate conservatorship" — a civil proceeding pursuant to Probate Code Section 1400 *et seq.*, in which a court has appointed someone to assist an adult who is either incapable of caring for himself or herself, or incapable of handling his or her own financial matters, or both. The memorandum does not discuss any special types of conservatorships or civil commitments of adults, such as a limited conservatorship for a developmentally disabled adult, or a conservatorship of a "gravely disabled"

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The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

person under the Lanterman-Petris-Short Act. Issues relating to these special types of conservatorships will be addressed in a future memorandum.

As discussed in prior memoranda, California conservatorship law uses different terminology than is used in UAGPPJA. For convenience, this memorandum uses the California terminology, *except when specifically describing the law of other states*. Except as otherwise indicated, all statutory references in this memorandum are to the California Probate Code.

NOTE ON THE APPLICATION OF CALIFORNIA LAW AFTER TRANSFER

Before turning to the details of California law on elective review of a conservatorship, it is worth noting that UAGPPJA should not have any continuing regulatory effect on a conservatorship after it has been transferred. Once the transfer is completed, California law would govern the transferred conservatorship.

That general understanding of the limited effect of UAGPPJA was confirmed through staff inquiries to Prof. David English (the reporter for UAGPPJA) and Eric Fish (ULC Legislative Counsel). Eric Fish stated: "[W]hen the [conservatorship] is transferred into California, it will become subject to all of California's rules." See Memorandum 2012-35, p. 10.

In response to a specific question about whether UAGPPJA would have any effect on court review of a conservatorship, after a completed transfer to California, Mr. Fish replied: "As for re-litigation, the act is designed to facilitate transfer only. If issues are raised after the transfer occurs, they would be reviewed under the accepting state procedures." *Id*. at 12. Professor English concurred:

> Following the new appointment under [UAGPPJA] Article 3, the [conservatee] or any other person with standing may file an action to contest a finding of incapacity or choice of a … conservator. The burdens of proof would presumably be whatever is provided under local law.

Id.

In prior memoranda, the staff raised the possibility of codifying this understanding, if UAGPPJA is adopted in California, in order to avoid misunderstanding of the relationship between UAGPPJA and California law:

> Although the staff expected this interpretation, the language of UAGPPJA is not as clear on this point as it could be. Greater clarity

on this matter seems advisable if California is to adopt the uniform act.

For example, California's version of the uniform act could ***expressly state*** **that if a proceeding is transferred to California from another state under the act, the proceeding is thereafter subject to California conservatorship procedures and other applicable California law**. Such a statement would be fully consistent with the intent of UAGPPJA, and thus would not conflict with the goal of uniformity.

Id. at 11 (emphasis in original).

The Commission has provisionally approved that approach:

> The Commission tentatively decided that if it proposes a version of UAGPPJA for adoption in California, its version should expressly state that after a proceeding relating to an incapacitated adult is transferred to California, the proceeding is henceforth subject to California law and will be treated as a California conservatorship.

Minutes (Aug. 2011), p. 5.

ELECTIVE REVIEW OF A PROBATE CONSERVATORSHIP UNDER CALIFORNIA LAW

In California, the statutory law governing elective review of a probate conservatorship is generally divided into two bodies, each providing for review of a different aspect of a conservatorship:

- Sections 1861-1863 govern the procedure for termination of a conservatorship.
- Sections 2650-2655 govern the procedure for removal of a conservator.

Those statutes, and a handful of related provisions, are discussed below.

Termination of Conservatorship

Sections 1861 to 1863 provide a procedure for termination of a conservatorship, on the grounds that it is no longer needed or that the grounds for establishment of the conservatorship no longer exist. In effect, this provides a mechanism for review of a conservatee's capacity.

Petition

A petition for the termination of a conservatorship may be filed by the conservator, the conservatee, the conservatee's spouse, domestic partner, or

relative, or any other interested person. Section 1861. For the purposes of conservatorship law, "interested person" is defined in Section 1424, as follows:

> "Interested person" includes, but is not limited to:
> (a) Any interested state, local, or federal entity or agency.
> (b) Any interested public officer or employee of this state or of a local public entity of this state or of the federal government.

The petition must "state facts showing that the conservatorship is no longer required." Section 1861(b).

Notice

The petitioner must give notice of the hearing pursuant to the general notice provisions governing conservatorship proceedings. See Section 1862 (incorporating the notice requirements of Sections 1460-1469). Notice must be given, at least 15 days before the hearing date, to the conservator, conservatee, the spouse or domestic partner of the conservatee, and any person who has requested notice pursuant to a specified procedure. See Section 1460(a)-(b). Under special circumstances, notice may also need to be given to the Veterans Administration. See Section 1461.5.

Hearing and Judgment

A hearing on a petition for termination of a conservatorship is conducted and determined "according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded by the conservatee." Section 1863(a). The express mention of the right to a jury trial establishes an exception to the default rule that there is no right to a jury in conservatorship proceedings. See Section 1452 ("Except as specifically provided in this division, there is no right to trial by jury in proceedings under this division.").

The conservator, conservatee, spouse, domestic partner, relative or friend of the conservatee, and any interested person may appear to support or oppose the petition. *Id*.

