

MAINE STATE LEGISLATURE

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New Draft of: S. P. 268, L. D. 750
FIRST REGULAR SESSION

ONE HUNDRED AND TENTH LEGISLATURE

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No. 1639

S. P. 630

In Senate, May 20, 1981

Reported by Senator Devoe of Penobscot from the Committee on Judiciary
and Printed under Joint Rules No. 2.

MAY M. ROSS, Secretary of the Senate

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND EIGHTY-ONE

AN ACT Concerning the Protection of Incapacitated and Dependent Adults.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 22 MRSA c. 958, as enacted by PL 1973, c. 631, § 2, and as amended, is repealed.

Sec. 2. 22 MRSA c. 958-A is enacted to read:

CHAPTER 958-A

ADULT PROTECTIVE SERVICES ACT

SUBCHAPTER I

GENERAL PROVISIONS

§ 3470. Title

This Act may be cited as the Adult Protective Services Act.

§ 3471. Declaration of policy and legislative intent

The Legislature recognizes that many adult citizens of the State, because of incapacitation, are unable to manage their own affairs or to protect themselves from abuse, neglect, exploitation or physical danger. Often these persons cannot find others able or willing to render assistance. The Legislature intends, through this Act, to establish a program of protective services designed to fill this need

and to assure its availability to all incapacitated and dependent adults who are faced with abuse, neglect, exploitation or physical danger. It is also the intent of the Legislature to authorize only the least possible restriction on the exercise of personal and civil rights consistent with the person's need for services and to require that due process be followed in imposing those restrictions.

§ 3472. Definitions

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings.

1. Abuse. "Abuse" means the willful infliction of injury, unreasonable confinement, intimidation or cruel punishment with resulting physical harm or pain or mental anguish; or the willful deprivation of essential needs.

2. Adult. "Adult" means any person who has attained the age of 18 years.

3. Caretaker. "Caretaker" means any individual or institution who has or assumes the responsibility for the care of an adult.

4. Commissioner. "Commissioner" means the Commissioner of Human Services or his representative in the geographical area in which the person resides or is present or, in the case of mentally retarded adults, the Commissioner of Mental Health and Corrections or his representative in the geographical area in which the person resides or is present.

5. Department. "Department" means the Department of Human Services and, in the case of mentally retarded adults, the Commissioner of Mental Health and Corrections.

6. Dependent adult. "Dependent adult" means any adult who is wholly or partially dependent upon one or more other persons for care or support, either emotional or physical, and who would be in danger if that care or support were withdrawn.

7. Emergency. "Emergency" refers to a situation where:

A. The incapacitated or dependent adult is in immediate risk of serious harm;

B. The incapacitated or dependent adult is unable to consent to services which will diminish or eliminate the risk; and

C. There is no guardian to consent to emergency services.

8. Emergency services. "Emergency services" refer to those services necessary to avoid serious harm.

9. Exploitation. "Exploitation" means the illegal or improper use of an incapacitated or dependent adult or his resources for another's profit or advantage.

10. Incapacitated adult. "Incapacitated adult" means any adult who is

impaired by reason of mental illness, mental deficiency, physical illness or disability to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, or to the extent the adult cannot effectively manage or apply his estate to necessary ends.

11. Neglect. "Neglect" means a threat to an adult's health or welfare by physical or mental injury or impairment, sexual abuse or exploitation, deprivation of essential needs or lack of protection from these.

12. Protective services. "Protective services" means services which will separate incapacitated or dependent adults from danger. Protective services include, but are not limited to, social, medical and psychiatric services necessary to preserve the incapacitated adult's rights and resources and to maintain the incapacitated adult's physical and mental well-being.

Protective services may include seeking guardianship or a protective order under Title 18-A, Article 5. The department shall classify as protective clients the incapacitated adults who receive protective services.

