Study L-750 November 17, 2011

Third Supplement to Memorandum 2011-31

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Comments of Alzheimer's Association and Disability Rights California

The Commission has received the following new comments on its study of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (hereafter, "UAGPPJA" or "the uniform act"):

Exhibit p.

- Theresa Renken, Alzheimer's Association (10/6/11) 1
- Michael Stortz and Elizabeth Zirker, Disability Rights California, (10/26/11) 2

As discussed below, these comments reflect quite different views on the proper approach to follow. **The Commission should bear them in mind and strive to balance the competing policy considerations as it proceeds with this study.**

COMMENTS OF ALZHEIMER'S ASSOCIATION

Theresa Renken, State Public Policy Director for the Alzheimer's Association, "urge[s] the CLRC to refrain from *any* modifications to the uniform act, especially in regards to the transfer provisions." Exhibit p. 1 (emphasis added). She explains that Alzheimer's patients and their caregivers must often consider relocating the patient to another state to obtain the best care for the patient. *Id.* As a result, they frequently encounter complex jurisdictional issues. *Id.* The Alzheimer's Association endorses the uniform act "because it provides statutory guidance on jurisdictional issues and facilitates the ease of transfer without imposing additional burdens on already burdened caregivers." *Id.*

Ms. Renken warns that deviating from the transfer procedures of the uniform act would have harmful effects:

> Modifications of these procedures hampers the uniform process that will be understood by lawyers in other states who are transferring wards in or out of California and may inhibit the

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.

> judicial economy that this act aims to achieve. Diverging from what has become the national standard may encourage more litigation, disrupt interstate court communications, and inhibit this act from accomplishing its goals.

Id. As the staff has previously explained, problems like these arose some time ago in the analogous context of a uniform act on child custody, eventually necessitating enactment of federal legislation and promulgation of a new uniform act. See Memorandum 2011-18, pp. 7-9. **That history serves as an important reminder of the potential consequences of deviating from uniformity in the context of this study.**

Ms. Renken further asserts that "[t]o date, 30 jurisdictions have enacted the [UAGPPJA] without modification to the procedures related to transfer." Exhibit p. 1. She is correct that 30 jurisdictions (29 states plus the District of Columbia) have now enacted the uniform act. Some of those jurisdictions have, however, made various modifications to UAGPPJA Article 3, which addresses transfer of a guardianship or conservatorship.

For example, with regard to accepting a transfer from another state, UAGPPJA Section 302(d) says:

> (d) The court shall issue an order provisionally granting a petition filed under subsection (a) unless:
> (1) *an objection is made and the objector establishes* that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or
> (2) the guardian or conservator is ineligible for appointment in this state.

(Emphasis added.) In contrast, the corresponding Oregon provision says:

> (4) The court shall issue an order provisionally granting a petition filed under subsection (1) of this section unless:
> (a) *The court determines* that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or
> (b) The guardian or conservator is ineligible for appointment in this state.

Or. Rev. Stat. (hereafter, "ORS") § 125.840(4) (emphasis added). While the UAGPPJA provision seems to require an objection and proof by the objector, the Oregon provision seems broader than that; it appears to allow the court to make the necessary determination regardless of whether anyone objects and regardless of who provides proof.

Similarly, with regard to permitting a transfer to another state, there are several differences between UAGPPJA Section 301 and the corresponding Nevada provision. For instance, UAGPPJA Section 301 draws a distinction between transfer of:

(1) A court proceeding in which the court has appointed someone to make decisions for an adult regarding the adult's *personal care*; and
(2) A court proceeding in which the court has appointed someone to make decisions for an adult regarding the adult's *property*.

Before a court issues an order provisionally granting a petition to transfer the first type of proceeding, the court must find (among other things) that "plans for care and services for the incapacitated person in the other state are reasonable and sufficient," and "the incapacitated person is physically present in or is reasonably expected to move permanently to the other state." UAGPPJA § 301(d)(1), (3). Before a court issues an order provisionally granting a petition to transfer the second type of proceeding, the court must find (among other things) that "adequate arrangements will be made for management of the protected person's property," and "the incapacitated person is physically present in or is reasonably expected to move permanently to the other state, *or the protected person has a significant connection to the other state considering the factors in Section 201(b)*." UAGPPJA § 301(e)(1), (3) (emphasis added).

The requirements for the two types of proceedings thus differ under UAGPPJA. But the corresponding Nevada provision draws no such distinction; the same set of requirements (the ones stated in UAGPPJA § 301(d)) appear to apply to any transfer petition, regardless of the nature of the underlying proceeding. See Nev. Rev. Stat. (hereafter, "NRS") § 159.2023(2).

These are just a couple of examples of modifications that states have made in adopting UAGPPJA's transfer provisions. The staff does not yet know how many other examples exist, because we have not yet compared all 30 UAGPPJA enactments to the text of UAGPPJA. We will complete such analysis later in this study, as we begin statutory drafting. **In considering whatever modifications do exist, the Commission should closely examine their merits and weigh any advantages against the interest in achieving nationwide uniformity,** which is weighty for the reasons Ms. Renken has stated on behalf of the Alzheimer's Association.