Standard of Proof

In order to terminate an existing conservatorship the court must determine "that the conservatorship is no longer required or that grounds for establishment of a conservatorship of the person or estate, or both, no longer exist." See Section 1863(c).

Although the Probate Code does not directly state who bears the burden of proof in a termination hearing, the law does provide that "the court shall determine the matter according to the law and procedure relating to the trial of civil actions…." Section 1863(a). Presumably, that broad incorporation of civil law and procedure encompasses the Evidence Code. (Even without that express incorporation of civil trial procedures, the Evidence Code would probably apply by its own terms. See Evid. Code § 300 ("Except as otherwise provided by statute, this code applies in every action before the … superior court….").)

If so, then the petitioner bears the burden of proof. See Evid. Code § 500 ("Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.")

The grounds for termination of a conservatorship would need to be proven by a preponderance of the evidence. See Evid. Code § 115.

Timing

There does not appear to be any fixed rule on when or how often a petition for termination of a conservatorship may be filed.

However, conservatorship law does include a special provision governing vexatious litigation, which expressly applies to a petition for termination of a conservatorship. Section 1970 provides:

> (a) The Legislature finds that unwarranted petitions, applications, or motions other than discovery motions after a conservatorship has been established create an environment that can be harmful to the conservatee and are inconsistent with the goal of protecting the conservatee.
>
> (b) Notwithstanding Section 391 of the Code of Civil Procedure, if a person other than the conservatee files a petition for termination of the conservatorship, or instruction to the conservator, that is unmeritorious or intended to harass or annoy the conservator, and the person has previously filed pleadings in the conservatorship proceedings that were unmeritorious or intended to harass or annoy the conservator, the petition shall be grounds for the court to determine that the person is a vexatious litigant for the purposes of Title 3A (commencing with Section 391) of Part 2 of the Code of Civil Procedure. For these purposes, the term "new litigation" shall include petitions for visitation, termination of the conservatorship, or instruction to the conservator.

As can be seen, the Legislature has expressed concern about the harmful effect of excessive conservatorship litigation and has imposed a fairly strict standard for policing the matter: If a person other than the conservatee files *two* unmeritorious petitions for termination, *apparently without any time limitation*, that fact alone seems to be grounds for finding the person to be a vexatious litigant. Compare Code Civ. Proc. § 391(b)(1) ("vexatious litigant" includes person who brings at least *five* unsuccessful litigations *in seven-year period*).

Removal of Conservator

Sections 2650 to 2655 provide a procedure for removal of a conservator for any of the following causes:

> (a) Failure to use ordinary care and diligence in the management of the estate.
> (b) Failure to file an inventory or an account within the time allowed by law or by court order.
> (c) Continued failure to perform duties or incapacity to perform duties suitably.
> (d) Conviction of a felony, whether before or after appointment as guardian or conservator.
> (e) Gross immorality.
> (f) Having such an interest adverse to the faithful performance of duties that there is an unreasonable risk that the guardian or conservator will fail faithfully to perform duties.
> (g) In the case of a guardian of the person or a conservator of the person, acting in violation of any provision of Section 2356.
> (h) In the case of a guardian of the estate or a conservator of the estate, insolvency or bankruptcy of the guardian or conservator.
> (i) In any other case in which the court in its discretion determines that removal is in the best interests of the ward or conservatee; but, in considering the best interests of the ward, if the guardian was nominated under Section 1500 or 1501, the court shall take that fact into consideration.

Section 2650. See also Section 2356 (express limitations on conservator powers).

The procedures for a petition to remove a conservator are largely similar to those governing a petition to terminate a conservatorship.

Petition

A petition for the removal of a conservator may be filed by the conservatee, the conservatee's spouse, domestic partner, relative or friend, or any other interested person. Section 2651. Again, "interested person" is defined in Section 1424.

The petition must "state facts showing cause for removal." Section 2651.

Notice

The petitioner must give notice of the hearing pursuant to the general notice provisions governing conservatorship proceedings. See Section 2652 (incorporating the notice requirements of Sections 1460-1469). Notice must be given, at least 15 days before the hearing date, to the conservator, conservatee, the spouse or domestic partner of the conservatee, and any person who has requested notice pursuant to a specified procedure. See Section 1460(a)-(b).

Hearing and Judgment

While a hearing to *terminate* a conservatorship is conducted and determined "according to the law and procedure relating to the trial of civil actions," the staff could not find an equivalent provision specifically governing a hearing to *remove* a conservator.

However, there is a general provision with a similar effect that governs all proceedings under the Probate Code:

> Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions, including discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.

Section 1000.

Because that provision makes no mention of the right to a jury trial, it would appear that there is no right to jury in a hearing for *removal* of a conservator. See Section 1452 ("Except as specifically provided in this division, there is no right to trial by jury in proceedings under this division.").

If the court removes a conservator for cause, it shall award costs, including attorney's fees, to the petitioner (unless the court finds that the conservator acted in good faith, based on the best interests of the conservatee). Section 2653(c)(1). Those costs may not be charged to the conservatee's estate. The conservator is personally liable. Section 2653(c)(2).

