

MAINE STATE LEGISLATURE

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ONE HUNDRED AND EIGHTH LEGISLATURE

Legislative Document

No. 1155

H. P. 940

House of Representatives, March 22, 1977

On motion of Mr. Goodwin of So. Berwick, referred to the Committee on Judiciary. Sent up for concurrence and ordered printed.

EDWIN H. PERT, Clerk

Presented by Mr. Goodwin of South Berwick.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-SEVEN

AN ACT Providing for Guardianship for Incapacitated Adults.

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

Sec. 1. 18 MRSA §§ 3501 - 3511, as amended, are repealed.

Sec. 2. 18 MRSA c. 501, sub-c. I-A is enacted to read:

SUBCHAPTER I-A

GUARDIANSHIP FOR INCAPACITATED ADULTS

§ 3521. Definitions

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

1. Incapacitated adult. "Incapacitated adult" means a person who has attained the age of majority and is substantially impaired in his capacity to make, communicate or implement responsible decisions concerning his person or property by reason of mental illness, mental retardation, physical illness or disability, advanced age, chronic use of drugs or chronic intoxication.

§ 3522. Guardianship petitions

1. By whom brought. A guardianship petition may be brought by any adult on his own behalf, the spouse, parent, adult child or next of kin to an alleged incapacitated adult or any other interested and responsible person, including but not limited to, the director of any facility where the alleged incapacitated adult resides.

2. Contents; filing. The petition shall state the factual basis for the allegation of incapacity, and the name of the guardian recommended by the

petitioner, and list the name and last known address of each close relative of the alleged incapacitated adult known to the petitioner. The petition shall be filed with the District Court in the district where the alleged incapacitated adult resides.

§ 3523. Determination of need

Within 6 months prior to the date when a minor, who resides at a state-operated facility for the mentally retarded or mentally ill, attends a special education facility or has been identified by an administrative unit operating a school as an exceptional child, will attain the age of majority, or an adult admitted to a state-operated facility for the mentally retarded or mentally ill will be released, the director of the facility or administrative unit shall cause a comprehensive evaluation of the individual to be conducted. If the results of the evaluation indicate that the individual is likely to be considered an incapacitated adult, the director of the facility or administrative unit shall cause a guardianship petition to be brought prior to the minor's attainment of majority or adult's release.

§ 3524. Court duties

The court, upon receipt of the petition, shall:

1. Appointment of counsel. Appoint counsel for the alleged incapacitated adult;
2. Comprehensive evaluation. Order a suitable agency to conduct a comprehensive evaluation of the individual;
3. Hearing. Set a date and time and place for hearing; and
4. Notices to other persons and agencies. Identify those interested persons or agencies to be notified of the proceedings. The court shall cause notice, including a copy of the order and the petition, to be served in hand on the alleged incapacitated adult and by certified mail to other persons or agencies as directed.

§ 3525. Comprehensive evaluation

The comprehensive evaluation provided in section 3524, shall be conducted by an appropriately constituted interdisciplinary team; at least one member of which shall be a physician or doctor of psychology licensed to administer individual tests. The physician or doctor of psychology shall, whenever possible, be chosen by the individual to be examined. The evaluation shall cover physical, emotional, social and cognitive factors. The agency shall report the team's findings and recommendations to the court within 30 days of the order, except that if any party files with the court the results of such an evaluation performed within one year preceding the petition, this requirement may be waived. The court shall mail copies of the report to parties and to any other persons and agencies the court deems necessary, at least 14 days prior to the date set for hearing.

§ 3526. Nominations for guardian

Nominations for potential guardians to be considered by the court may be made by any party and shall be filed with the court at least 14 days prior to

the date set for hearing. The court shall timely notify each nominee and request that the nominee attend or be represented at the hearing, submit a written guardianship plan, or both.

§ 3527. Hearing

At the hearing the burden shall be on the petitioner to establish the allegation of incapacity. The court shall receive evidence concerning the nature and extent of the individual's general intellectual functioning, evaluate the extent of impairment in adaptive behavior and ascertain the individual's capacity to make, communicate and implement responsible decisions concerning his person and property.

§ 3528. Findings

A finding by the court that the individual's capacity is not substantially impaired shall result in immediate dismissal of the petition. If the court finds that the individual's capacity is substantially impaired, it shall make a further finding of fact as to which of the following areas of authority over the person or property require the approval of a guardian:

1. Residence. Choice of residence;

A. Any choice of a residential facility pursuant to this subsection, shall be limited to federal or state institutions or private facilities licensed as residential facilities by the Commissioner of Human Services pursuant to Title 22;

2. Education. Enrollment in educational or habilitation treatment programs;

3. Employment. Employment;

4. Disposition of property. Disposition or encumbrances of real or personal property other than by will;

5. Possession of personal property. Possession of personal property including the receipt of income or benefits;

6. Contracts. Contracts, except those for necessities;

7. Judicial actions. Commencement and defense of judicial actions;

8. Marriage. Marriage;

9. Family planning. Family planning;

10. Surgery. Nonemergency surgery;

11. Records. Release of information or records; and

12. Autopsy; burial. Provision for autopsy or burial.

An incapacitated adult retains all legal and civil rights except those which have by court order been designated as legal disabilities or specifically granted to the guardian by the court.