13. Serious harm. "Serious harm" means:

A. Serious injury;

B. Serious mental injury or impairment, evidenced by severe anxiety, depression or withdrawal, untoward aggressive behavior or similar serious dysfunctional behavior; or

C. Sexual abuse or exploitation.

14. Serious injury. "Serious injury" means serious physical injury or impairment.

§ 3473. Authorizations

1. General. The department shall act to:

A. Protect abused, neglected or exploited incapacitated and dependent adults in circumstances which present a substantial risk of abuse, neglect or exploitation;

B. Prevent further abuse, neglect or exploitation;

C. Enhance the welfare of these incapacitated and dependent adults; and

D. Promote self-care wherever possible.

2. Reports. The department shall:

A. Receive, promptly investigate and determine the validity of reports of alleged abuse, neglect or exploitation;

B. Take appropriate action, including providing or arranging for the provision of appropriate services; and

C. Petition for guardianship or a protective order under Title 18-A, Article 5, when all less restrictive alternatives have been tried and have failed to protect the incapacitated adult.

§ 3474. Records; confidentiality, disclosure

1. Confidentiality of adult protective records. All department records which contain personally identifying information and are created or obtained in connection with the department's adult protective activities and activities related to an adult while under the jurisdiction of the department are confidential and subject to release only under the conditions of subsections 2 and 3. Within the department, the records shall be available only to and used by authorized departmental personnel and legal counsel for the department in carrying out their functions.

2. Optional disclosure of records. The department may disclose relevant information in the records to the following persons:

A. An agency investigating a report of adult abuse, neglect or exploitation when the investigation is authorized by statute or by an agreement with the department;

B. An advocacy agency conducting an investigation under chapter 961;

C. A physician treating an incapacitated or dependent adult whom he reasonably suspects may be abused, neglected or exploited;

D. An incapacitated or dependent adult named in a record who is reported to be abused, neglected or exploited, or the caretaker of the incapacitated or dependent adult, with protection for identity of reporters and other persons when appropriate;

E. A person having the legal responsibility or authorization to care for, evaluate, treat or supervise an incapacitated or dependent adult; and

F. Any person engaged in bona fide research, provided that no personally identifying information is made available, unless it is essential to the research and the commissioner or his designee gives prior approval. If the researcher desires to contact a subject of a record, the subject's consent shall be obtained by the department prior to the contact.

3. Mandatory disclosure of records. The department shall disclose relevant information in the records to the following persons:

A. The guardian ad litem of an incapacitated or dependent adult named in a record who is reported to be abused, neglected or exploited;

B. A court on its finding that access to those records may be necessary for the determination of any issue before the court. Access shall be limited to in-camera inspection, unless the court determines that public disclosure of the information is necessary for the resolution of an issue pending before it; and

C. A grand jury on its determination that access to those records is necessary in the conduct of its official business.

§ 3475. Penalty for violations

A person who knowingly violates a provision of this chapter commits a civil violation for which a forfeiture of not more than \$500 may be adjudged.

§ 3476. Spiritual treatment

1. Treatment not considered abuse, neglect or exploitation. An incapacitated or dependent adult shall not be considered to be abused, neglected or exploited solely because treatment is by spiritual means by an accredited practitioner of a recognized religious organization.

2. Treatment to be considered if requested. When medical treatment is authorized, under this chapter, treatment by spiritual means by an accredited practitioner of a recognized religious organization may also be considered if requested by the incapacitated or disabled adult or his caretaker.

SUBCHAPTER II

INVESTIGATIONS AND PROTECTIVE SERVICES

§ 3480. Investigations

1. Subpoenas and obtaining criminal history. The commissioner, his delegate or the legal counsel for the department may:

A. Issue subpoenas requiring persons to disclose or provide to the department information or records in their possession which are necessary and relevant to an investigation of a report of suspected abuse, neglect or exploitation or to a subsequent adult protective proceeding;

(1) The department may apply to the District Court and Probate Court to enforce a subpoena; and

(2) A person who complies with a subpoena is immune from civil or criminal liability that might otherwise result from the act of turning over or providing information or records to the department; and

B. Obtain nonconviction data and other criminal history record information under Title 16, section 611, which he deems relevant to a case of alleged abuse, neglect or exploitation.