Standard of Proof

If the court determines that "cause for removal exists," it may remove a conservator and make related orders winding up the conservator's

responsibilities. See Section 2653(b). See also Section 2650 (causes for removal), 2655 (removal for contempt).

Although Section 2653 does not expressly provide that the rules of civil practice govern a hearing on a petition to remove a conservator, Section 1000 states a similar rule. Consequently, the Evidence Code provisions on the burden of proof probably apply. (Even without any express incorporation of civil trial procedures, the Evidence Code would probably apply by its own terms. See Evid. Code § 300 ("Except as otherwise provided by statute, this code applies in every action before the … superior court….").)

If so, then the petitioner bears the burden of proof. See Evid. Code § 500 ("Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.")

The grounds for removal of a conservator would need to be proven by a preponderance of the evidence. See Evid. Code § 115.

Timing

There does not appear to be any fixed rule on when or how often a petition may be filed for removal of a conservator.

Moreover, it is not clear that the special conservatorship provision on vexatious litigation, discussed above, applies to a petition for removal of a conservator. By its terms, Section 1970 addresses "a petition for termination of the conservatorship, or *instruction* to the conservator." (Emphasis added.) The reference to a petition for "instructions" probably refers to procedures used by a conservator to seek the court's approval and instructions before undertaking certain types of actions. See, e.g., Section 2359 (petition for authority and instructions relating to certain property transactions). A petition for removal of a conservator for cause is probably not intended to be included within the reference to a petition for instructions.

Summary

- California law provides procedures that can be used to petition for (1) termination of a conservatorship (on the grounds that the conservatee does not "need" the conservatorship) or (2) removal of a conservator (for specified breaches of duty or changes in circumstances).

- These petitions may be filed by the conservator, conservatee, and other interested persons. Notice of the hearing is provided to those persons. Those persons may appear at the hearing in support of or opposition to the petition.
- In general, the hearings are governed by the procedures governing civil trials. In a hearing for termination of a conservatorship, the conservatee has the right to a jury trial. This does not appear to be the case in a hearing to remove a conservator.
- In each type of proceeding, the petitioner bears the burden of proving the necessary grounds for granting the petition, by a preponderance of the evidence.
- The staff did not find any fixed limitation on the timing or frequency of the petition proceedings. However, a petition for termination of a conservatorship is subject to a special and strict provision governing vexatious litigation.

ELECTIVE REVIEW OF A PROBATE CONSERVATORSHIP IN NEIGHBORING STATES

California's system for elective review of a conservatorship differs in some respects from comparable processes used in Arizona, Nevada, and Oregon. The processes used in those states are described below, in the order listed.

In preparing the discussion of the law in neighboring states, the staff benefitted greatly from research conducted by two U.C. Davis Law School student externs, Heather Cantua and Christopher Magaña. The staff is very grateful for their assistance.

ELECTIVE REVIEW IN ARIZONA

In Arizona, someone who has been appointed to assist an incapacitated individual with personal care is known as a "guardian," and the incapacitated individual is known as the "ward." See Ariz. Revised Statutes (hereafter "ARS") § 14-5101(8).

A "conservator" is appointed for an "incapacitated person" who "is unable to manage the person's estate and affairs effectively for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance" See ARS §§ 14-5101(1) ("incapacitated person"), 14-5401(2) (appointment of conservator).

Petition

A petition to terminate a guardianship may be filed by the ward. ARS § 14-5307(B). The petition may be communicated by an informal letter. *Id*. Interference with the transmission of such a petition is contempt of court. *Id*.

A petition to remove a guardian may be filed by the ward or any person interested in the ward's welfare. ARS § 14-5307(A). The court may also act to remove a guardian on its own initiative. Id.

A petition to terminate a conservatorship may be filed by the "protected person, the conservator or any other interested person." ARS § 14-5430(A).

A petition to remove a conservator may be filed by any person interested in the estate or affairs of a person for whom a conservator has been appointed. ARS § 14-5416(A)(4).

Notice

The staff could not find any statute specifically addressing who must receive notice of a motion to terminate a guardianship. It is *possible* that notice must be given to the same people who would receive notice of a petition to appoint a guardian. See ARS § 14-5307(E) (requiring that court apply "the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian"). If so, notice must be given to the ward, the ward's spouse, parents, and adult children, the guardian, and any person who has filed a request for notice. ARS § 14-5309(A). There is no specific mention of a ward's domestic partner.

Similarly, the staff could not find any statute specifically addressing who must receive notice of a motion to terminate a conservatorship. Again, it seems *possible* that notice must be given to the same people who would receive notice of a petition to appoint a conservator. See ARS § 14-5415(E) (requiring that court apply "the same procedures to safeguard the rights of the protected person that apply to a petition for appointment of a conservator").

If so, notice must be given to the protected person and that person's spouse, parents, and adult children, the conservator, and any person who has filed a request for notice. ARS § 14-5405(A). Again, there is no specific mention of a ward's domestic partner.

