



# Guardianship Planning

## When is a Guardianship Necessary?

When a person becomes incapacitated and financial or health decisions need to be made, it may be necessary to have a guardian appointed for that person's protection and care. Many guardianship applications are undisputed, but sometimes families disagree about whether or not a guardian is necessary or whether the person applying for guardianship should be appointed as the guardian. When a guardianship application is filed, the Allegedly Incapacitated Person is usually referred to as an "AIP".

We represent people who wish to have a guardianship established for an AIP. We also represent people who wish to oppose a particular guardianship application.

Under New York law, a hearing must occur before a guardian is appointed. When a guardianship application is filed, the Court appoints a Court Evaluator to make recommendations as to the AIP's need for a guardianship and the fitness of the petitioner to serve as the Court-appointed Guardian.

A guardianship may not be needed if the AIP has previously executed:

1. a valid Durable General Power of Attorney which is accepted by the AIP's financial institutions, and
2. a valid Health Care Proxy.

Sometimes allegations arise that a Durable General Power of Attorney or Health Care Proxy has been abused. In other instances, there may be two or more Agents who do not get along and are unable to make any joint decisions.

The best solution may be to get the Court to void the existing power of attorney and proxy, and appoint a guardian to make all decisions on behalf of the AIP.

If you have a relative or a friend whose physical or mental condition has made it impossible for him to make choices or communicate those choices, a guardianship may need to be initiated. Unless your loved one has created a power of attorney and named someone to act as an agent, guardianship may be the only option for getting the necessary authority to take control and manage his assets.



# Guardianship Planning

## What is a Guardianship?

If someone cannot make decisions for himself, that person will need a guardian. Children, for example, need guardians. Their parents usually fulfill this role unless a parent is unfit or unable to care for the child. Adults may need guardians too if they have a physical or mental issue that prevents them from making choices in their own best interest or communicating their needs and preferences.

When an adult needs a guardian, court proceedings must be initiated. A concerned friend, relative, or caregiver may begin the process by petitioning for guardianship. The court will conduct a hearing to assess whether the person in question is or is not incapacitated under the law. The court may then declare that person a ward. An assessment will be made of who would be an appropriate guardian for the ward, and that person will be appointed guardian.

## Understanding Guardianship

The guardian manages assets of the ward and makes decisions on their behalf. Guardians have a fiduciary responsibility to act in the best interests of their ward, and the court will oversee the actions of the guardian in order to make certain that the guardian is fulfilling his role and living up to his duty.

## Are There Any Alternatives to Guardianship?

Guardianship proceedings can be an emotional and costly process for family members or friends of an incapacitated person. An attorney can ease some of the burden.

A person can take steps now to simplify any future guardianship needs. While still of sound mind, a person may decide who their own future guardian will be by creating a power of attorney (POA). A POA allows you to name who will care for your needs in the event you become incapacitated. The agent could then take control of making decisions and managing assets without any type of court involvement or guardianship proceedings.

A living trust is another option, which allows for the management of trust assets.



# NY Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

## Article 83 of the Mental Hygiene Law

On October 23, 2013, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (“the Act”) was signed into law in New York State. The Act amended the Mental Hygiene Law to add a new article, Article 83, which is known as the "Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act".

The Act provides a set of uniform rules that address jurisdiction and related issues in adult guardianship cases where multiple states are involved. Most of the states, including D.C. and Puerto Rico, have enacted similar rules.

Prior to the enactment of the Act, multi-state guardianship matters were problematic since guardianship orders and judgments are exempt from the full faith and credit of the U.S. Constitution. This meant that guardianship orders and judgments did not have to be recognized by another state. A guardian appointed by an out-of-state court would have to petition for guardianship in New York, even if the Incapacitated Person (the “IP”) resides in New York State.

Today, multi-state guardianship issues are not uncommon. These issues arise in matters involving “snowbirds”, who may be New York residents residing in Florida during the winter months; caregivers, who need to relocate sick family members into or out of New York; individuals, who may be utilizing out-of-state health care providers; individuals, who may wander into or out of New York, and elderly persons, who may be victims of “granny snatching” into or out of New York.

## The Act’s Objectives

The Act is intended to:

1. identify one singular state court to adjudicate first time guardianship petitions;
2. establish a system for the transfer of existing guardianship appointments from one state to another; and
3. establish a system for the recognition and enforcement of guardianship orders of one state in another.



# NY Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

## The Act's Basic Provisions

The Act addresses three main issues that arise when multiple states are involved in an adult guardianship matter: First, which state court has priority jurisdiction over a guardianship petition. Second, how can an existing guardianship matter can be transferred to another state. Lastly, how can guardians enforce orders from one state in another state.

