

The Uniform Adult Guardianship and Protective Proceedings Act

By Edward D. Loughman, III

The Uniform Adult Guardianship and Protective Proceedings Act (hereinafter “the Act”) became effective April 12, 2014.¹ Its purpose is to ameliorate the problem which arises when multiple states² exercise jurisdiction over the same allegedly incapacitated person or incapacitated person. The Act sets forth uniform rules to determine which state has “Home State” or “Significant Connection” jurisdiction, to effectuate communication between different jurisdictions and to allow transfer of jurisdiction. Although the Act is particularly helpful in “granny snatching” cases in which one relative removes an elderly person to another state, it is also helpful in less contentious matters such as “snowbirds” who spend significant time in two states such as New York and Arizona,³ or incapacitated persons who own property in more than one state. The Act applies not only to Article 81 Guardians but also to Guardians under Article 17-A of the Surrogate’s Court Procedure Act, and Guardians or Conservators appointed in other states or countries.

The Uniform Law Commission of National Conference of Commissions on Uniform State Laws drafted the Act in 2007. Since then, 42 States, the District of Columbia and Puerto Rico have adopted it. In addition, three states, Louisiana, Georgia, North Carolina, and the Virgin Islands have introduced legislation to adopt it this year. Only Florida, Kansas, Michigan, Texas and Wisconsin have not acted.

Uniform legislation is required because Guardianship, like child custody, is not entitled to full faith and credit and does not have *res judicata* affect.⁴ It is no surprise that this act bears similarity to Uniform Child Custody Laws. Conceptually, it bears some similarities with Ancillary Probate in Surrogate’s Court, but its application is easier.

JURISDICTION (Mental Hygiene Law § 83.17)

The Court has jurisdiction to appoint a Guardian or issue a protective order⁵ if it is the “Home State,” a “Significant Connection” state or in certain other situations.

Home State

“Home State” jurisdiction is defined in Mental Hygiene L. § 83.03(c). Essentially, a new state has jurisdiction of the proceeding if the person has been there for six or more months before the proceeding is commenced. If the person has moved or has been moved into the state less than six months before the proceeding was commenced, the previous state has Home State jurisdiction. The court having Home State jurisdiction

has primary jurisdiction for the Guardianship. Once a Guardian has been appointed or protective order has been issued, under Mental Hygiene Law (“MHL”) § 83.17, that court has exclusive and continuing jurisdiction⁶ until the Home State court terminates it. Despite having a basis for Home State jurisdiction, the court may nevertheless decline jurisdiction because it finds that another state is a more appropriate jurisdiction⁷ or if it finds that jurisdiction was obtained by “unjustifiable conduct.”⁸ If unjustifiable conduct is found the court may issue sanctions.⁹

Significant Connection State

Significant Connection State is defined in MHL § 83.03(M). The state does not fit the definition of “home state” but there exists “significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.” “Significant connection factors” are found in MHL § 83.13. The court can assert jurisdiction if there is no home state or if the Home State has declined jurisdiction as a less appropriate forum and there is no petition pending in Home State, no objection to jurisdiction filed and the court determines that it is an appropriate forum under MHL § 83.23.

The court may also assert jurisdiction if there is no other alternative. A court lacking jurisdiction under MHL § 83.17 can nevertheless intervene via Special Jurisdiction.¹⁰ Under Special Jurisdiction, the court can appoint a temporary emergency guardian for up to 90 days, for an AIP physically present in the state in an emergency situation¹¹ or pending transfer to a Guardianship in another state.¹² It can issue a protective order regarding property in the state.¹³ If, however, the court having Home State jurisdiction requests, the court having only Significant Connection jurisdiction, shall dismiss.

INTERSTATE TRANSFERS

Guardianship can be transferred into¹⁴ or out of New York.¹⁵ It is a three-step process involving a provisional order of transfer in the transferor state, a proceeding in the transferee state to accept the transfer and then a final order of transfer in the transferor state.

