



Multi-state guardianship jurisdiction

*Where should a person be
found to be incapacitated?*

By Carol Sikov Gross, CELA and Zoe E. Babe

In a guardianship case, have you ever been faced with issues of domicile and multi-state guardianship jurisdiction? Probably not. Well, you are not alone. Neither have the Pennsylvania courts, which have yet to directly address the issue of domicile for purposes of multi-jurisdictional guardianship litigation.

The scenario can look like this: Mother, who is 82, lives and maintains a home in State M, where Mother has lived for most of her life. Son lives approximately 30 minutes away in State V, while Daughter resides here in Allegheny County, Pennsylvania. When Mother's symptoms of early onset Alzheimer's disease begin to worsen, Mother becomes less able to care for herself. Although Son had been named Power of Attorney because he lives closer and he makes an effort to stop by Mother's house as much as he can, Daughter feels that he is unable to meet Mother's needs because he is so busy.

Daughter visits Mother, notices that she is out in her garden and the stove's burner is on. Daughter sees there is not much food and finds out Mother has been forgetting to make meals, which leads Daughter to feel that Mother should come to live with her in Pennsylvania. As Mother's Alzheimer's symptoms worsen, financial issues move to the forefront. Daughter feels that her brother is mismanaging Mother's money and is refusing to pay for in-home caregivers. Daughter thinks that, because her brother is a joint owner on Mother's bank accounts, he will not hire the caregivers due to his vested interest in preserving funds for himself. Feeling insecure about his sister's frequent visits and worried that he might lose control over Mother's money, Son files an Emergency Petition for Guardianship in State M and is appointed as the Temporary Emergency Guardian until the hearing can be held in 30 days on her capacity.

Not having been given notice of the Emergency Guardianship, Daughter drives to State M and asks Mother if she would like "to come and live in Pennsylvania for awhile." At this point, it is unclear whether Mother knows or can understand what Daughter tells her. Mother agrees to make the trip and goes to live with her daughter in Pennsylvania. Son files a Motion to have Mother returned to State M.

When Daughter receives notice of the Motion alleging that she "kidnapped" Mother from State M, she contacts a Pennsylvania attorney who encourages her to file a Petition for Guardianship in Pennsylvania, where her Mother is currently residing. When Daughter presents her Petition, does Pennsylvania have jurisdiction to schedule a hearing?

Section 5111 of the Pennsylvania Probate Estates and Fiduciaries Code, 20 Pa.C.S. 5111 §§(a)-(b) provides the basis for personal jurisdiction over an alleged incapacitated person and the basis of jurisdiction for purposes of initiating a guardianship hearing on the matter of the capacity of an alleged incapacitated person. The law states that the court may appoint a guardian of a person or the person's estate for a Pennsylvania resident if the court, upon petition and hearing and upon the presentation of clear and convincing evidence, finds a person domiciled in the Commonwealth or if the person is a nonresi-

dent but has property in the Commonwealth.

Because Mother, the alleged incapacitated person, is a domiciliary of State M and she owns no property in Pennsylvania, the appropriate jurisdiction for this case is most likely the county in State M that is the locale of the alleged incapacitated person's permanent residence.

Although Mother, the alleged incapacitated person, may be visiting her Daughter here for a period of time, she has not established residency in Pennsylvania, unless it is possible to prove that it was Mother's intention to change her domicile from State M to Pennsylvania.

In order for a court to find a change of domicile, there must be a concurrence of two factors: (1) physical presence in the place where domicile is alleged to have been acquired, and (2) an intention to make it her home without any fixed or certain purpose to return to her former place of abode. *In re Coulter Estate*, 406 Pa. 402, 406, 178 A.2d 742 (Pa. 1962).

Interpreting Chapter 55 of Probate, Estates and Fiduciaries Code, courts have held that the intentions of the alleged incapacitated person are to be honored "to the fullest extent possible." *In re Estate of Sheri Rosengarten*, 2005 Pa.Super. 112, 871 A.2d 1249, 1255 (Pa.Super. 2005), quoting *Estate of Haertsch*, 412 Pa.Super. 598, 609 A.2d 1384, 1386 (Pa.Super. 1992). Additionally, the Pennsylvania Superior Court in *Haertsch* found, "It is clear that through the carefully drawn legislation [Chapter 55 of 20 Pa.C.S.A.], it was intended that the incapacitated person be permitted the fullest degree of freedom and control over his/her physical and financial affairs." *Haertsch* at 1255.

In this case, the alleged incapacitated person expressed her intent to reside in State M, where her home and permanent residence are located. Mother was only brought to Pennsylvania by Daughter for care. As held by the Pennsylvania Supreme Court in *Coulter*, a person's physical presence in a state must be one of his or her *choice*, not force or even the "necessity created by physical condition and advanced years." *Id.* at 407. This issue can create a paradox—if a person is incapacitated, how can he or she have an intention to change domicile or to reside in another jurisdiction?

