

MAINE STATE LEGISLATURE

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(Governor's Bill)
SECOND REGULAR SESSION

ONE HUNDRED AND NINTH LEGISLATURE

Legislative Document

No. 1871

S. P. 721

In Senate, January 24, 1980

Referred to the Committee on Judiciary. Sent down for concurrence and ordered printed.

MAY M. ROSS, Secretary of the Senate

Presented by Senator Conley of Cumberland.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND EIGHTY

**AN ACT to Amend the Procedure for Appointment of Guardians and Conservators
under the Maine Probate Code.**

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

Sec. 1. 18-A MRSA § 5-104, as enacted by PL 1979, c. 540, § 1, is further amended by adding at the end the following sentence:

The delegation becomes effective only when the power of attorney is filed with the court.

Sec. 2. 18-A MRSA § 5-303, as enacted by PL 1979, c. 540, § 1, is further amended to read:

§ 5-303. Procedure for court appointment of a guardian of an incapacitated person

(a) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian. **The petitioner shall inform the court in the petition of the steps he proposes to take to preserve, maintain or improve the well-being of the allegedly incapacitated person.**

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, **it shall require the petitioner to show cause why a guardian ad**

litem should not be appointed and may appoint an appropriate official or attorney to represent ~~him~~ **the allegedly incapacitated person** in the proceeding, who shall have the powers and duties of a guardian ad litem. **The petitioner may be ordered to bear the cost of a guardian ad litem if the allegedly incapacitated person's estate is insufficient for that purpose.** The person alleged to be incapacitated shall be examined by a physician acceptable to the court who shall submit his report in writing to the court. The court may appoint a visitor who shall interview the allegedly incapacitated person and the person who is seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made, and submit his report in writing to the court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see and hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the physician and the visitor. The issue may be determined at a closed hearing if the person alleged to be incapacitated or his counsel so requests.

Sec. 3. 18-A MRSA § 5-304, as enacted by PL 1979, c. 540, § 1, is amended to read:

§ 5-304. Findings; order of appointment

(a) The court may appoint a guardian as requested if it is satisfied **by a clear and convincing evidence** that the person for whom a guardian is sought is incapacitated and that the appointment is necessary ~~or~~ **and** desirable as a means of providing continuing care and supervision of the person of the incapacitated person. Alternatively, the court may dismiss the proceeding or enter any other appropriate order. **The court shall, upon the request of a party made as a motion within 5 days after notice of the decision, or may upon its own motion, find the facts specially and state separately its conclusion of law.**

(b) **In any appointment under subsection (a), the court shall impose the least restrictive protective order consistent with the welfare of the ward.**

Sec. 4. 18-A MRSA § 5-306, as enacted by PL 1979, c. 540, § 1, is amended to read:

§ 5-306. Termination of guardianship for incapacitated person

The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal ~~or~~, resignation **or termination** as provided in section 5-307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward.

Sec. 5. 18-A MRSA § 5-307, sub-§ (b), as enacted by PL 1979, c. 540, § 1, is amended to read:

~~(b) An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the~~ **The ward or any person interested in his welfare may petition for an order that he is no longer incapacitated, and for removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.**

Sec. 6. 18-A MRSA § 5-307, sub-§ (d) is enacted to read:

(d) A guardianship shall terminate on any 6th anniversary of the appointment, unless, during the year preceeding the anniversary, the guardian satisfies the court that the grounds for the original appointment continue to exist. If the court believes such grounds may not exist, it shall order a hearing, as provided in section 5-303, at which the guardian shall be required to satisfy the court by clear and convincing evidence that such grounds exist. After hearing, the court may affirm, modify or dismiss the guardianship.

Sec. 7. 18-A MRSA § 5-312, sub-§ (a), ¶ (5) as enacted by PL 1979, c. 540, § 1, is repealed and the following enacted in its place:

(5) The guardian shall file an annual report with the court indicating the present place of residence and health status of the ward, the guardian's plan for preserving, maintaining or improving the well-being of the ward. A guardian shall report annually the condition of the estate which has been subject to his possession or control, as required by the court or court rules. A guardian shall account formally to the court every 5 years for the estate which has been subject to his possession or control.

Sec. 8. 18-A MRSA § 5-407, sub-§ (c), as enacted by PL 1979, c. 540, § 1, is amended to read:

(c) After hearing, upon finding by a preponderance of the evidence that a basis for the appointment of a conservator or the issuance of any other protective order has been established is necessary and desirable, the court shall make an appointment or other appropriate protective order.

Sec. 9. 18-A MRSA § 5-410, sub-§ (c) is enacted to read:

(c) A facility or institution which is licensed under Title 22, sections 1817 and 7801 may not act as conservator of the state of a protected person who is a resident of the facility or institution.

Sec. 10. 18-A MRSA § 5-419, as enacted by PL 1979, c. 540, § 1, is amended to read:

§ 5-419. Accounts

Every conservator shall report annually to the court for his administration of the ward's estate as required by the court or court rule. Every conservator must

shall formally account to the court for his administration of the trust every 5 years, upon his resignation or removal, and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court, or he may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors, relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the state in his control, to be made in any manner the court may specify.

Sec. 11. Effective date. This Act shall take effect on January 2, 1981.

STATEMENT OF FACT

The purpose of this bill is to amend the procedure for appointment of guardians and conservators for incapacitated adults under the Maine Probate Code which will go into effect January 1, 1981.

The bill provides that the petitioner requesting to become a guardian inform the court of the manner in which he will preserve, maintain or improve the well-being of the ward. In addition, subsequent reports must be filed during the course of the guardianship.

It also provides the potential ward with a guardian **ad litem** and expanded notice and hearing procedures.

The court, too, will have a role in assuring that the least restrictive form of guardianship is ordered.

Similar provisions will be made in the case of conservatorships.

Any of these procedural requirements may be waived by the court after a showing that the procedure is unnecessary in a given case.