The provision governing notice of a petition for appointment of a guardian also applies to a proceeding to remove a guardian. See ARS § 14-5309(A)

(requiring notice to ward, the ward's spouse, parents, and adult children, the guardian, and any person who has filed a request for notice).

Similarly, the provision governing notice of a petition for appointment of a conservator also applies to a proceeding to remove a conservator. See ARS § 14-5405(A) (requiring notice to protected person, the protected person's spouse, parents, and adult children, the conservator, and any person who has filed a request for notice).

Hearing

In a proceeding to terminate a guardianship or remove a guardian, the ward shall be afforded the "same procedures" that are afforded in a proceeding to appoint a guardian:

> Before substituting a guardian, accepting the resignation of a guardian or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send an investigator to the residence of the present guardian and to the place where the ward resides or is detained to observe conditions and report in writing to the court.

ARS § 14-5307(E).

Similar, but less detailed, language governs a proceeding to terminate a conservatorship:

> A protected person seeking termination [of a conservatorship] is entitled to the same rights and procedures as in an original proceeding for a protective order.

ARS § 14-5430(A). There is no equivalent provision relating to a proceeding to remove a conservator.

What procedures govern the appointment of a guardian (and therefore apply to a proceeding to remove a guardian or terminate a guardianship)? The court shall set a hearing; the alleged incapacitated person is entitled to present evidence and cross-examine witnesses; the alleged incapacitated person may be represented by counsel and is entitled to a jury trial; the alleged incapacitated person shall be interviewed by a court investigator and examined by a court-appointed physician, psychologist, or registered nurse who is qualified to assess capacity; the hearing may be closed on the request of the alleged incapacitated person. ARS § 14-5303.

Similar procedures govern a proceeding to appoint a conservator (or terminate a conservatorship), except that there does not appear to be a right to a jury trial. ARS § 14-5407.

Standard of Proof

There is no express standard governing a decision to terminate a guardianship. Presumably, the court must find that the ward is no longer incapacitated. See ARS § 14-5307(B).

In order to remove a guardian, the court must find that it would be in the best interests of the ward. "The court does not need to find that the guardian acted inappropriately to find that the substitution is in the ward's best interest." ARS § 14-5307(A).

There is no provision that expressly states who bears the burden of proof in a proceeding to terminate a guardianship. However, as discussed above, the ward is entitled to the same rights and procedures that apply in the initial appointment proceeding. In an appointment proceeding, the petitioner must prove incapacity by clear and convincing evidence. ARS § 13-5304. It is therefore possible that there is a similarly strong presumption of capacity in a proceeding to terminate a guardianship. The staff found no cases or secondary sources addressing that issue. Nor did the staff find guidance on the burden of proof in a proceeding to remove a guardian.

In order to terminate a conservatorship, the court must find that the protected person's disability has ceased:

> The court, on determining after notice and a hearing that the minority or disability of the protected person has ceased, shall terminate the conservatorship unless the court has continued the conservatorship or other protective order pursuant to section 14-5401, subsection B.

ARS § 14-5430(B). See also ARS § 14-5401 (continuation of conservatorship of minor after achieving age of majority).

Although the same rights and procedures apply in a proceeding to terminate a conservatorship that apply in a proceeding to appoint a conservator, that does not provide any guidance as to the burden of proof in a termination proceeding. Unfortunately, the staff could not find any guidance on the burden of proof when appointing a conservator.

Nor did the staff find guidance on the burden of proof in a proceeding to remove a conservator.

Timing

The staff could not find any provision that limits the timing or frequency of a petition for review of a guardianship *that is filed by a ward*. However, a guardianship petition may not be brought *by a person other than the ward* during the year following the initial adjudication of incapacity. See ARS § 14-5307(C)-(D).

The staff did not find any timing constraints on a petition for review of a conservatorship.

Summary of Arizona Law

- Arizona law provides procedures that can be used to petition for (1) termination of a guardianship or conservatorship or (2) removal of a guardian or conservator.
- Apparently, a petition for termination of a guardianship can only be filed by a ward. A petition for termination of a conservatorship or the removal of a guardian or conservator can be filed by any interested person.
- In a proceeding for termination of a guardianship or conservatorship, or the removal of a guardian, the "same rights and procedures" shall apply as those that govern an initial appointment proceeding. In a guardianship proceeding, this includes the right to a jury trial.
- The burden of proof is not entirely clear. It is *possible* that a strong presumption of capacity applies in a proceeding to terminate a guardianship.
- There do not seem to be any limits on when a ward may petition for elective review of a guardianship. Nor did the staff find any limits on when a conservatorship petition may be filed. However, a person other than the ward may not file a guardianship petition during the year that follows an initial determination of incapacity.

ELECTIVE REVIEW IN NEVADA

In Nevada, the term "ward" is used to refer to a protected person. See Nevada Revised Statutes (hereafter "NRS") § 159.027. A person appointed to manage a ward's person, estate, or person and estate is referred to as a "guardian." NRS § 159.017.

Subject to exceptions not relevant here, Nevada law provides that:

> Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes,

> administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses.

NRS § 122A.200. Consequently, any statutory reference to a "spouse" that is discussed below, should be read to apply equally to a domestic partner.