COMMENTS OF DISABILITY RIGHTS CALIFORNIA

Pursuant to federal law, Disability Rights California ("DRC") advocates for the rights of Californians with disabilities, helping them to "live in their own homes and communities with Medi-Cal services and other supports they need to be safe and successful." Exhibit p. 2. The organization "is committed to furthering the personal autonomy rights of individuals with disabilities." *Id.* at 3. In particular, the organization seeks to protect an individual's rights to:

- Self-direction and self-determination.
- Informed consent for treatment.
- Select an agent to make decisions on the individual's behalf when the individual is unable to do so.
- Refuse treatment.
- Have minimum standards for conservators.
- Parent.
- Marry and engage in consensual sexual relationships.
- Vote.
- Be informed of the individual's own rights.

Id.

Unlike the Alzheimer's Association, DRC does not urge the Commission to adopt UAGPPJA without change. Instead, DRC's comments address the following topics:

I. Use of the term "incapacity."
II. Conservatorships involving involuntary mental health care.
III. Potential impact of UAGPPJA's transfer procedure on California's policy of accommodating the desires of a conservatee.
IV. Procedure for bringing a transferred proceeding into compliance with California law (UAGPPJA § 302(f)).
V. Transfer from a state with fewer due process protections than California.
VI. UAGPPJA's registration procedure.

Each of those topics is discussed below.

I. Use of the Term "Incapacity"

DRC notes that consideration of UAGPPJA "requires attention to terminology." Exhibit p. 3. In addition to the terminological issues the staff has already noted (see Memorandum 2011-8, pp. 12-13), DRC expresses concern

about use of the term "incapacity" to refer to the basic standard for establishment of a conservatorship. Exhibit p. 4. DRC recommends that the Commission use the term "establishment standard," instead of "incapacity." *Id.*

In making this suggestion, DRC's main point seems to be that a determination that an adult needs a conservator *is not equivalent* to a determination that the adult is "incapacitated" for all purposes. *See id.* at 4-7. As DRC puts it, California's standards for appointing a conservator "do not necessarily connote generalized 'incapacity.'" *Id.* at 4. In other words, an adult for whom a conservator has been appointed in California — pursuant to the general standards in the Probate Code, the special standard for an adult with a developmental disability, or the Lanterman-Petris-Short ("LPS") Act — is not necessarily "incapacitated" for all purposes. Rather, absent further proof, the adult is still deemed capable of making certain decisions.

For example, absent special proof, an adult conserved under the general standards in the Probate Code retains various decisionmaking rights, including (among others) the right to make a will, the right to marry, and the right to consent to medical treatment. Prob. Code §§ 1871(c), 1900, 2354-2355. An adult with a developmental disability, for whom a limited conservator has been appointed, "retain[s] all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator." Prob. Code § 1801(d). "Except as otherwise provided in the order of the court appointing a limited conservator, the appointment *does not limit* the legal capacity of the limited conservatee to enter into transactions or types of transactions. Prob. Code § 1872(b) (emphasis added). Similarly, a person involuntarily detained for evaluation or treatment under the LPS Act retains certain decisionmaking rights, such as the right to refuse psychosurgery and the right to refuse convulsive treatment (unless specifically determined to lack capacity to refuse convulsive treatment). Welf. & Inst. Code §§ 5325, 5326.6, 5326.7. Importantly, such a person "shall not be deemed incapable of refusal solely by virtue of being diagnosed as a mentally ill, disordered, abnormal, or mentally defective person." Welf. & Inst. Code § 5326.5(d); *see also In re Qawi*, 32 Cal. 4th 1, 17, 81 P.3d 224, 7 Cal. Rptr. 3d 780 (2004).

In the memoranda the staff has prepared for this study, we did not mean to suggest otherwise. We acknowledged that a probate conservatee retains certain decisionmaking rights (see Memorandum 2011-8, p. 15; Memorandum 2011-31, 20, 21), noted that we had not covered "the rules relating to medical decisions

and other special types of decisions, such as marriage, divorce, or making a will," and explained that we planned to address those matters in the future (Memorandum 2011-31, pp. 16, 69-70). We also cautioned that the memoranda did not address the rules relating to developmentally disabled adults or LPS conservatorships, but again those topics would have to be addressed in the future (*id.* at 16-17; Second Supplement to Memorandum 2011-31, pp. 2-3).

To the extent that we might have inadvertently implied that a conservatee loses all decisionmaking rights (e.g., by using the term "incapacitated person" to refer to a conservatee), we regret that imprecision. **In the future, we will be more careful in using the term "incapacity," so as to avoid creating such an impression.**

We are somewhat reluctant, however, to recommend that the Commission use the phrase "establishment standard" as DRC suggests. According to a Lexis search, that phrase does not appear in any California case or statute. Rather than introducing new terminology, it might be preferable to focus on using existing terminology precisely. For example, we could refer to the "conservatee" or "protected person," instead of using the term "incapacitated person." **Unless the Commission otherwise directs, the staff will try to follow that approach.**

II. Conservatorships Involving Involuntary Mental Health Care

DRC's next point relates to involuntary mental health care. Unless the Commission thoroughly explores the standards that other states use for such care, DRC suggests that California's version of UAGPPJA should not permit transfer of a court proceeding involving involuntary mental health care to California, or registration of such a proceeding in California:

> Absent full consideration by the Commission of standards for involuntary mental health treatment of conservatees in other states, we respectfully request the exclusion of both the transfer and the registration of outside conservatorships permitting involuntary mental health care.