Transfer Out

The Guardian of the Person or Property may petition the court to transfer the Guardianship to another

EDWARD D. LOUGHMAN, III, is a partner with the firm of Muldoon, Horgan & Loughman in New Rochelle, New York.

state.¹⁶ Notice must be given to the same people who must be given notice of application to appoint a Guardian under Article 81 of the MHL.¹⁷ If New York is not the Home State, notice must be given to those persons entitled to notice in the Home State.¹⁸ Provided the proper proof is shown, the court need not hold a hearing unless one of the parties, entitled to notice, so requests.¹⁹

Transfer of Guardianship requires proof that:

1. The person is physically present in or reasonably expected to move permanently to the transferee state.
2. Reasonable and sufficient plans for care and services in the transferee state are in place to transfer a Guardianship of the Person or that adequate arrangements will be made for management of the protected person's property.
3. No objection to transfer has been made or that the "objection has not established that the transfer would be contrary to the interest of the person subject to the guardianship of the person."²⁰

There are not yet any reported New York decisions on this, but it is submitted that if the protected person has already moved, the proof should evidence the new residence, such as deed, lease or affidavit of a representative of the facility. If not yet removed to the new state, the plan should be explained and contracts or other proof of the proposed new residency should be provided.

The plan of care and services or plan for management of the property should also be set forth in detail. If a geriatric care manager, nurse, doctor or other health care provider has been selected in the transferee state, they should be identified and perhaps proof provided that they have been retained. Similarly, if a lawyer, accountant, investment adviser or banker has been retained, or even selected, similar proof should be provided.

If the IP's consent to transfer has been given, show proof. If persons entitled to notice have been uninvolved, let the court know. If objection has been made, let the court know but set forth proof why the transfer is in the best interests of the protected person (not just the convenience of the Guardian).

If the court makes the prior three findings, it shall issue a provisional Order of Transfer of Guardianship and direct that the Guardian petition the court in the transferee state.²¹ After the transferee state has accepted the transfer from New York, the Guardian comes back to the New York court. Once the Guardian produces a certified copy of the provisional order²² from the transferee state and "the documents required to terminate a guardianship of the person or property

in the state,"²³ the court shall issue a final order confirming the transfer and terminating the New York Guardianship.²⁴

Transfer In

The Guardian of the Person or Property in another state may petition the court of his or her state to transfer the Guardianship to New York. Once the order is obtained in the other state a petition can be made in New York pursuant to Article 81 of the MHL or Article 17-A of the Surrogate's Court Procedure Act ("SCPA"). "The petition must include a certified copy of the other state's provisional order of transfer."²⁵

Notice must be to those persons entitled to notice in either state.²⁶ Notice must be given in the form required under MHL § 81.07.²⁷

A hearing will be held if the Guardian, the IP, or "other person required to be notified of the proceeding" requests, or on the court's own motion.²⁸

Unless the Guardian is ineligible²⁹ or an "objector establishes that transfer of the proceeding would be contrary to the best interest of the incapacitated or protected person" the court will issue an order provisionally granting the petition.³⁰ After receipt of a final order from the transferor state effecting the transfer, the court issues a final order.³¹

Within 90 days of issuance of the final order, the court will determine whether the guardianship needs to "be modified to conform to the law of this state."³²

The granting of the petition recognizes the order of the transferor state including the determination of incapacity and appointment of Guardians.³³ The denial of the petition does not preclude an application pursuant to article 81 of the MHL or 17-A of the SCPA.³⁴

PROVISIONAL REMEDIES AND STAYS

Pending resolution of the proceeding, the court can appoint a Temporary Emergency Guardian for up to 90 days,³⁵ issue protective orders with respect to real or tangible personal property,³⁶ or appoint a Guardian subject to a pending Guardianship.³⁷ The protective orders could enjoin the removal of tangible personal property, block the sale or encumbrance of real estate or act as a restraining notice on bank accounts. The Temporary Guardian could be given powers needed to protect the IP's person.

A stay is available even if the court intends to decline jurisdiction because of a less appropriate forum³⁸ or because of unjustifiable conduct.³⁹ The court may stay the proceeding until a petition is brought in a state having more appropriate jurisdiction.

INTERSTATE ACTION

In addition to transferring Guardianship from one state to another, Article 83 contains features making Article 81 Guardianships easier in this or another state.