## Jurisdiction

New York has jurisdiction to appoint a guardian of an individual who is a resident of New York or who simply is physically present in the state. Extensive and costly litigation over jurisdiction may result where the domicile of an “alleged incapacitated person” (an “AIP”) is difficult to determine. For example, this situation has arisen where the AIP lives for an equal amount of time in two different states or when it is unclear whether the AIP has the capacity to form an intent to change domicile. The Act now provides guidance for New York courts in determining whether they have primary jurisdiction over an AIP. Primary jurisdiction is determined by three levels of priority:

**First Priority - Home State:** A “home state” is a state in which the AIP was physically present, including any period of temporary absence, for at least six (6) consecutive months immediately prior to the commencement of the guardianship proceeding.

**Second Priority - Significant Connection State:** A “significant connection state” is a state, other than the home state, with which the AIP has a “significant connection” other than mere physical presence, and in which substantial evidence concerning the AIP is available. To determine whether a state is a “significant connection state”, courts are to consider the following factors: (i) the location of the AIP’s family and other parties required to be notified of the guardianship proceeding; (ii) the length of time the AIP was at any time physically present in the state and the duration of any absences; (iii) the location of the AIP’s property; (iv) the extent to which the AIP has other ties to the state, such as voting registration, filing of state or local tax returns, vehicle registration, driver’s license, social relationships, and receipt of services.



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However, a “significant connection” state only has jurisdiction over an AIP if (a) the AIP does not have a home state or (b) the home state declined jurisdiction because it has found the “significant connection state” to be a more appropriate forum. Additionally, in consideration of cases where all parties are in agreement concerning which court should hear the case, a “significant connection state” may have jurisdiction where (a) no petition has been filed or pending in a home state or other “significant connection” state, (b) no objections to the court’s jurisdiction have been filed by a person required to be notified of the proceeding, and (c) the “significant connection state” determines that it is an appropriate forum. The issue of whether a state is an appropriate forum is determined by all relevant factors set forth in the Act, including (i) any expressed preference of the AIP; (ii) whether abuse, neglect, or exploitation of the AIP has occurred or is likely to occur, and which state could best protect the respondent from abuse, neglect, or exploitation; and (iii) the length of time the AIP was physically present in or was a legal resident of the state or another state.

Pursuant to the Act, once a court has jurisdiction, jurisdiction continues until the proceeding is terminated or the appointment or order expires by its own terms. Notwithstanding the priority rules, under Article §83.19 of the Act, special jurisdiction for a limited purpose is available in a New York court, even when it does not have priority jurisdiction. For example, a New York court would have special jurisdiction to appoint a guardian for a term no longer than 90 days for an AIP, who is physically present in the state and an emergency requires the appointment of such guardian.

## **Transfer of Guardianship to and from New York**

Prior to enactment of the Act, in cases where a guardianship had been established and an AIP was to be moved to another state, the transfer of an existing guardianship was not generally available. Under the prior law, New York required that a new guardianship petition be commenced in New York. This resulted in added cost and time spent for the AIP because a redetermination had to be made as to the individual’s capacity, and whether the guardian to be appointed was appropriate. This also discouraged caregivers from moving an AIP to a better living arrangement, such as a locale that is closer to the caregiver. This cumbersome process also took time and attention away from the caregiver’s primary task of caring for the AIP.



# NY Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

The Act provides a streamlined procedure for the transfer of a guardianship from New York to another state. It also provides a set of procedures for the transfer of a guardianship from another state to New York State.

## **Registration and Recognition of Orders from Other States**

Under the Act, New York courts can now recognize the authority of such guardian, who has been appointed in another state, for the limited purpose of assisting the guardian with the AIP's property management within New York. This process is not in recognition of the out-of-state guardianship, but is merely a mechanism for the handling of financial matters in New York. Conversely, under Article §83.35 of the Act, for an AIP who is in New York and who does not have property in New York, his or her out-of-state guardian of the person can make decisions over his or her person by registering the guardianship in New York.

## **Benefits of the Act**

The Act resulted in substantial benefits to New York and the parties in a guardianship matter involving multiple states. The uniform rules create an expeditious and predictable process to which AIPs and their caregivers can seek either initial guardianship appointment, the transfer of an existing guardianship, or New York's recognition of an out-of-state order. The Act will certainly minimize the cost to the AIP.

The Act also helped to reduce incidences of elder abuse. Jurisdiction based merely on the physical presence of an AIP in New York often encouraged "granny snatching," i.e., the unauthorized removal or retention of an elder person.

## **How Can an Elder Law Attorney Help You Avoid Guardianship?**

We understand the guardianship process and we can help you to make sure your relative is taken care of and that his assets are not lost or devalued in the event of incapacity. We can provide assistance with the creation of a power of attorney and/or with the creation of living trusts so guardianship will not be the only option in the event of incapacity. Call us now toll-free at (800) 363-3416 or contact us online to find out more about the assistance that we can offer.