Exhibit p. 7.

DRC explains that other states "may not recognize the personal autonomy, privacy and dignity rights accorded individuals with psychiatric disabilities in California." *Id.* As DRC points out,

> One of the biggest distinctions between a probate conservatorship and an LPS conservatorship relates to involuntary placement in a mental health facility. A probate conservator

> generally cannot place an individual in a psychiatric facility against his or her will.
>
> This can only be done through the LPS conservatorship, *which entails heightened procedural protections (e.g., proof beyond a reasonable doubt, jury trial, and appointment of counsel).*

Id. (emphasis added, footnotes omitted). California's system of mental health treatment is designed to

> enable persons experiencing severe and disabling mental illnesses … to access services and programs that assist them, in a manner tailored to each individual, to better control their illness, to achieve their personal goals, and to develop skills and supports leading to their living the most constructive and satisfying lives possible in the least restrictive available settings.

Welf. & Inst. Code § 5600.1. The approach is client-centered, such that individuals with psychiatric disabilities are "the central and deciding figure, except where specifically limited by law, in all planning for treatment and rehabilitation based on their individual needs." Welf. & Inst. Code § 5600.2. Thus, DRC believes "California policy provides more protections to its residents with psychiatric disabilities than in other states," making it inadvisable to apply UAGPPJA in the context of involuntary mental health care. Exhibit p. 7.

As discussed above, the staff has not yet prepared a memorandum addressing LPS conservatorships and related matters, but that is an important future priority. DRC's suggested approach — making California's version of UAGPPJA inapplicable to any conservatorship involving involuntary mental health care — may well be the best means to proceed. **We will explore the pros and cons more thoroughly when we turn to LPS conservatorships and related matters.**

For now, however, it would be helpful to know DRC's position (if any) on whether UAGPPJA's transfer and/or registration procedures should be available with regard to an out-of-state conservatorship (using California terminology) in which a conservatee with dementia has been placed in a secured facility. Does DRC view this as a situation involving "involuntary mental health care" and thus warranting exclusion from UAGPPJA?

It would also be helpful to know what the Alzheimer's Association thinks about the same point. From Ms. Renken's comments, we suspect that the group would like UAGPPJA's transfer and registration procedures to apply to a

conservatorship involving a dementia patient in a secured facility. But it would be helpful to have confirmation of that.

Under California law, placement of a conservatee with dementia in a secured facility is governed by a special set of rules in Probate Code Section 2356.5, not by the LPS Act or any other statute governing involuntary mental health care. The staff has not yet described that set of rules for the Commission; we plan to do so in a future memorandum contrasting California's rules on a conservatee's residence with comparable law in neighboring states.

The staff does not know how other states handle placement of a conservatee with dementia in a secured facility. We suspect that a variety of approaches are used. Without further research, we are uncertain how difficult it would be to differentiate between (1) an out-of-state proceeding involving a dementia patient placed in a secured facility outside California, and (2) an out-of-state proceeding involving a patient receiving involuntary mental health care outside California for reasons other than dementia.

As a matter of statutory drafting, however, it probably would be relatively simple to provide that a court proceeding could not be transferred to California pursuant to UAGPPJA if the subject of the proceeding is to receive involuntary mental health care in California, aside (perhaps) from treatment for dementia in a secured facility in accordance with Probate Code Section 2356.5. Under this approach, instead of using the transfer process, the propriety of requiring involuntary mental health care in California (other than perhaps treatment for dementia) would have to be litigated from scratch in a California court, in accordance with California law. **Comments on the merits of this approach would be helpful.**

III. Potential Impact of UAGPPJA's Transfer Procedure on California's Policy of Accommodating the Desires of a Conservatee

DRC next points out that "California's policy strongly protects the personal autonomy, privacy, and dignity rights accorded individuals subject to all types of conservatorship." Exhibit p. 8. In particular, DRC explains that California accords respect to the desires of conservatees. *Id.* at 8-9.

For example, Probate Code Section 2113 directs a conservator to "accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate." Similarly, in some contexts

California applies a substituted judgment standard, which focuses on what the conservatee would desire if the conservatee were able to decide, rather than a best interest standard, which focuses on what would be in the best interests of the conservatee. See Exhibit pp. 8-9; Prob. Code § 2355 (health care decisions for conservatee who lacks capacity to make such decisions); *Edward W. v. Lamkins*, 99 Cal. App. 4th 516, 535, 122 Cal. Rptr. 2d 1 (2002) (same).

As the staff has previously pointed out, UAGPPJA's transfer procedure might result in temporary impingements on some California policies. See Memorandum 2011-31, pp. 33, 53, 68. That could include temporary impingements on California's policy of accommodating the desires of conservatees. DRC warns that this risk is unacceptable:

> We are concerned about the diminishment of the conservatee's protections through the proposed adoption of UAGPPJA. The Commission has recognized the "potential for temporary impingements on California's policy of protecting personal liberties …." *We consider that risk to be unacceptable and encourage the Commission to develop appropriate safeguards*.