Petition

A petition for termination or modification of a guardianship may be filed by the ward, the guardian, or "another person." NRS § 159.1905(1). The staff could not find any authority construing the meaning of "another person."

A petition for removal of a guardian may be filed by the ward, the ward's spouse, a relative within the second degree of consanguinity (i.e., parent, grandparent, child, grandchild, sibling), a public guardian, or "any other interested person." NRS § 159.1853(1).

Notice

Once a petition to terminate a guardianship or remove a guardian has been filed, the court will serve a "citation" (which serves a function similar to a subpoena) on the guardian and all other interested persons. NRS §§ 159.1855(1), 159.1905.

There is also a general notice provision, which by its terms applies to a "guardianship proceeding" (which is not defined). NRS § 159.034. It requires the petitioner to give notice of the time and place of a hearing to each "interested person," any person entitled to notice under the guardianship law, any person who has filed a request for notice, the "proposed guardian," and "[t]hose persons entitled to notice if a proceeding were brought in the proposed ward's home state." The staff is not entirely certain that this provision was intended to apply to a termination or removal proceeding. It is phrased in a way that suggests it was intended for use in an appointment proceeding (it refers to the *proposed* guardian and *proposed* ward). However, there is no statutory language or other authority expressly limiting its application to appointment proceedings.

Hearing

The citation that the court serves on the guardian and all interested persons requires them to appear and show cause why the petition should not be granted. NRS §§ 159.1855(1), 159.1905(4).

The staff did not find any other useful guidance on the procedure used in conducting the hearing.

Standard of Proof

In order to terminate a guardianship, "[t]he petitioner has the burden of proof to show by clear and convincing evidence that the termination or modification of the guardianship of the person, of the estate, or of the person and estate is in the best interests of the ward." NRS § 159.1905(3).

Grounds for removal include the best interests of the protected person and various specified performance breaches. NRS § 159.185.

The staff could not find any authority on who bears the burden of proof as to the grounds for removal of a guardian or what quantum of proof is required.

Timing

The staff could not find any provision limiting the timing or frequency of a petition for termination of guardianship or removal of a guardian.

However, there is provision barring a petitioner who files an unsuccessful removal petition from filing another petition for removal of the guardian (barring a material change of circumstances). NRS § 159.1853(3).

Also, Nevada has a special vexatious litigant provision for guardianship proceedings, which is very similar to the California provision discussed earlier. A person may be found to be a vexatious litigant merely for filing a petition which is "without merit" after having previously file an unmeritorious pleading in a guardianship proceeding. See NRS § 159.0486.

Summary of Nevada Law

- Nevada law provides procedures that can be used to petition for (1) termination of a guardianship or (2) removal of a guardian.
- A petition for termination of a guardianship can be filed by the ward, the guardian, or "another person." A petition to remove a guardian can be filed by the ward, the ward's spouse, a relative within the second degree of consanguinity, or "any other interested person."
- The court shall issue a citation to the guardian and all interested persons, compelling them to appear and show cause why the petition should not be granted. It is not certain whether another notice provision, which is applicable to a "guardianship proceeding" also applies.

- In a proceeding for termination of a guardianship, the petitioner bears the burden of proving, by clear and convincing evidence, that termination would be in the best interests of the ward. There is no guidance on the burden or required quantum of proof in a proceeding for removal of a guardian.
- There do not appear to be any general limits on when or how often a petition for elective review may be filed. However, a person who files an unsuccessful petition for removal of a guardian is barred from filing another. Also, Nevada imposes a strict vexatious litigant rule in guardianship proceedings, that is similar to the rule in California.

ELECTIVE REVIEW IN OREGON

In Oregon, a "guardian" or "conservator" may be appointed for a "protected person." See Oregon Revised Statutes (hereafter "ORS") § 125.005(1), (4), (7). A guardian assists the protected person with personal care. ORS § 125.315. A conservator assists with management of the protected person's estate. ORS §§ 125.420-125.450.

The term "fiduciary" may be used to refer to either a guardian or a conservator. ORS § 125.005(2). The term "protective proceeding" may be used to refer to either a guardianship or a conservatorship. ORS § 125.005(9). See also ORS § 125.010 (protective proceedings generally).

Petition

The court may consider removing a fiduciary or terminating a protective proceeding on its own motion or on the motion of any person who has standing to object in a protective proceeding. ORS § 125.085.

Such persons include:

> Any person who is interested in the affairs or welfare of a … protected person …, including but not limited to:
> (a) Any person entitled to receive notice under ORS 125.060.
> (b) Any stepparent or stepchild of the respondent or protected person.
> (c) Any other person the court may allow.

ORS § 125.075(1). Persons who are entitled to notice under Section 125.060 (and are therefore entitled to make a motion or objection in an elective review proceeding) are discussed below, under "Notice."

Notice

A person making a motion to remove a fiduciary or terminate a protective proceeding must give notice to the fiduciary, the protected person, any person who has requested notice, certain public entities (in specified circumstances), and "[a]ny other person that the court requires." ORS § 125.060(3).

Hearing

Those persons who may file a petition for elective review (described above under "Petition") may also present objections to a petition that has been filed. ORS § 125.075.

