

MAINE STATE LEGISLATURE

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122nd MAINE LEGISLATURE

FIRST REGULAR SESSION-2005

Legislative Document

No. 1402

S.P. 491

In Senate, March 22, 2005

**An Act To Provide Guidelines, Standards and Rights for Children
and the Guardians Who Care for Them**

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator ROSEN of Hancock.

Cosponsored by Senators: HASTINGS of Oxford, PERRY of Penobscot, RAYE of Washington, Representatives: CARR of Lincoln, DUCHESNE of Hudson, PINGREE of North Haven, ROSEN of Bucksport, SHERMAN of Hodgdon.

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

4 **Sec. 1. 18-A MRSA Art. 5, Pt. 2-A is enacted to read:**

6 **PART 2-A**

8 **DE FACTO GUARDIANS OF MINORS**

10 **§5-251. De facto guardianship; definitions**

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

14 (a) "De facto guardian" means an individual who has been the primary caretaker for a child who has, within the 24 months immediately preceding the filing of a petition pursuant to section 5-252, subsection (b), resided with the individual without a parent present and with a lack of demonstrated consistent participation by a parent for a period of:

20 (1) Six months or more, which need not be consecutive, if the child is under 3 years of age; or

24 (2) Twelve months or more, which need not be consecutive, if the child is 3 years of age or older.

26 For purposes of this subsection, any period of time after a legal proceeding has been commenced and filed is not included in determining whether the child has resided with the individual for the required minimum period.

32 "De facto guardian" does not include an individual who has a child placed in the individual's care under Title 22, chapter 1071 or for adoption under Article 9.

36 (b) "Lack of demonstrated consistent participation" means refusal or neglect to comply with the duties imposed upon a parent by the parent-child relationship, including, but not limited to, providing the child necessary food, clothing, shelter, health care, education, a nurturing and consistent relationship and other care and control necessary for the child's physical, mental and emotional health and development.

44 The court shall consider, but is not limited to considering, the following factors in determining whether there has been a lack of demonstrated consistent participation:

48 (1) The intent of the parent or parents in placing the child with the de facto guardian;

50

2 (2) The amount of involvement the parent or parents had
with the child during the parent's or the parents' absence;

4 (3) The facts and circumstances of the parent's or parents'
absence;

6 (4) The parent's or parents' refusal to comply with the
8 conditions for retaining custody set forth in any previous
10 court orders; and

12 (5) Whether the parent or parents seeking custody were
14 previously prevented from doing so as a result of domestic
16 violence or child abuse or neglect.

16 **§5-252. Appointment as guardian**

18 (a) A de facto guardian seeking appointment as the guardian
of one or more children in a de facto guardianship proceeding
20 commences a proceeding by filing a petition with the court. A
petition for guardianship filed under this section must state and
22 allege:

24 (1) The name and address of the petitioner and any prior or
other name used by the petitioner;

26 (2) The name and, if known, the address and social security
28 number of the respondent mother and father or guardian and
any prior or other name used by the respondent that is known
30 to the petitioner;

32 (3) The name and date of birth of each child of whom
guardianship is sought;

34 (4) The relationship of the petitioner to each child of
whom guardianship is sought;

36 (5) The petitioner's basis for standing under this section;

38 (6) The current legal and physical custodial status of each
40 child of whom guardianship is sought and a list of all prior
orders of custody, if known to the petitioner;

42 (7) Whether any party is a member of the Armed Forces of
44 the United States;

46 (8) The length of time each child of whom guardianship is
48 sought has resided with the petitioner and has resided in
this State;

2 (9) Whether a separate proceeding for divorce, legal
4 separation or parental rights and responsibilities is
6 pending in a court in this State or elsewhere;

8 (10) Whether parenting time should be granted to the
10 respondents;

12 (11) Any temporary or permanent child support, attorney's
14 fees, costs and disbursements sought by the petitioner;

16 (12) Whether an order of protection under Title 22, chapter
18 1071 or a similar law of another state that governs any
20 party or each child of whom guardianship is sought is in
22 effect and, if so, the district court or similar
24 jurisdiction in which it was entered; and

26 (13) That it is in the best interests of each child of whom
28 guardianship is sought under section 5-253 that the
30 petitioner be appointed guardian of the child.

32 (b) The court shall provide written notice of a hearing on
34 a petition to appoint a de facto guardian as the guardian of a
36 child to:

38 (1) A person if:

40 (i) The person's name appears on the child's birth
42 certificate as a parent;

44 (ii) The person has substantially supported the child;

46 (iii) The person either was married to the person
48 designated on the birth certificate as the natural
50 mother within the 325 days before the child's birth or
 married that person within the 10 days after the
 child's birth;

(iv) The person is openly living with the child or the
 person designated on the birth certificate as the
 natural mother of the child, or both;

(v) The person has been adjudicated the child's parent;

(vi) The person has filed a paternity action within 30
 days after the child's birth and the action is still
 pending; or

(vii) The person and the mother of the child signed an
 acknowledgment of paternity or other recognition of
 parentage that has not been revoked or vacated; and

2 (2) The guardian or legal custodian, if any, of the child.