Exhibit p. 9 (emphasis added, footnote omitted). DRC further explains:

> The cases cited in Commission memoranda show how conservatorship or guardianship matters are fraught with family feuds where an individual with a disability may get caught in the middle and where his or her rights are subjugated to the interests of others. Individuals affected by these processes must have a voice that is heard by the courts with regard to their interests, including but not limited to: establishment standards; preferences for appointment, such as a domestic partner; legal capacities; placement in the least restrictive, most integrated setting; extraordinary medical decisionmaking; and other express preferences.

Id.

The Commission should take DRC's concern into account in determining whether, and, if so, how to implement UAGPPJA's transfer procedure in California.

IV. Procedure for Bringing a Transferred Proceeding into Compliance with California Law (UAGPPJA § 302(f))

Under UAGPPJA Section 302(f), if a conservatorship or comparable proceeding were transferred to California, the court accepting the proceeding

would have 90 days to determine whether any changes are required to bring the proceeding into compliance with California law:

> (f) Not later than [90] days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

DRC writes:

> [T]he Commission sought guidance on 302(f) from the Uniform Law Commission (ULC), and the Commission tentatively proposed that Section 302(f) 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. CLRC believes that such language would conform to the UAGPPJA.

Exhibit p. 10 (emphasis in original). That statement is essentially correct, although the Commission did not resolve whether to place the proposed language in Section 302(f) or elsewhere. See Minutes (Aug. 2011), p. 5.

DRC further writes that it "is in agreement with this proposal," subject to the concerns discussed earlier in this memorandum. Exhibit p. 10. **That information is very helpful, and the Commission should bear it in mind as it proceeds with this study.**

DRC goes on to say, however, that it is "concerned that for three months, out-of-state conservators/guardians might be able to act in ways forbidden under California law." *Id.* To address this potential problem, DRC suggests that "some kind of documentation before transfer should be required that would ensure the conservator will comply with California laws — for instance, a declaration by the conservator/guardian that the conservator/guardian will comply with all of California's protections." *Id.*

DRC's suggestion is somewhat similar to the staff's suggestion that the court "aler[t] the fiduciary to California's educational programs and provid[e] the fiduciary with California's educational materials at the time of transfer, in the same manner that a proposed conservator receives such information when a case originates in California." Second Supplement to Memorandum 2011-31, p. 17. The purpose of such a requirement would be "to help ensure that conservatorships are handled properly, in compliance with California's policies." *Id.*

Perhaps the two suggestions could be combined into a single procedure, similar to the one prescribed by Probate Code Section 1834, which applies when a conservator is appointed in California:

> 1834. Before letters are issued, the conservator (other than a trust company or a public conservator) shall file an acknowledgment of receipt of (1) a statement of duties and liabilities of the office of conservator, and (2) a copy of the conservatorship information required under Section 1835. The acknowledgment and the statement shall be in the form prescribed by the Judicial Council.
>
> (b) The court may by local rules require the acknowledgment of receipt to include the conservator's birth date and driver's license number, if any, provided that the court ensures their confidentiality.
>
> (c) The statement of duties and liabilities prescribed by the Judicial Council shall not supersede the law on which the statement is based.

If the Commission likes this concept, the staff will draft language to implement it later in this study, and present that language for the Commission and stakeholders to consider.

It might also be helpful to **make explicit that the duty to comply with California's conservatorship laws attaches as soon as the fiduciary begins functioning as a conservator in California;** there is no 90-day grace period following a transfer. For example, UAGPPJA Section 302(d) directs a court to issue an order provisionally granting a transfer petition unless certain circumstances exist. This provisional order precedes issuance of a final order accepting the transfer. But UAGPPJA does not specify the contents of the provisional order, nor does it describe the effect of that order, if any, on the fiduciary's ability to take action in the accepting state (or the transferring state). The Commission should perhaps clarify these points, such as by requiring that the provisional order include a statement that

- The fiduciary is not authorized to function as a California conservator unless and until the court grants a final order accepting the transfer, at which time the fiduciary shall commence functioning as a California conservator and shall perform such duties in compliance with California law.

Alternatively, the Commission's proposal could require that the provisional order include a statement that

- The fiduciary is provisionally authorized to function as a California conservator and may function in that capacity until the court decides whether to issue a final order accepting the transfer. At all times while functioning as a California conservator, whether pursuant to the provisional order or pursuant to a final order accepting the transfer, the fiduciary shall perform such duties in compliance with California law.

The staff is not certain which of these alternatives would be more consistent with the ULC's intent regarding how UAGPPJA's transfer procedure is supposed to work. **This is another topic that the Commission might want to explore with ULC representatives, ideally at a Commission meeting.**

V. Transfer From a State with Fewer Due Process Protections Than California

At pages 55-69 of Memorandum 2011-31, the staff compares the procedural protections used in California conservatorship proceedings to those used in similar proceedings in neighboring states, and discusses the potential impact of UAGPPJA's transfer procedure on the policies underlying California's procedural protections. The staff raises the possibility of making UAGPPJA's transfer procedure available only if the proceeding to be transferred to California complied with due process. Memorandum 2011-31, p. 68. The staff also suggests that "[a]lternatively, or perhaps in addition, the Commission might want to make the transfer procedure available only if the proceeding to be transferred to California complied with specified procedural requirements, such as the right to counsel or presentation of medical evidence of incapacity." *Id.* at 68-69.