The court *may* hold a hearing on any petition in a protective proceeding, but *must* hold a hearing if any objection is filed in response to the petition. ORS § 125.080.

The protected person is entitled to appear at the hearing. ORS § 125.080(3).

The court may "[c]ompel the attendance of any person, including respondents, protected persons, fiduciaries and any other person who may have knowledge about the person or estate of a respondent or protected person. The court may require those persons to respond to inquiries and produce documents that are subject to discovery." ORS § 125.025(3).

Standard of Proof

Grounds for terminating a protective proceeding include, in relevant part:

> (b) The appointment of a fiduciary or other protective order was made because the protected person was incapacitated, and the protected person is no longer incapacitated.
>
> (c) The appointment of a fiduciary or other protective order was made because the protected person was financially incapable, and the protected person is no longer financially incapable….
>
> …
>
> (e) The best interests of the protected person would be served by termination of the proceedings.

ORS § 125.090(2). See also ORS § 125.535 (estate exhausted).

In a proceeding to terminate a protective proceeding *that is opposed by the fiduciary*, the fiduciary "has the burden of proving by clear and convincing evidence that a protected person continues to be incapacitated or financially incapable…." ORS § 125.090(1). That section is silent on who bears the burden of proof if the petition is unopposed, or is opposed by a person other than the fiduciary.

However, there is another provision that might fill that gap. Oregon Revised Statutes Section 125.300(2) provides, without qualification: "An adult protected person for whom a guardian has been appointed is not presumed to be incompetent." In other words, in cases where the fiduciary does not oppose termination, there may still be a presumption of the protected person's competence.

The staff could not find any statute addressing the burden of proof in a proceeding to remove a fiduciary. Grounds for removal include the best interests of the protected person and various specified performance breaches. See ORS § 125.225.

Timing

There do not appear to be any limits on when or how often elective review may occur.

The staff did not find any special vexatious litigant rules for protective proceedings.

Summary of Oregon Law

- Oregon law provides procedures that can be used to petition for (1) termination of a guardianship or (2) removal of a guardian.
- A petition may be filed by the court on its own motion, or by any person who is interested in the affairs or welfare of the protected person.
- Notice of the petition must be given by the petitioner to the fiduciary, the protected person, any person who has requested notice, and in specified circumstances, to certain public entities.
- In a proceeding for termination of a guardianship, a fiduciary who opposes termination bears the burden of proving, by clear and convincing evidence, that the protected person continues to be incapacitated. It is also possible that a presumption of competence applies generally in any termination proceeding, regardless of who (if anyone) is in opposition.
- There do not appear to be any limits on when or how often a petition for elective review may be filed.

CALIFORNIA LAW COMPARED TO THAT OF NEIGHBORING STATES

As discussed above, California and all of its neighbors permit elective review of an existing conservatorship. Elective review can be used to re-evaluate the conservatee's capacity or to remove and replace a conservator. In general, a

conservatee or any other interested person can petition for elective review at any time. The burden of proof in elective review varies between the surveyed states. California and Nevada presume the *incapacity* of the conservatee. Oregon (and perhaps Arizona) presume the *capacity* of the conservatee.

Arizona, Nevada, and Oregon have all adopted UAGPPJA. Consequently, these states appear to permit post-transfer relitigation of capacity and the choice of conservator. This suggests that there is no fundamental incompatibility between UAGPPJA and post-transfer elective review of a transferred conservatorship. This is true even for Oregon (and perhaps Arizona), which presume the conservatee's capacity when conducting elective review.

If California were to adopt UAGPPJA, without making any modifications to its existing law on elective review, the result would be similar to what appears to be the state of affairs in Arizona, Nevada, and Oregon: At any time after the transfer of a conservatorship to California, the conservatee or other interested person could petition for elective review of capacity or the choice of conservator. This would provide an immediately available vehicle for relitigation of those matters.

In prior memoranda, the staff suggested clarifying the availability of post-transfer review of a transferred conservatorship. See Memorandum 2012-31, pp. 33 (relitigation of capacity), 53-54 (relitigation of choice of conservator). One way to achieve such clarification would be to expressly limit the availability of post-transfer review of a transferred conservatorship, as by requiring proof of changed circumstances or creating a period after transfer during which relitigation would be barred. **If the Commission wishes to pursue that possibility, the staff could present alternative approaches and implementing language at a future meeting.**

However, it is worth noting that none of our neighbors seem to impose any special limitations on the use of elective review when reviewing a conservatorship that is transferred under UAGPPJA. This suggests that such limitations are not necessary to ensure the effective and uniform implementation of UAGPPJA. That view would seem to be consistent with the input that the Commission received from Professor English and Eric Fish, that UAGPPJA is not intended to have any effect after a transfer has been completed. Any post-transfer review would be governed by the law of the jurisdiction that accepted the transfer.

Memorandum 2012-31 also suggested the possibility of creating a special rule on the burden of proof when relitigating the issue of capacity in a transferred conservatorship. In such a case, it might be appropriate to presume the capacity of the conservatee (consistent with the presumption of capacity that California applies when first deciding whether to create a conservatorship), "because the proceeding would be the respondent's first opportunity to have his or her capacity determined pursuant to California law." *Id*. at 33.