Matters of interstate comity also come into play due to the pending guardianship in State M. The judicial proceeding of any state shall have the same full faith and credit in every court in the United States. 28 U.S.C. §1738. No Pennsylvania court should take any action which would supercede the orders of court issued in State M, as Full Faith and Credit shall be given in each state to the Public Acts, Records, and Judicial proceedings of every other state. U.S. Const. Art. IV. §1. If a Pennsylvania court were to adjudicate whether or not Mother has capacity, or whether or not a guardian should be appointed for her, this court would be acting in violation of the aforementioned constitutional provisions.

Issues of multi-state jurisdiction in guardianship matters have not been directly addressed by Pennsylvania courts. Because the courts that have addressed these issues in other

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states are few and have had inconsistent results, they are not of much help. In the future, it may be necessary to enact federal legislation to address jurisdictional issues, possibly similar to the legislation dealing with child custody matters. So when faced with a guardianship matter involving more than one state, be aware of the problems that you as an attorney may face with jurisdiction.

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policies. An insurer cannot, however, single out an individual insured for a rate increase. With no historical basis for the suggestion, we do suggest that you consider the possibility that the premiums for your policy may increase in the future by at least 50 percent.

At www.futurecareassociates.com you will find a Shared Care Cost/Benefit Matrix and an update of the Basic Cost/Benefit Matrix we have published since 1999. The costs shown are the average of qualified comprehensive policies currently offered by six major, well-rated companies for specific benefit structures. Your actual cost for the same benefits will be less because the matrices are averages. They, however, will be useful in giving you a ballpark idea of premiums for various issue ages and benefit periods.

Inflation

Once you have the basics covered in terms of your needs and budget, you should consider including an automatic annual inflation provision at an additional cost. This is an important choice because you may not need the coverage for many years to come.

The inflation benefits offered by LTC insurers today don't guarantee that your benefits will keep up with the growth in health care costs. But, without at least some inflation protection, you are guaranteed that your policy benefit will be inadequate.

Please note that there are planning techniques which may utilize LTCI for a

limited period of time (e.g., five years) in which case there may be no need for an inflation provision.

There are a number of other optional benefits offered by most insurers at additional costs. Some may have value in terms of your concerns. We, however, urge you to be certain that you can afford the cost of the basic benefits you need before considering supplemental provisions.

Tax Benefits

A word on the tax benefits of HIPAA qualified policies. Benefits are free of federal income tax up to a per diem limit (\$250 a day in 2006). Benefits in excess of the per diem limitation will also be free of such tax so long as you actually incurred qualified expenses at least equal to the benefit received. IRC §§7702B(a)(2), 104(a)(3), and 105(b).

You may also receive an individual federal income tax deduction for some or all of your premium. The deduction depends on whether the eligible portion of your premiums paid in the current tax year, together with your other un-reimbursed medical and dental expenses, exceed 7.5 percent of your adjusted gross income. The HIPAA eligible premiums are age graded, adjusted yearly for inflation, and can be found at IRC §213(d)(10)(A) or on the website noted earlier.

Qualified policy premiums paid by an employer also receive favorable tax treatment. Unlike employer-paid disability insurance premiums, benefits from employer-paid qualified LTCI policies are received federal income tax free by the insured.

The tax deductibility of employer-paid premiums varies depending on whether the employer is a C-Corporation or other business entity. In the case of a Partnership, Sub-S Corporation, or LLC, the premium deduction is limited to the age graded eligible premiums noted above if the insured is a two percent or greater owner.

None of us want to consider the personal and possible financial impact on ourselves and our families should we need long term care. The reality, howev-

er, is that should such a need develop, our choices are to pay out-of-pocket or to seek medical assistance (Medicaid). Long term care insurance is a planning tool which should be considered as an alternative to those options if you are insurable. Coverage that works for you, your needs and your financial circumstances should be an integral part of your estate plan.

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residents to be aware of the various issues and problems that can arise with nursing home arbitration agreements. Facilities need to make sure the arbitration provisions do not connote an "adhesion contract." The facility should not be in a more powerful position because of the resident's need for care. A voluntary arbitration agreement is more likely to be upheld than a mandatory agreement that a facility requires the resident sign as a condition of admission or continued residence. When arbitration agreements are properly drafted, presented and explained, they are more likely to be enforced.

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issues due to the high volume of questions both NLSA and legislators receive on elder law topics. Currently, presentations are available on the following topics:

- Protection through Powers of Attorney and Living Wills
 - Dealing Effectively with a Healthcare Facility
 - Guarding Against Senior Fraud
 - Understanding Retirement Benefits
 - Learning about Last Wills and Living Trusts
 - Avoiding Missteps in Medicare and Medicaid
 - Predatory Lending and the Elderly
- Since its launch in 2003, Laurel Legal Services, Southwestern Pennsylvania Legal Services, and Northwestern Legal Services have repli-