The latter approach was recommended by California Advocates for Nursing Home Reform ("CANHR") early in this study:

> [W]e share some of the concerns raised by Peter Stern and TEXCOM that accepting out-of-state conservatorships could allow California residents to lose very intimate rights to control their lives and property without the … due process protections provided by California law. We … hope that out-of-state conservatorships would be rejected that did not include medical evidence of incapacity or the right to counsel for conservatees when required under California law.

First Supplement to Memorandum 2011-24, Exhibit p. 1 (footnote omitted). DRC has now weighed in on this matter as well; it agrees with CANHR that transfer of a proceeding to California should be permitted only if there was medical evidence of incapacity and the protected person had a right to counsel. Exhibit p. 10. **We encourage others to add their input on this matter.**

DRC also agrees with the approach taken in a Connecticut bill to enact UAGPPJA, which would modify UAGPPJA Section 501 (a provision on uniformity that is included in every uniform act) as shown in strikeout and underscore below:

> In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact ~~it~~ such uniform provisions, consistent with the need to protect individual civil rights and in accordance with due process.

As stated at page 68 of Memorandum 2011-31, the staff does not think the underscored language is necessary, because every provision in the California codes must be construed in accordance with constitutional requirements, including the right of due process. However, when the Commission drafts a proposed version of UAGPPJA, it should **seriously consider DRC's view that the underscored language would be helpful, as well as the Alzheimer's Association's view that any deviation from uniformity would be problematic.**

VI. UAGPPJA's Registration Procedure

Finally, DRC expresses serious concerns about the registration procedure in Article 4 of UAGPPJA:

> Disability Rights California is *very concerned about Article IV because it appears that the registration provision could be used to circumvent the transfer procedure.* We believe that by itself, the notice requirement to the appointing court of the intent to register in another state is insufficient to prevent an abuse of the registration procedure especially because neither section 401 nor 402 clarifies the duties of the appointing court once it receives notice of possible registration. Without guidelines specifying its duties, the appointing court can do nothing to ensure that the conservatee's rights are protected after receipt of notice.

Exhibit p. 11 (emphasis added, footnote omitted). DRC "believe[s] that there should be constraints on the availability of the registration procedure." *Id.*

The staff has expressed the same view, while acknowledging that any constraints on the availability of the registration procedure would have to be very carefully drafted, so as to provide clear guidance, be easy to administer, and minimize inroads on the goal of uniformity. Memorandum 2011-31, p. 15; see also *id.* at 35-37, 54, 69; Second Supplement to Memorandum 2011-31, pp. 18-19.

If the Commission is inclined to impose constraints on the registration procedure, **input on how best to achieve those ends would be helpful.**

IMPORTANCE OF COMMENTS

The Commission much appreciates the time and effort that DRC and the Alzheimer's Association took to share their views on UAGPPJA. Although their views are to some extent conflicting, it is a big step forward to know what their concerns are, so that the Commission can seek to address them in a manner that would effectively address the competing considerations and best serve the citizens of California. We encourage other participants in this study to similarly share their views, and to inform us if they know of any other individuals or organizations who might be interested in UAGPPJA.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

alzheimer's association

the compassion to care, the leadership to conquer

October 6, 2011

TO: California Law Revision Commission
ATTN: Brian Herbert, Executive Director
4000 Middlefield Rd, Room D-2
Palo Alto, CA 94303

RE: Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Dear Mr. Herbert:

At the August 11, 2011 California Law Revision Commission meeting, a request was made for stakeholders to submit input on the issue of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). As such, I write to urge against modifications to UAGPPJA currently under study by the California Law Revision Commission.

Alzheimer's patients and their caregivers are frequently faced with the decision to relocate the patient to another state as they search for facilities that can best provide the care for the patient. In doing so, they often encounter complex jurisdictional issues associated with having a guardianship transferred or recognized in another state. The Alzheimer's Association, both nationally and here in California, endorses the UAGPPJA because it provides statutory guidance on jurisdictional issues and facilitates the ease of transfer without imposing additional burdens on already burdened caregivers.

To date, 30 jurisdictions have enacted the act without modification to the procedures related to transfer. Modifications of these procedures hampers the uniform process that will be understood by lawyers in other states who are transferring wards in or out of California and may inhibit the judicial economy that this act aims to achieve. Diverging from what has become the national standard may encourage more litigation, disrupt interstate court communications, and inhibit this act from accomplishing its goals. For these reasons, I urge the CLRC to refrain from any modifications to the uniform act, especially in regards to the transfer provisions.

Thank you for your careful consideration on this matter.

Sincerely,

Theresa M. Renken
State Public Policy Director

EX 1

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California State Public Policy Office

Disability Rights California

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October 26, 2011

California Law Revision Commission
Barbara Gaal, Chief Deputy Counsel
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RE: Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA")

Dear Ms. Gaal:

Thank you for including Disability Rights California among the stakeholders commenting on the proposal to adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA") in California.

Introduction

Disability Rights California is the federally mandated protection and advocacy agency in California and as such, advocates for the rights of people with disabilities throughout the State.[1] We engage in a significant amount of community integration litigation and advocacy, helping people with disabilities live in their own homes and communities with Medi-Cal services and other supports they need to be safe and successful.