4 Notice under this subsection need not be given to a person listed
6 in this subsection whose parental rights have been terminated.

8 (c) Written notice of a hearing on a petition to appoint a
10 de facto guardian as guardian of a child must be given to the
12 Department of Health and Human Services if either parent
14 receives public assistance, the petitioner receives public
16 assistance on behalf of the child or either parent receives child
18 support enforcement services or applies for public assistance or
20 child support enforcement services after a petition under this
22 section is filed. Notice to the department must include a copy
24 of the petition.

26 (d) Appointment of a guardian under this section without a
28 hearing is permitted if both parents consent by stipulation or
30 agreement that it is in the best interests of the child for the
32 de facto guardian to be appointed the guardian of the child. If
34 either parent receives public assistance, the petitioner receives
36 public assistance on behalf of the child or either parent
38 receives child support enforcement services, the petitioner must
40 notify the Department of Health and Human Services of the
42 stipulation or agreement under this subsection.

44 (e) To establish that the petitioner is a de facto
46 guardian, the petitioner must:

48 (1) Show by clear and convincing evidence that the
 petitioner satisfies the definition of de facto guardian in
 section 5-251; and

(2) Prove by a preponderance of the evidence that it is in
 the best interests of the child that the de facto guardian
 be appointed the guardian of the child.

(f) The court shall appoint the de facto guardian as the
 guardian of the child if the court determines the appointment is
 in the best interests of the child, consistent with section
 5-253. To the extent not inconsistent with this Part, Part 2
 applies to the appointment and powers of and other proceedings
 concerning the de facto guardian as the child's guardian.

(g) The court may order any responsible person to pay child
 support in accordance with the child support guidelines under
 Title 19-A, chapter 63.

(h) In a contested action, the court may appoint counsel,

2 if requested, for any indigent de facto guardian not already
3 represented.

4 **§5-253. Best interests of child**

6 For the purposes of this Part, the best interests of the
7 child are determined according to this section.

8 (a) The court shall consider the following factors:

10 (1) The wishes of the party or parties as to custody;

12 (2) The reasonable preference of the child, if the court
14 considers the child to be of sufficient age to express
15 preference;

16 (3) The child's primary caretaker;

18 (4) The intimacy of the relationship between each party and
20 the child;

22 (5) The interaction and interrelationship of the child with
24 a party or parties, siblings and any other person who may
25 significantly affect the child's best interests;

26 (6) The child's adjustment to home, school and community;

28 (7) The length of time the child has lived in a stable,
30 satisfactory environment and the desirability of maintaining
31 continuity;

32 (8) The permanence, as a family unit, of the existing or
33 proposed home;

34 (9) The mental and physical health of all individuals
36 involved;

38 (10) The capacity and disposition of the parties to give
40 the child love, affection and guidance and to continue
41 educating and raising the child in the child's culture and
42 religion or creed, if any;

44 (11) The child's cultural background; and

46 (12) The effect on the child of the actions of an abuser,
47 if related to domestic violence that has occurred between
48 the parents or other parties.

(b) The court may not consider any one of the factors set

2 out in subsection (a) to the exclusion of all others. The court
3 shall make detailed findings on each of the factors and explain
4 how the factors led to its conclusions and to the determination
5 of the best interests of the child.

6 (c) The court may not give preference to a party over the
7 de facto guardian solely because the party is a parent of the
8 child.

10 (d) The court may not prefer a parent over the de facto
11 guardian solely on the basis of the gender of the parent or de
12 facto guardian.

14 (e) The fact that the parents of the child are not or were
15 never married to each other may not be determinative of the
16 custody of the child.

18 (f) The court may not consider conduct of a proposed
19 guardian that does not affect the guardian's relationship to the
20 child.

22 **§5-254. Termination**

24 (a) If a parent seeks termination of a guardianship
25 appointed under this Part, the court shall establish a schedule
26 of review hearings for the court to review parental efforts to
27 demonstrate a capacity to fulfill the duties described in section
28 5-251, subsection (b) so that it is in the child's best interests
29 to terminate the guardianship.

30 (b) The parent must prove by the preponderance of the
31 evidence that the parent has made appropriate changes described
32 in subsection (a) so that termination of the guardianship is in
33 the best interests of the child.

34 (c) If there has not been adequate change described in
35 subsection (a) within the first 2 years of the guardianship,
36 there is a presumption that the guardianship should continue
37 until the child is 18 years of age. The parent may rebut the
38 presumption by clear and convincing evidence.

42 **SUMMARY**

44 This bill gives standing to "de facto guardians" to seek
45 appointment as guardians of minor children, with or without the
46 consent of the parents. The Probate Court will consider factors
47 that establish the person as a de facto guardian, including
48

2 actual custody and parenting of the child without legal
formalities, and consider whether the appointment is in the best
interests of the child. This bill is modeled on Minnesota de
4 facto custodian law.