Study L-750 October 15, 2012

First Supplement to Memorandum 2012-40

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

Memorandum 2012-40 discusses the law, in California and its neighboring states, governing "elective review" of an existing conservatorship (i.e., review that is initiated by petition or on the court's own motion, rather than on the basis of a periodic mandatory review schedule). The memorandum notes that the availability of elective review could alleviate some concerns about accepting the transfer of a conservatorship from another jurisdiction under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA").

In particular, the memorandum discusses a concern that the Commission has long recognized: notwithstanding the fact that a court in another jurisdiction has determined that a person needs a conservatorship, a California court applying California law could reach a different conclusion. If so, the UAGPPJA transfer provisions would require California to accept a conservatorship that would not be considered necessary under California law.

One way to address that problem would be to relitigate the issue of a transferred conservatee's capacity, under California law. A prior memorandum discussed how relitigation could arise pursuant to California's periodic automatic court review of a conservatorship. See Second Supplement to Memorandum 2012-31. That memorandum presented two possible ways of coordinating UAGPPJA's transfer process with California's system of periodic review: (1) conduct the first California review of a transferred conservatorship at or near the time of transfer, or (2) determine the time of the first California review pursuant to California law, with the review interval running from the transferring state's date of appointment or date of latest review, report, or accounting. See *id.* at 15-17. The first approach might be considered overly

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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.

burdensome, while the second might entail a considerable delay between a transfer and the first instance of periodic court review.

Memorandum 2012-40 explains how existing elective review procedures could be used by a conservatee or any interested person to relitigate the issue of capacity *at any time* after a UAGPPJA transfer. The memorandum acknowledges that this is "not a perfect solution" to the problem discussed above, but it does add another arrow to the quiver by providing a review mechanism that is not tied to the statutory periodic review schedule.

Anthony Chicotel writes on behalf of the California Advocates for Nursing Home Reform to comment on the merits of elective review as a mechanism for post-transfer relitigation of capacity. His letter is attached as an exhibit.

He writes that reliance on elective review as the sole vehicle for relitigation of capacity would be impractical, because some transferred conservatees will not have the wherewithal to understand their right to elective review and initiate it. To help address that problem, he suggests requiring that a transferred conservatee be given notice of the right of elective review. *Id*. Further, he suggests that there be a simplified mechanism for a transferred conservatee to initiate elective review (e.g., require a court investigator to visit a transferred conservatee and ask whether the conservatee would like to have the issue of capacity relitigated). *Id*.

Mr. Chicotel also supports the idea, proposed in a prior memorandum and revisited in Memorandum 2012-40, of shifting the burden of proof in elective review of capacity after a UAGPPJA transfer. Under that approach, the conservatee's capacity would be presumed. *Id*.

Respectfully submitted,

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Executive Director

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October 12, 2012

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File:

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

Re: Memorandum 2012-40

Dear Ms. Gaal:

I recently reviewed the Commission's Memorandum 2012-40, which discusses "elective" review of California conservatorships. The Memorandum states that elective review might alleviate concerns that UAGPPJA conservatorship transfers could undermine California's relatively strict conservatorship criteria. The Memorandum suggests that since conservatorship review is so easy to initiate, we shouldn't worry too much with California conservatees being wrongfully conserved via UAGPPJA transfers.

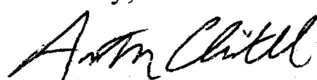
The Memorandum goes on to explain that forcing conservatees to rely on elective review to challenge wrongful conservatorship transfers shifts the burden of proof regarding capacity to the conservatee. A solution to this problem is mentioned: maintaining the burden of proof on the conservator in cases of elective review triggered by a UAGPPJA transfer. That solution seems appropriate.

I believe reliance on elective review as the sole vehicle for screening the propriety of transferred conservatorships is highly impractical. In the case of a transferred conservatorship, the conservatee likely suffers some form of cognitive disability, which may be exacerbated by a move to a new state. The conservatee is also going to be unfamiliar with local resources such as legal services to challenge the finer points of conservatorship law. Conservatees subject to a UAGPPJA transfer should be given mandatory notice that the conservatorship standards in California are different from those in other states. The notice should include a very simple opt-in procedure for initiating a formal review of the conservatorship (e.g. a court investigator visits the conservatee and ask if he or she would like a formal review).

Forcing a conservatee to independently summon the wherewithal to challenge the transfer of an out-of-state conservatorship without any notification of his or her right to do so seems very far-fetched.

Thank you for your consideration of these comments.

Sincerely,



Anthony Chicotel
Staff Attorney