[1] Disability Rights California provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15001); the Protection and Advocacy for Individuals with Mental Illness Act (42 U.S.C. §10801); the Rehabilitation Act (29 U.S.C. §794e); the Assistive Technology Act (29 U.S.C. §§3003, 3004); the Ticket to Work and Work Incentives Improvement Act (42 U.S.C. §1320b-20); the Children's Health Act of 2000 (42 U.S.C. §300d-53); and the Help America Vote Act of 2002 (42 U.S.C. §15461-62). Disability Rights California also receives other sources of funding as well.

Disability Rights California is committed to furthering the personal autonomy rights of individuals with disabilities. Personal autonomy rights include the following rights: the right to self-direction and self-determination, the right to informed consent for treatment, right to appoint an agent to make decisions when the individual is unable to make their own decisions, right to refuse treatment, right to have minimum standards for conservators, right to parent, right to marry and engage in consensual sexual relationships, the right to vote, and the right to information about their rights.

Comments and Concerns

We outline below our concerns and suggestions regarding the UAGPPJA.

1. **Terminology – Use of the terms "guardian,""conservator," and "incapacity"**

Discussion of whether California should adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act requires attention to terminology. As noted by the California Law Revision Commission ("Commission"), California uses very different terminology than UAGPPJA for the types of proceedings covered by the Act.[2] Under UAGPPJA § 102(3), a "guardian" is a person appointed by the court to make decisions regarding the person of an adult; whereas in California, a "guardian" may only be appointed for a minor.[3] In California, the term, "conservator of the person" is comparable to what UAGPPJA denominates a "guardian." *See* Commission Memorandum 2011-8 (2/1/11) at 12-13.[4] In addition, under UAGPPJA § 102(2), the term "conservator" refers to a person appointed by the court to administer the property of an adult, while in California, the comparable term is "conservator of the estate."[5]

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2 CALIFORNIA LAW COMMISSION, MEMORANDUM 2011-18, 1-2 (April 11, 2011); CALIFORNIA LAW COMMISSION, MEMORANDUM 2011-8, 12 (February 1, 2011); CALIFORNIA LAW COMMISSION, MEMORANDUM 2011-31, 2 (August 4, 2011).

3 CALIFORNIA LAW COMMISSION, MEMORANDUM 2011-8, at 12.

4 *Id.* at 12-13.

5 *Id.*

We also encourage the Commission to pay careful attention to another term used throughout its materials. Specifically, the term, "incapacity," is used to connote the basic standard for establishment of conservatorship. This is imprecise for several reasons. We recommend use of the term, "establishment standard," rather than "incapacity."

a. Establishment Standard under the Probate Code – Limited Effect

First, California's establishment standards do not constitute a finding of "incapacity" generally. The establishment standard for a conservator of the person under the California Probate Code "is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter[.]"[6] The establishment standard for a conservator of the estate "is substantially unable to manage his or her own financial resources or resist fraud or undue influence[.]"[7] These establishment standards do not necessarily connote generalized "incapacity." In fact, California law recognizes that the proposed conservatee may have the capacity to petition for the appointment of a conservator for himself or herself.[8]

b. Person on Probate Conservatorship Retains Some Legal Capacity

Second, the Commission inaccurately implies that there is no presumption of competency in California after a conservatorship has been established.[9] While California law contains some archaic terms,[10] an adult for whom a conservator has been appointed conservator must not be generally deemed to have "incapacity." In fact, California law clearly provides that a person for whom a conservatorship has been established retains capacity

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6 Cal. Prob. Code § 1801(a).

7 Prob. § 1801(b).

8 Prob. § 1820(a).

9 CALIFORNIA LAW COMMISSION, MEMORANDUM 2011-31, 18-19.

10 *See* Cal. Code Civ. Proc. § 372(a) ("Where reference is made in this section to 'incompetent person,' such reference shall be deemed to include 'a person for whom a conservatorship may be appointed.'" Annotations to that section state that it was enacted in 1872. Since then, the terms used to describe people with disabilities as well as perspectives on their abilities or capacities have evolved, as have legal standards.

with respect to exercise of various rights, such as the right to make a will.[11] In addition, as recognized by the Commission, "[t]he conservatee retains the power to make medical decisions, except upon a finding that the conservatee lacks capacity to give informed consent."[12]

c. Person on Limited Conservatorship

Likewise, a limited conservatorship may be appointed for an adult who has a developmental disability (the limited conservatee). The limited conservator's duty is to help the limited conservatee develop "maximum self-reliance and independence." The limited conservator's role is to assist developmentally disabled individuals to manage their personal and/or financial needs. However, there are many rights that a limited conservatee retains, including for instance, the right to marry, and the right to enter into contracts.[13]

d. Person on LPS Conservatorship Retains Legal Competence

Finally, there is a statutory presumption of competence for individuals subject to involuntary or voluntary psychiatric evaluation and treatment

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[11] Prob. § 1871(c); Prob. § 2351.5(b)(6) (An adult with a developmental disability who has a duly appointed limited conservator retains capacity to exercise rights not otherwise adjudicated including consent to or withholding consent to sexual contacts and relationships).

