

Memorandum in Support

NYSBA #12

June 4, 2015

S. 5482
A. 7596

By: Senator Hannon
By: M of A Weinstein
Senate Committee: Mental Health
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the mental hygiene law, in relation to the effect of registration for purposes of the uniform guardianship and protective proceedings jurisdiction act

THE NEW YORK STATE BAR ASSOCIATION SUPPORTS THIS LEGISLATION

Summary of Proposal

The New York version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, Article 83 of the Mental Hygiene Law, became effective in New York on April 21, 2014. The purpose of this uniform law is to eliminate jurisdictional disputes between states with regard to adult guardianship issues. Forty-one states have enacted a version of this uniform law.

The purpose of the legislation currently under consideration is to clarify three ambiguities in Mental Hygiene Law § 83.39 which concerns the enforceability of the guardianship orders of other states in New York and to make a technical correction to the definition of the term “protective order” in Mental Hygiene Law § 83.05(i) by adding a comma.

With regard to Mental Hygiene Law § 83.39, this bill would make it clear that the procedure that an adult guardian appointed in another state must use to sell real property in New York is exactly the same as the procedure that is currently used by New York adult guardians. It would also make it clear that an adult guardian appointed in another state, if authorized to do so by the appointing court, could appear in New York courts. Finally, it would make it clear that all “protective orders,” not just orders appointing a guardian of the property or a guardian of the person, are enforceable pursuant to Mental Hygiene Law § 83.39.

With regard to Mental Hygiene Law § 83.05(i), this bill would make it clear that a conservator and a guardian of the property are distinct entities.

The Ambiguity in Mental Hygiene Law § 83.39

Mental Hygiene Law §§ 83.35 and 83.37 establish procedures pursuant to which the adult guardianship orders of other states may be "registered" in New York by filing them in the same manner as a foreign judgment would be filed. Mental Hygiene Law § 83.39 sets forth the powers that a guardian appointed in another state has in New York after the order of that other state is properly registered.

The current language of the statute is ambiguous with regard to the meaning of the phrase "including maintaining actions and proceedings in this state and selling real property." The purpose of this legislation is to resolve that ambiguity.

The current statute is also ambiguous with regard to the enforceability of all "protective orders" under Mental Hygiene Law § 83.39. A protective order is defined in Mental Hygiene Law § 83.05(i) to mean an order appointing a guardian of the property or "other order related to property management." Mental Hygiene Law § 83.37 allows the registration of all protective orders, whether they are orders appointing a guardian of the property or other order related to financial management. However, Mental Hygiene Law § 83.39 only refers to an "order of appointment." It therefore arguably excludes a protective order issued after the guardian was already appointed. This legislation would resolve that ambiguity, as well.

The Lack of Clarity in Mental Hygiene Law § 83.05(i)

The current definition of the term "protective order" in Mental Law §83.05(i) is as follows:

"Protective order" means an order appointing a conservator guardian of the property or other order related to management of an adult's property.

This is slightly confusing because there is no such thing as a "conservator guardian of the property." Some states use the term conservator to mean a fiduciary who is appointed to manage the financial affairs of an incapacitated person. New York uses the term "guardian of the property." There should therefore be a comma between the word "conservator" and the words "guardian of the property." It is therefore proposed that this statute be amended to read as follows:

"Protective order" means an order appointing a conservator, guardian of the property or other order related to management of an adult's property.

Analysis

This legislation would do four things.

First, it would make it clear that the powers granted to a guardian of the property appointed in another state in any "protective order" issued after the guardian of the property has been appointed are enforceable in New York if that order is properly registered.

Second, it would make it clear that an adult guardian appointed by another state, if so authorized by the courts of that state, could commence and defend lawsuits in the State of New York without first being appointed as guardian under New York law. Such an amendment would be consistent with the one of the overall purposes of Article 83 of the Mental Hygiene Law, which is to eliminate the need for separate proceedings for the appointment of a guardian in each state where an incapacitated person is located or otherwise would require the appointment of a guardian.

Third, it would make it clear that adult guardians appointed in other states have the same rights as New York guardians with regard to the sale of real property. Under current law, guardians appointed by New York courts must apply for permission to sell real property owned by their wards pursuant to Article 17 of the Real Property Actions and Proceedings Law. The bill would make it clear that guardians appointed in other states, who have been authorized to do so by the courts appointing them, may use exactly the same procedure to obtain authority to sell real property in New York. There would be no requirement, as there was under the law as it existed prior to April 21, 2014, that a guardian appointed in the other state first be appointed as guardian in New York before New York real property could be sold. This part of the bill would therefore eliminate the need for duplicate proceedings for the appointment of a guardian in New York when one has been appointed in another state.

Fourth, it would make it clear that in the statute's definition of the term "protective order," conservators and guardians of the property are separate and distinct entities.

Conclusion

Based on the foregoing, the State Bar Association **SUPPORTS** the enactment of this legislation, which was developed by its Elder Law and Special Needs Section.