As noted above, California's neighbors vary as to the burden of proof of capacity in elective review. This suggests that neither approach (i.e., a presumption of capacity or incapacity) is essential for the effective implementation of UAGPPJA. **The possibility of presuming capacity when conducting elective review of a transferred conservatorship is discussed further below.**

POST-TRANSFER REVIEW AND CONCERNS ABOUT ACCEPTING A UAGPPJA TRANSFER

Prior memoranda identified possible policy concerns about the effect of adopting the UAGPPJA transfer provisions in California. See, e.g., Memorandum 2012-35, pp. 7-10, 15-24. The most significant of those concerns, and the ways in which post-transfer elective review could be used to address them, are discussed below.

Determination of Incapacity

California law governing proof of incapacity is likely to be stricter than the law in some other jurisdictions. Under The Due Process in Competence Determinations Act ("DPCDA"), all persons are rebuttably presumed to "have the capacity to make decisions and to be responsible for their acts or decisions." Section 810(a). A determination that a person lacks capacity must "be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder." Section 810(c); see also Section 811. Incapacity must be proven by clear and convincing evidence. Section 1801(e). For further information on determination of capacity in California, see Memorandum 2011-31, pp. 17-22.

Consequently:

> Under UAGPPJA's transfer process, a case from another state could be "transferred" to California, and California would be

> expected to defer to the other state's determination of incapacity, at least temporarily so as to expedite the transfer process. As a result, a California court might sometimes be required to treat an individual as incapacitated even though the individual would not be considered incapacitated under California law. That would to some extent conflict with California's policy of providing strong protection for personal liberties, imposing conservatorships only where the facts clearly demand that result.
>
> The degree of conflict would depend on the extent to which the other state's capacity standard differs from California's standard. For example, Arizona's standard for appointing someone to assist with personal care seems almost as strong as California's corresponding standard. If a case involving that type of appointment was transferred to California from Arizona, there would be relatively little impingement on California's policy interests. In contrast, Arizona's standard for appointing someone to assist with financial matters appears to be much weaker than California's corresponding standard. If a case involving that type of appointment was transferred to California from Arizona, there would be significant impingement on California's policy interests.

Id. at 16-17.

Post-transfer elective review could help to address that concern. Under existing California law, a conservatee or other interested person can petition the court for termination of a conservatorship, if it is no longer needed or the grounds for the establishment of the conservatorship no longer exist. There appear to be no limits on the timing or frequency of such a petition.

This means that a conservatee or any other interested person could petition a California court for review of the conservatee's capacity, at any time after the transfer of the conservatorship under UAGPPJA. This would provide a relatively expeditious forum for the application of California standards in determining whether the transferred conservatorship is necessary.

Post-transfer review should not delay, complicate, or interfere with the UAGPPJA transfer process. The transfer would go forward under the streamlined procedure proposed in UAGPPJA and only after the transfer is completed would there be an opportunity for elective review. This kind of post-transfer relitigation of capacity is available in all of our neighboring states, all of which have adopted UAGPPJA.

The main shortcoming of existing law on elective review, as a means for applying California law to determine the necessity of a transferred conservatorship, is the burden of proof. In a California proceeding to terminate a

conservatorship, the petitioner must prove the grounds for termination; there is no presumption of the conservatee's capacity. That is a different standard than the one that applies when a conservatorship is first proposed in California. In an initial appointment proceeding, there is a presumption of the proposed conservatee's capacity, which must be overcome with clear and convincing evidence. See Sections 810(a), 1801(e).

This means that post-transfer elective review under existing law is not a perfect solution for the problem discussed above. For example, suppose that a court in another jurisdiction determines, based on a preponderance of the evidence, that a proposed conservatee lacks capacity. The court creates a conservatorship, which is later transferred to California. Elective review would provide a means of reassessing the transferring jurisdiction's determination of incapacity, but the conservatee would not enjoy the strong presumption of capacity that protects a proposed conservatee in California.

As discussed earlier, a prior memorandum suggested a possible solution to that problem: apply the same presumption of capacity that governs the initial appointment of a conservator in California, when first petitioning for termination of a conservatorship that was transferred under UAGPPJA. That would provide an opportunity for the full application of California law and policy to a conservatorship that has been transferred to California.

One possible disadvantage of that approach is that it could invite litigation when a conservatorship is transferred to California. In cases where the question of capacity is a close call, a presumption of capacity would make it easier to contest a conservatorship than it would be without such a presumption. However, such cases are probably in the minority. Most probate conservatorships, established through judicial proceedings, are likely to be appropriate and uncontroversial. Furthermore, in those cases where there is a genuine dispute as to incapacity, it would probably be good policy to provide a transferred conservatee a full opportunity to have the matter decided pursuant to California law.

The application of a presumption of capacity in post-transfer review of a conservatorship transferred under UAGPPJA would not be a novel approach. As noted above, Oregon allows any interested person to petition for termination of a protective proceeding at any time, with a presumption of the protected person's capacity. The same may be true in Arizona. This suggests that such a presumption is not fundamentally incompatible with UAGPPJA.