[12] CALIFORNIA LAW COMMISSION, MEMORANDUM 2011-8, at 15 (citing Cal. Prob. Code §§ 2354-55). A conservatee keeps the following rights unless a judge has determined that the right must be taken away because the conservatee is unable to exercise it, including the right: to vote; to control their salary; to marry; to receive personal mail; to be represented by a lawyer; to ask a judge to change their conservator; to ask a judge to end the conservatorship; to control personal spending money; and to make or change a will. Prob. §§ 1870-76; 1880-98; 1900-01; 1910; 2350-e.

[13] Unless specifically requested in the petition and granted in the court's order, a limited conservator does not have any of the following powers or controls: to determine place of residence; to have access to confidential records; to control the right to marry; to control the right to enter into contracts; to give consent for medical treatment; to control social and sexual contacts and relationships; to make decisions concerning education. Prob. § 1801.

under the Lanterman-Petris-Short (LPS) Act.[14] Under Cal. Welf. & Inst. Code § 5331, "[n]o person may be presumed to be incompetent because he or she has been evaluated or treated for mental disorder . . . regardless of whether such evaluation or treatment was voluntarily or involuntarily received[.]"

Cal. Welf. & Inst. Code § 5326.5(d), referring to informed consent, provides: "A person confined shall not be deemed incapable of refusal solely by virtue of being diagnosed as a mentally ill, disordered, abnormal, or mentally defective person." The California Supreme Court has recognized that the statutory presumption of competence applies to long-term LPS conservatees as well as to short-term LPS patients. *In re Qawi* 32 Cal.4th 1, 17-19 (2004).

In *Riese v. St. Mary's Hospital and Medical Center*, 209 Cal. App. 3d 1303 (Cal. Ct. App. 1987), the court held, under section 5331 and section 5326.5(d) of the LPS Act, that individuals subject to non-judicial detention under the LPS Act are entitled to a judicial determination of capacity to consent to or refuse administration of psychiatric medications before psychiatric medications can be administered involuntarily.[15] The court held that a judicial determination of incapacity was necessary in order to overcome the statutory presumption of capacity. *Riese*, 209 Cal. App. 3d at 1320; *see also* Welf. & Inst. § 5325.2 (the statute gives involuntarily detained patients the right to refuse treatment with antipsychotic medication, but does not refer to conservatees); Welf. & Inst. § 5327 ("[e]very person involuntarily detained under provisions of this part . . .

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[14] *See* Cal. Welf. & Inst. Code § 5000 *et seq.* The LPS Act provides, among other things, for 72-hour hold for evaluation and treatment. Welf. & Inst. § 5150. It further sets forth the procedures for judicial commitments for involuntary evaluation and treatment of persons with psychiatric disabilities through temporary and full conservatorships; the establishment standard for which is inability to provide for one's basic personal needs for food, clothing or shelter due to psychiatric condition. Welf. & Inst. §§ 5008(h)(1), 5350. The temporary conservatorship cannot last longer than 30 days unless a jury trial is requested with respect to imposition of the one-year conservatorship; in which case, the temporary conservatorship cannot last longer than 6 months. Welf. & Inst. § 5352.1. Full LPS conservatorship lasts for one year and can be renewed. Welf. & Inst. § 5361.

[15] *See also Keyhea v. Rushen*, 178 Cal. App. 3d 526, 542 n.14 (Cal. Ct. App. 1986).

including a conservatee placed in any medical, psychiatric or nursing facility, shall be entitled to all rights set forth in this part and shall retain rights not specifically denied him [or her] under this part"); Welf. & Inst. § 5326.7 (the statute concerns convulsive treatment and specifically applies to all involuntary patients, "including anyone under guardianship or conservatorship."); *Edward W. v. Lamkins*, 99 Cal. App. 4th 516, ns. 6-8 (Cal. Ct. App. 2002).

Individuals subject to LPS conservatorship retain rights absent a specific, adjudicated, imposition of legal disability.[16]

In sum, the use of the term "incapacity" raises a host of concerns, which relate to the risk of the diminishment of procedural protections under California law through the proposed adoption of UAGPPJA.

2. Exclusion of Involuntary Mental Health Care

Absent full consideration by the Commission of standards for involuntary mental health treatment of conservatees in other states, we respectfully request the exclusion of both the transfer and the registration of outside conservatorships permitting involuntary mental health care. This is due to the above-referenced points, as well as to additional points indicating that California policy provides more protections to its residents with psychiatric disabilities than in other states.

One of the biggest distinctions between a probate conservatorship and an LPS conservatorship relates to involuntary placement in a mental health facility. A probate conservator generally cannot place an individual in a psychiatric facility against his or her will.[17]

This can only be done through the LPS conservatorship, which entails heightened procedural protections (e.g., proof beyond a reasonable doubt, jury trial, and appointment of counsel).[18]
Other states may not recognize the personal autonomy, privacy and dignity rights accorded individuals with psychiatric disabilities in California. One of

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16 Welf. & Inst. § 5357.

