Proposed Uniform Act clarifies interstate guardianship issues

By Kim M. Smith

Often referred to as the "Granny Snatching Act" the New York State Uniform Adult Guardianship and Protective Proceedings Act (hereinafter referred to as "The Uniform Act") has passed both the Assembly and the Senate and is awaiting Governor Cuomo's signature.

The purpose of the Uniform Act is to address the needs of our incapacitated or functionally limited elderly residents who have not done advanced planning and require the appointment of a guardian for their personal and/or property needs. It is an act to amend the Mental Hygiene Law and the Surrogate's Court Procedure Act, but it will not change New York State's substantive guardianship rules. The Uniform Act should clarify interstate issues pertaining to guardianships.

The objectives of the Act are to identify one state court to adjudicate first time guardianship proceedings; establish a system to transfer existing guardianship appointments from one state to another; and to create a system to recognize and enforce guardianship orders from state to state.

The current New York State guardianship statute, MHL Article 81, like many states, allows a petitioner to bring a guardianship proceeding for an alleged incapacitated person if they reside in the state or are merely present in the state. The key concept of the Uniform Act is that the "home state" will have jurisdiction over the alleged incapacitated person regardless of where they are physically located. This is important, because our society has become a very mobile one, whereby our elderly residents often have connections in several states whether they are snowbirds or they have children domiciled elsewhere. As a result of our mobile society multi-state guardianship issues have become more and more common. Families can often get entwined in jurisdictional issues resulting in a delay in proper care, creating an opportunity for abuse, and/or the aggravation of interfamily disputes.

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The Uniform Act seeks to establish a systematic procedure for transferring existing guardianships from one state to another, alleviating the need for a second guardianship proceeding to be brought in the state to which the guardian may look to move the incapacitated person. While the U.S. Constitution's Full Faith and Credit Clause normally allow court orders in one state to be recognized in other states, it does not generally apply in protective proceedings and guardianships. The cooperation of financial institutions or medical facilities in the foreign jurisdiction can often be an issue which can only be rectified by a new application for guardianship in the foreign, incurring additional costs and burdens. The Uniform Act seeks to establish a system which will enforce guardianship orders from one state to the other by permitting Guardianship Orders to be registered in each applicable state (much like that of judgments) making them enforceable without further court proceedings.

The Uniform Act intends to create a clear process for determining which state has proper jurisdiction to entertain a specific guardianship proceeding when there is a conflict. The elimination of the "mere physical presence" rule is designed to help reduce elder abuse as it prevents "granny snatching" as a way of establishing jurisdiction. Courts now can decline to exercise jurisdiction where jurisdiction previously existed even where there was unjustifiable conduct such as granny snatching. It also now requires the court to consider elder abuse and use its ability to monitor the conduct of the guardian when determining the appropriate forum. More significantly it allows the court to establish procedures that could remove individuals from abusive circumstances.

If enacted, New York State will become the 37th state to adopt the Uniform Act across the nation.

Note: Kim M. Smith, Esq., is a solo practitioner in Islandia, New York. She practices in the areas of Elder Law, Trust and Estate Planning, Trust and Estate Administration, Guardianship, Medicaid and Special Needs Planning. Ms. Smith earned her undergraduate degree from Stony Brook University where she was a member of the Golden Key National Honor Society. She received her Juris Doctorate from Touro Law School, where she graduated cum laude. Prior to her career as an attorney, Ms. Smith worked in the health care profession for over fifteen years.

Ms. Smith is a member of the New York State Bar Association, the Suffolk County Bar Association (past Co-Chair of the Elder Law Committee), the Suffolk County Women's Bar Association (immediate Past President), and the Estate Planning Council of Suffolk County. Ms. Smith also serves on the Board of Directors for Suffolk County United Cerebral Palsy and Touro Law Center's Alumni Council.

Medicaid planning for same sex spouses

Ralph M. Randazzo

New York State's gay and lesbian community won a victory in 2011 with the passage of the Marriage Equality Act, DRL 10-a and 10-b, which allows same sex couples the legal right to marry in the state. Though New York's Medicaid program had recognized foreign same sex marriages since August 2008, GIS 08 MA 023, the number of persons who married a same sex partner and lived in New York was not significant. Since 2011, the Marriage Equality Act affords same sex couples the legal right to marry within New York and enjoy both the benefits and obligations of marriage that the state offers to heterosexual married couples. As a result, many more same sex couples have married.

Through the debate leading to the Marriage Equality Act, many couples had an acute awareness of the rights and benefits they would receive, but married without any awareness of the obligations of marriage that they were undertaking.

The rights and benefits of marriage were the primary content of the debate about marriage equality, but there was little to no discussion as to the resultant obligations of marriage. Many same sex couples who married had been coupled for decades and were eager to enter into a marital relationship. As an elder law attorney and frequent lecturer on same sex marriage, I have been involved in the process of educating couples and attorneys about the obligations of marriage, most particularly the spousal obligation of support as a legally responsible relative. Most clients are entirely unaware of this obligation of support created by their change in marital status, and same sex couples who marry later in life are particularly in need of the services of the Elder Law Bar.

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Generally speaking, when a couple marries at any time in their lives they become legally obligated to support one another. This includes the mutual obligations to provide food, shelter and health care, or the costs associated therewith, planning for which typically falls within the practice of elder law when couples are advanced in years. Many same sex marriages subsequent to the Marriage Equality Act are between couples who are in their sixties, seventies and even eighties, and while an elder law attorney may have had the opportunity to counsel similarly situated heterosexual couples about the legal obligations of marriage, many same sex couples have not and do not seek premarital legal counsel. Ultimately, when such clients do reach my office, many state that they have waited their entire lives for the right to marry the person they love. Some have said that if they had been granted the right earlier they would have married then, so their current marriage is conceptually a retroactive act, despite the new personal financial "risks" the marriage creates.

On closer look, some of the couples I have counseled have always commingled assets, but many have not.[1] One particular couple serves as a meaningful example. Susan and Margaret are in their late seventies. They had been a couple for over 40 years when marriage equality became law and they promptly seized the opportunity to marry despite Margaret's failing health. They each had separate assets, but had estate plans that provided for one another, Health Care Proxies, and Durable Powers of Attorney that granted full gifting powers to the other. They were each other's primary beneficiary, but they each had different contingent beneficiaries in their wills.

Soon after their first anniversary it became apparent that Margaret would soon need care in a nursing home. Each woman had approximately $200,000 in savings. On consultation with Susan we discussed the cost of nursing home care, approximately $15,000 a month, and her status as a legally responsible relative. As such, if Margaret's assets are exhausted Susan would be obligated to pay for the costs of Margaret's nursing home care with her own assets. We discussed the statutory right of spousal refusal that New York affords married couples. That right, coupled with the

(Continued on page 26)