2. Confidentiality. Information or records obtained by subpoena shall be treated in accordance with section 3474.

§ 3481. Providing for protective services with the consent of the person; withdrawal of consent; caretaker refusal

When it has been determined that an incapacitated or dependent adult is in need of protective services, the department shall immediately provide or arrange for protective services, provided that the adult consents.

1. **Consent.** If an incapacitated or dependent adult does not consent to the receipt of protective services, or if he withdraws consent, the service shall not be provided.

2. **Consent refused.** When a private guardian or conservator of an incapacitated adult who consents to the receipt of protective services refuses to allow those services to be provided to the incapacitated adult, the department may petition the Probate Court for removal of the guardian pursuant to Title 18-A, section 5-307, or for removal of the conservator pursuant to Title 18-A, section 5-415. When a caretaker or guardian of an incapacitated adult who consents to the receipt of protective services refuses to allow those services to be provided to the incapacitated adult, the department may petition the Probate Court for temporary guardianship pursuant to Title 18-A, section 5-310 or for a protective arrangement pursuant to Title 18-A, section 5-409.

§ 3482. Providing for protective services to incapacitated adults who lack the capacity to consent

If the department reasonably determines that an incapacitated adult is being abused, neglected or exploited and lacks capacity to consent to protective services, the department may petition the Probate Court for guardianship or conservatorship, in accordance with Title 18-A, section 5-601. The petition must allege specific facts sufficient to show that the incapacitated adult is in need of protective services and lacks capacity to consent to them.

§ 3483. Emergency intervention; authorized entry of premises; immunity of petitioner

1. **Action.** When the court has exercised the power of a guardian or has appointed the department temporary guardian pursuant to Title 18-A, section 5-310, and the ward or a caretaker refuses to relinquish care and custody to the court or to the department, then at the request of the department, a law enforcement officer may take any necessary and reasonable action to obtain physical custody of the ward for the department. Necessary and reasonable action may include entering public or private property with a warrant based on probable cause to believe that the ward is there.

2. **Liability.** No petitioner shall be held liable in any action brought by the incapacitated adult if the petitioner acted in good faith.

§ 3484. Payment for protective services

At the time the department makes an evaluation of the case reported, it shall be determined, according to regulations set by the commissioner, whether the incapacitated or dependent adult is financially capable of paying for the essential services. To the extent that assets are available to incapacitated or dependent adults, or wards, the cost of services shall be borne by the estate of persons receiving those services.

§ 3485. Reporting abuse

Upon finding evidence indicating that a person has abused, neglected or exploited an incapacitated or dependent adult, the department shall notify the district attorney.

§ 3486. Cooperation

All other state and local agencies as well as private agencies receiving public funds shall cooperate with the department in rendering protective services on behalf of incapacitated and dependent adults.

§ 3487. Adoption of standards

The department shall adopt standards and other procedures and guidelines with forms to insure the effective implementation of this chapter.

Sec. 3. 34 MRSA § 2616, sub-§ 2, as enacted by PL 1977, c. 502, § 4, is repealed and the following enacted in its place:

2. Protective services. The term “protective services” has the meaning in Title 22, section 3472, subsection 12.

FISCAL NOTE

The Department of Human Services indicates that the appropriation to fund additional staff is included in the Governor’s proposed budget, but that, even if there is no appropriation, the language of this bill should be approved.

STATEMENT OF FACT

This new draft provides jurisdiction for the Department of Mental Health and Corrections to provide protective services to mentally retarded adults. This new draft also deletes from the bill some of the listings of possible protective services and restates the authorization the departments have under this Act. The new draft deletes a paragraph that permitted disclosure of records to state officials and a section detailing the department’s investigative duties upon receiving a report of a need for adult protective services. The new draft also deletes a subsection providing for temporary guardianship. Finally, this new draft adds a fiscal note.