If the Commission is interested in the approach discussed above (allowing existing law on elective review to apply to a conservatorship transferred under UAGPPJA, with or without the addition of a presumption of capacity), the staff could draft implementing language for consideration at a future meeting.

Choice of Conservator

Another significant policy concern about accepting a UAGPPJA transfer involves the selection of the conservator. In prior memoranda, the staff noted that there are differences between the law of California and other jurisdictions, with regard to the following issues :

- How much weight a court must give to the preference of [the conservatee].
- Whether there are any protections against appointment of a spouse or domestic partner [as conservator] when the marriage or partnership is in the process of breaking up.
- How much flexibility and discretion a court has in the selection process.
- How a court is to treat a domestic partner in the selection process.
- Whether, and, if so, under what conditions, a court may appoint a felon [as conservator].
- Whether, and, if so, under what conditions, a court may appoint a person who is or has been bankrupt or insolvent.
- Whether, and, if so, under what conditions a court may appoint a person who has abused, neglected, or exploited someone else.
- Whether, and, if so, under what conditions a court may appoint a person who has engaged in "gross immorality."
- Whether, and, if so, under what conditions a court may appoint a person who has had a professional or occupational license revoked, canceled, or the equivalent.
- Whether a parent or spouse of [a conservatee] may make an appointment by will.
- Whether a special master or master of the court is used in the selection process.
- The extent to which an appointee can delegate authority to another person without court approval.

Memorandum 2012-35, p. 20.

Consequently:

> transfer of a case to California under UAGPPJA "could mean that Californians would have to accept, at least temporarily, the authority of a person who would not have been selected to serve as

> conservator under California law." … To illustrate this point, the staff gave the following example:
>
> [S]uppose a court in another state appointed an incapacitated person's sister [as conservator], instead of the incapacitated person's domestic partner, because that state's rules do not treat a domestic partner as a family member. Under UAGPPJA's transfer procedure, the sister would remain in charge upon transfer of the proceeding to California, *despite California's policy of treating a domestic partner as equivalent to a spouse and higher in priority than any other relative in the selection process.*

Id. (emphasis added).

As has been discussed previously, the UAGPPJA process itself would seem to provide an opportunity to replace a conservator with a person who is more qualified under California law. UAGPPJA Section 302(f) provides that an accepting court may modify a transferred conservatorship "to conform to the law of this state." The ULC's "General Comment" on UAGPPJA Article 3 explains: "This … is also an appropriate time to change the guardian or conservator if there is a more appropriate person to act as guardian or conservator in the accepting state." See Memorandum 2012-35, p. 21.

In addition, it appears that UAGPPJA does not *permit* a transfer to be completed if the conservator is *ineligible* to serve in the accepting state. See UAGPPJA § 302(d)(2); Memorandum 2012-35, p. 21. (Note that it is not entirely clear what is meant by "ineligible" in this context. **The staff recommends that this question be posed to Mr. Fish, if he is able to join the Commission at its December meeting.**)

However, it is still possible that such issues will not be raised and addressed in the transfer process. If not, post-transfer elective review could provide an expeditious means of addressing the matter.

Under existing California law, a conservatee or other interested person can petition the court for removal of a conservator. There appear to be no limits on the timing or frequency of such a petition, so it could be filed at any time after a UAGPPJA transfer is completed. Thus, the existing elective review process could be used to remove an inappropriate conservator at any time after a transfer.

Post-transfer review should not delay, complicate, or interfere with the UAGPPJA transfer process. The transfer would go forward under the streamlined procedure proposed in UAGPPJA and only after the transfer is completed would there be an opportunity for elective review. This kind of post-

transfer relitigation of the choice of conservator is available in all of our neighboring states, all of which have adopted UAGPPJA.

The existing grounds for removal of a conservator in California permit the court to remove a conservator if doing so is in the best interests of the conservatee. See Section 2650(i). That might provide sufficient latitude for a court to remove a conservator appointed by a transferring state, if another person would have been appointed pursuant to California law. (For example, if Arizona, acting pursuant to its statutory preference scheme, appoints a conservatee's sibling to act as conservator, rather than the conservatee's domestic partner, a California court might conclude that it is in the best interest of the conservatee, to replace the sibling with the domestic partner, in accord with California policy.)

However, it may not be sufficiently clear that the "best interests" standard could be used as a basis for such action. If the Commission wishes to pursue that approach, it might be helpful to add language to make clear that the court has authority to replace a transferred conservator with a person who would be chosen under California law. **Should the staff draft such language, for review at a future meeting?**

The Commission should also consider a related suggestion that the staff made in a prior memorandum. If, after a conservatorship is transferred to California under UAGPPJA, there is a petition to remove the conservator, it might be appropriate to impose a temporary hold on the conservator's ability to make irrevocable decisions. That would allow time for the court to determine whether the conservator is the correct person to be making such decisions, before any irreversible actions are taken. See discussion in Memorandum 2011-31, pp. 52-54. **If the Commission is interested in that possibility, the staff will draft implementing language for later consideration.**

Respectfully submitted,

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