17 Prob. § 2356.

18 Welf. & Inst. § 5000 *et seq.*

the overarching principles of the state's mental health system is that services be "client-centered." As such, individuals with psychiatric disabilities "[a]re the central and deciding figure, except where specifically limited by law, in all planning for treatment and rehabilitation based on their individual needs."[19]

Even where a conservatee has been adjudicated to lack capacity to make health care decisions, the conservator must make decisions based on the conservatee's individual health care instructions and expressed wishes.[20]

3. Express Interests v. Best Interests

California's policy strongly protects the personal autonomy, privacy, and dignity rights accorded individuals subject to all types of conservatorship. A duly authorized conservator has a duty to make decisions "in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator." [21] The California Uniform Health Care Decisions Act has a similar provision for medical decision-making by a health care agent.[22]

Stanislaus County has provided us a document on "Medical Surrogacy Standards," which discusses how its "Substituted Judgment Standard" is based on express wishes over the "Best Interest Standard." The Stanislaus County policy explains: "The Best Interest Standard mirrors the view that the guardian's duties are akin to those imposed on a parent. Under this standard, the charge of the guardian is to make an independent decision [about] the ward's best interest as defined by more objective, societally shared criteria. . . ."

"The principle of Substituted Judgment requires the surrogate to attempt to reach the decision the [conservatee] would make if that person were able to choose. Use of this model for decision making allows the guardian to make decisions in accord with the incompetent person's own definition of

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19 Welf. & Inst. § 5600.2(a).

20 Welf. & Inst. § 5000 *et seq.*

21 Prob. § 2355; *see also Lamkins*, 99 Cal. App. 4th, at 535.

22 *See* Prob. § 4684.

well-being . . . . [T]his type of decision making should be utilized if possible, [and] imposes a duty on guardians to attempt to find this information."

Further, California law expressly provides for reasonable accommodation of a conservatee's desires. Cal. Prob. Code § 2113 states "[a] conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate."

We are concerned about the diminishment of the conservatee's protections through the proposed adoption of UAGPPJA. The Commission has recognized the "potential for temporary impingements on California's policy of protecting personal liberties . . . ."[23] We consider that risk to be unacceptable and encourage the Commission to develop appropriate safeguards.

The cases cited in Commission memoranda show how conservatorship or guardianship matters are fraught with family feuds where an individual with a disability may get caught in the middle and where his or her rights are subjugated to the interests of others. Individuals affected by these processes must have a voice that is heard by the courts with regard to their interests, including but not limited to: establishment standards; preferences for appointment, such as a domestic partner; legal capacities; placement in the least restrictive, most integrated setting; extraordinary medical decision-making; and other express preferences.

4. Transfer Procedure - UAGPPJA § 302(f)

Section 302(f) of the UAGPPJA provides that within 90 days after issuance of an order accepting transfer, the court must determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state:

> Not later than [90] days after issuance of a final order accepting a transfer of a guardianship or conservatorship, the court shall

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23 CALIFORNIA LAW COMMISSION, MEMORANDUM 2011-31, at 33.

> determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

According to the comments to Section 302(f), "The number '90' is placed in brackets to encourage states to coordinate this time limit with the time limits for other required filings such as guardianship or conservatorship plans."[24]

In addition, the Commission sought guidance on 302(f) from the Uniform Law Commission (ULC), and the Commission tentatively proposed that Section 302(f) 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. CLRC believes that such language would conform to the UAGPPJA. Disability Rights California is in agreement with this proposal, subject to the limitations set forth in sections 1-3 of this letter.

However, we are concerned that for three months, out-of-state conservators/guardians might be able to act in ways forbidden under California law. Perhaps some kind of documentation before transfer should be required that would ensure the conservator will comply with California laws - for instance, a declaration by the conservator/guardian that the conservator/guardian will comply with all of California's protections. For example, in California, the Probate Code contains specific information about how Conservators must perform their duties.[25]

5. Due Process Protections—States with Fewer Due Process Protections transferring to California

According to the Commission, due process concerns are a potential issue with the UAGPPJA. Disability Rights California agrees with CANHR's June 6, 2011 comments and the proposal suggested by Connecticut.[26]

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[24] CALIFORNIA LAW COMMISSION, MEMORANDUM 2011-31, at 6.

[25] Cal. Prob. Code Section 2410; *see also* Judicial Council of California, Handbook for Conservators (2002), available at http://www.courts.ca.gov/documents/handbook.pdf.

[26] CALIFORNIA LAW COMMISSION, MEMORANDUM 2011- 31, at 14, 68 ("Consideration shall be given to the need to promote uniformity of the law with respect to its subject

6. Article 4 - Registration

Disability Rights California is very concerned about Article IV because it appears that the registration provision could be used to circumvent the transfer procedure.[27] We believe that by itself, the notice requirement to the appointing court of the intent to register in another state is insufficient to prevent an abuse of the registration procedure especially because neither section 401 nor 402 clarifies the duties of the appointing court once it receives notice of possible registration. Without guidelines specifying its duties, the appointing court can do nothing to ensure that the conservatee's rights are protected after receipt of notice. We believe that there should be constraints on the availability of the registration procedure.

Conclusion

Thank you for the opportunity to review and comment on the Commission's Second Supplement to Memorandum 2011-31; we hope to do so before the next meeting.

Sincerely,

Michael Stortz
Senior Attorney

Elizabeth Zirker
Staff Attorney

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matter among states that enact such uniform provisions, consistent with the need to protect individual civil rights and in accordance with due process.")

[27] This concern is also shared by others. *See* CALIFORNIA LAW COMMISSION, MEMORANDUM 2011- 31, at 13-14.