Under MHL § 83.09, the court may request a sister state hold an evidentiary hearing, order depositions or the production of evidence, direct an evaluation or assessment of the AIP, order any appropriate investigations, forward a certified transcript, evidence and evaluation already conducted in another state, order the testimony of a witness in that state or order the release of confidential information.⁴⁰ The court may admit any such evidence into evidence in the New York proceeding.⁴¹

The New York court may also cooperate with a sister state if it asks for similar relief.⁴²

The New York court may allow testimony by deposition, telephone, audiovisual or other electronic means and the production of evidence from another state.⁴³

Finally, Guardianship⁴⁴ and related orders from sister states⁴⁵ can be registered in New York. By so doing the judgment or order has virtually the same effect as if it were a New York judgment or order.⁴⁶

CONCLUSION

The Uniform Adult Guardianship and Protective Proceedings Act, as codified as Article 83 of the New York Mental Hygiene Law, is a useful tool to facilitate Guardianship issues arising in more than one state. It essentially adds full faith and credit status to Guardianship matters. It significantly broadens the use of out-of-state evidence in a New York proceeding and vice versa. Time will tell how sister states co-operate but it should alleviate multi-state proceedings and prevent inconsistent results.

Endnotes

1. Mental Hygiene Law, Article 83, L. 2013, c. 427.
2. In addition, the court may treat a foreign country as a sister state for most of the provisions of Article 83. MHL § 83.05.
3. I would have said Florida except that Florida is one of five states which have not enacted the statute or introduced legislation to enact it. Interestingly, the Nassau Surrogate Court nevertheless approved the transfer of an SCPA Article 17-A Guardianship to Florida. *Matter of Guardianship of Louise D.*, 47 Misc. 3d 716, 3 N.Y.S.3d 918 (Sur. Ct., Nassau Co. 2015).
4. Nevertheless, some states like Florida allow for the “domestication” of an out-of-state Guardianship, essentially giving it full faith and credit.
5. A protective order is defined as an order appointing a conservator guardian of the property or other order related to management of an adult’s property. MHL § 83.03(i).
6. MHL § 83.21.
7. MHL § 83.23.
8. MHL § 83.25. Unjustifiable conduct is not defined but presumably would include surreptitiously moving the person out of state

against his or her wishes, hiding his or her whereabouts, or denying proper parties access.

9. *Id.*
10. MHL § 83.19.
11. MHL § 83.19(A)(1).
12. MHL § 83.19(A)(3).
13. MHL § 83.19(A)(2). This might be particularly helpful if assets outside of the Home State were being stolen or if assets had been taken out of the Home State to another jurisdiction.
14. MHL § 83.33.
15. MHL § 83.31.
16. MHL § 83.31(A).
17. MHL § 83.31(B). Section 81.07 of the MHL requires notice to the person alleged to be incapacitated, his attorney, if known, the Court Evaluator, if any, the AIP’s spouse, parents adult children, adult siblings, persons with whom the AIP resides, presumptive distributees, anyone holding power of attorney or health care proxy, anyone with a genuine interest in the AIP, DSS (if the AIP receives Medicaid), the Chief Executive Officer of any facility in which the AIP resides, Mental Hygiene Legal Services, if the AIP resides in a mental hygiene facility and such other person as the Court may deem based upon the recommendations of the Court Evaluator.
18. MHL § 83.27.
19. MHL § 83.31(c).
20. MHL § 83.31(d & e).
21. *Id.*
22. Although the statute does not specifically require a certified copy, it does read “issued under provisions similar to section 83.33 of this article.” MHL § 83.31(f)(1). Section 83.33 requires a certified copy of the order of the transferor state in order to accept a transfer in. *Matter of B.A.M.W. (C.M.W.)*, 44 Misc. 3d 465, 988 N.Y.S.2d 456 (Sup. Ct., Dutchess Co. 2014).
23. MHL § 83.31(f)(2).
24. MHL § 83.31(f).
25. MHL § 83.33(a).
26. MHL § 83.33(b).
27. MHL § 83.33(b).
28. MHL § 83.33(c).
29. Surrogate’s Court Procedure Act § 707.
30. MHL § 83.33(d).
31. MHL § 83.33(e).
32. MHL § 83.33(f).
33. MHL § 83.33(g).
34. MHL § 83.33(h).
35. MHL § 83.19(a)(1).
36. MHL § 83.19(a)(2).
37. MHL § 83.19(a)(3).
38. MHL § 83.23(b).
39. *Id.*
40. MHL § 83.09(a).
41. MHL § 83.09(b).
42. MHL § 83.09(c).
43. MHL § 83.11.
44. MHL § 83.35.
45. MHL § 83.37.
46. MHL § 83.39.