§ 3529. Estate

If the adult is found to be incapacitated in financial areas set out in section 3528, subsections 4 to 7, and has or expects to have an estate which includes any interest in real estate, or assets valued greater than \$2,000, or annual income greater than \$4,000, the court shall transfer the financial aspects of the finding to the probate court of the same area of jurisdiction in order to establish requirements for bond pursuant to section 3801 and receive the guardian's accounting and inventory of financial transactions governed by section 3851, et. seq. The register of probate shall forward a copy of the District Court order pertaining to disposition or encumbrance of real property to the register of deeds in each county where the incapacitated adult has an interest in real property.

§ 3530. Choice of guardian

The choice of guardian for an incapacitated adult, shall be based on the court's inquiry as to each nominee's qualifications and guardianship plan, with due regard to possible conflicts of interest. Whenever possible, an individual shall be preferable to an agency and any agency which is directly providing services to the incapacitated adult shall be appointed only as a last resort. Prior to appointment, the court shall make reasonable effort to question the incapacitated adult concerning his preference of a guardian and any preference indicated shall be given due consideration by the court.

§ 3531. Guardianship plan

A guardianship plan shall be approved by the court at the time of appointment. The plan shall describe how the incapacitated adult's needs for income, housing, medical and dental care, education or habilitation, treatment and any other needs as identified at hearing, are to be met during the coming year.

§ 3532. Duties of guardian

The duties of a guardian are those of a fiduciary. In addition to customary and enumerated duties, every guardian shall account to the court annually, or more often if the court so orders. The guardian shall account for all financial transactions and in addition, shall report on the manner in which the guardianship plan has been carried out and the need for revisions, if any, in the original order or plan.

§ 3533. Removal

Removal of a guardian may be accomplished by the following procedures:

1. **Petition.** Petition by any interested person or agency, including the guardian, or on the court's own motion; or
2. **Court finding.** A finding by the court that:
 - A. The guardian has failed to perform any of the duties imposed by law;
 - B. Another willing and more suitable guardian is available; or
 - C. The individual's capacity to make, communicate or implement responsible decisions concerning his person or property has increased and is no longer substantially impaired.

All interested persons and agencies shall receive adequate notice and if the basis of the petition is based on subsection 2, paragraph A, the guardian shall have the opportunity to appear and show cause why he should not be removed.

§ 3534. Prior guardianship

Every guardian appointed prior to the effective date of this subchapter, shall file a guardianship plan with the court within one year of the effective date of this subchapter. Any such guardian, ward or court on its own motion may initiate a petition under section 3522.

§ 3535. Penalties for violations

Whoever violates any provision of this subchapter or willfully fails, neglects or refuses to perform any of the duties imposed upon him by this subchapter, shall be guilty of a class E crime and shall forfeit all allowance for services.

§ 3536. Confidentiality and disclosure of information

All petitions, medical and administrative records, applications and reports and facts and information therein pertaining to any matters before the court in guardianship proceedings, shall be kept confidential and shall not be disclosed by any person except:

1. Consent of individual. As the individual identified or his legal guardian, if any, having been given the opportunity to review the information sought to be disclosed shall give his informed written consent;

2. Necessity. As disclosure may be necessary to carry out any of the statutory functions of any facility where an incapacitated person may be receiving services or the hospitalization provisions of Title 34, chapter 191; or

3. Court directive. As may be ordered by a court of record subject to any limitations contained within the privileged communication provisions of Title 32.

Sec. 3. 18 MRSA §§ 3601-3607, as amended, are repealed.

Sec. 4. 18 MRSA §§ 3621-3637, as amended, are repealed.

Sec. 5. 18 MRSA §§ 3638-3650-E, as amended, are repealed.

Sec. 6. 18 MRSA §§ 3701 and 3702, are repealed.

Sec. 7. 19 MRSA § 32 is repealed.

STATEMENT OF FACT

This bill provides for a single, streamlined procedure for both private and public guardianship of incapacitated adults. It reflects the current professional approach to various forms of mental impairment. The procedure is

designed to provide the essential elements of due process and to encourage maximum participation and cooperation of the incapacitated individual and his family. The effects of guardianship are made flexible, being tailored to the individual's specific type and degree of disability, as opposed to an "all or nothing" determination of competence. A partially incapacitated individual retains legal rights and obligations to the reasonable extent of his capacity to responsibly exercise those rights and meet those obligations. Under this bill, guardianship can serve both as a protective measure and foster individual growth and responsibility.