

# MAINE STATE LEGISLATURE

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5  
D.O.F.R.

1

L.D. 577

2

(Filing No. S- 176)

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STATE OF MAINE

4

SENATE

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112TH LEGISLATURE

6

FIRST REGULAR SESSION

7

COMMITTEE AMENDMENT "A" to S.P. 218, L.D. 577,  
8 Bill, "AN ACT to Amend the Probate Code to Improve  
9 Guardianship and Conservatorship Proceedings."

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Amend the bill by striking out everything after  
the enacting clause and inserting in its place the  
following:

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'Sec. 1. 18-A MRSA §5-303, as amended by PL  
1983, c. 816, Pt. A, §8, is further amended to read:

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

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(a) The incapacitated person or any person in-  
terested in his welfare may petition for a finding of  
incapacity and appointment of a guardian. The person  
nominated to serve as guardian shall file a plan  
which, where relevant, shall include, but not be lim-  
ited to, the type of proposed living arrangement for  
the ward, how the ward's financial needs will be met,  
how the ward's medical and other remedial needs will  
be met, how the ward's social needs will be met and a  
plan for the ward's continuing contact with relatives  
and friends.

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(b) Upon the filing of a petition, the court  
shall set a date for hearing on the issues of inca-  
pacity and unless the allegedly incapacitated person  
has counsel of his own choice, it may appoint an ap-  
propriate official or attorney to represent him in  
the proceeding, who shall have the powers and duties  
of a guardian and item the court shall appoint one or  
more of the following: A visitor, a guardian ad li-  
tem or an attorney to represent the allegedly inca-  
pacitated person in the proceeding. The person al-  
leged to be incapacitated shall be examined by a phy-

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1       sician or by a licensed psychologist acceptable to  
2       the court who shall submit his report in writing to  
3       the court, providing diagnoses, a description of the  
4       person's actual mental and adaptive limitations and  
5       prognoses. The court may appoint a visitor who shall  
6       interview the allegedly incapacitated person and the  
7       person who is seeking appointment as guardian, and  
8       visit the present place of abode of the person al-  
9       leged to be incapacitated and the place it is pre-  
10      posed that he will be detained or reside if the re-  
11      quested appointment is made, and submit his report in  
12      writing to the court. The person alleged to be inca-  
13      pacitated is entitled to be present at the hearing in  
14      person, and to see and hear all evidence bearing upon  
15      his condition. He is entitled to be represented by  
16      counsel, to present evidence, to cross-examine wit-  
17      nesses, including the physician and the visitor. The  
18      issue may be determined at a closed hearing if the  
19      person alleged to be incapacitated or his counsel so  
20      requests.

21       (c) If appointed, the visitor shall interview  
22      the allegedly incapacitated person and the person who  
23      is seeking appointment as guardian, and visit the  
24      present place of abode of the person alleged to be  
25      incapacitated and the place it is proposed that he  
26      will reside if the requested appointment is made and  
27      submit his report in writing to the court. The visi-  
28      tor shall explain the meaning and possible conse-  
29      quences, including, but not limited to, those enumer-  
30      ated in section 5-312, of the requested appointment  
31      to the allegedly incapacitated person and determine  
32      if he wishes to contest any aspect of the proceeding  
33      or seek any limitation of the proposed guardian's  
34      powers. If the visitor determines that the person  
35      wants to contest any issue or seek a limited appoint-  
36      ment and that the person does not have counsel of his  
37      own choice, the visitor shall so indicate in his  
38      written report to the court. The person alleged to  
39      be incapacitated is entitled to be present at the  
40      hearing in person, and to see and hear all evidence  
41      bearing upon his condition. He is entitled to be

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1 represented by counsel, to present evidence, to  
2 cross-examine witnesses, including the physician and  
3 the visitor. The issue may be determined at a closed  
4 hearing if the person alleged to be incapacitated or  
5 his counsel so requests.

6 (d) Except as otherwise provided by law, all re-  
7 ports and plans required by this section shall be  
8 submitted to the court, and all parties of record, at  
9 least 10 days before any hearing on the petition.

10 Sec. 2. 18-A MRSA §5-304, as amended by PL 1979,  
11 c. 690, §18, is repealed and the following enacted in  
12 its place:

13 §5-304. Findings; order of appointment

14 (a) The court shall exercise the authority con-  
15 ferred in Parts 3 and 6 so as to encourage the devel-  
16 opment of maximum self reliance and independence of  
17 the incapacitated person and make appointive and oth-  
18 er orders only to the extent necessitated by the in-  
19 capacitated person's actual mental and adaptive limi-  
20 tations or other conditions warranting the procedure.

21 (b) The court may appoint a guardian as re-  
22 quested if it is satisfied that the person for whom a  
23 guardian is sought is incapacitated and that the ap-  
24 pointment is necessary or desirable as a means of  
25 providing continuing care and supervision of the in-  
26 capacitated person. Alternatively, the court may  
27 dismiss the proceeding or enter any other appropriate  
28 order.

29 (c) The court shall not enter any order of de-  
30 fault against the allegedly incapacitated person un-  
31 less all procedural requirements have been substan-  
32 tially met and there is factual basis in the record  
33 that an order of default is appropriate.

34 (d) In its order, the court may make separate  
35 findings of fact and conclusions of law. If a party

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1     requests separate findings and conclusions, within 5  
2     days of notice of the decision, the court shall make  
3     them.

4             Sec. 3. 18-A MRSA §5-309, sub-§(a), ¶(3), as en-  
5     acted by PL 1979, c. 540, §1, is amended to read:

6             (3) In case no other person is notified under  
7             paragraph (1), at least one of his closest adult  
8             relatives or adult friends, if any can be found.

9             Sec. 4. 18-A MRSA §5-309, sub-§(b), as enacted  
10     by PL 1979, c. 540, §1, is amended to read:

11            (b) Notice shall be served personally on the  
12     alleged allegedly incapacitated person, and, if they  
13     can be found within the State, on the spouse of the  
14     alleged incapacitated person, or on an adult child of  
15     the alleged incapacitated person if no spouse can be  
16     found within the State, or on a parent of the inca-  
17     pacitated person if no spouse or adult child can be  
18     found within the State. Notice to the spouse, adult  
19     child, or parent, if they cannot be found within the  
20     State, shall be given as provided by court rule under  
21     section 1-401. Waiver of notice by the person alleged  
22     to be incapacitated is not effective unless he at-  
23     tends the hearing or his waiver of notice is con-  
24     firmed in an interview with the visitor. Representa-  
25     tion of the alleged incapacitated person by a guardi-  
26     an ad litem is not mandatory. The court may order  
27     that the petition and hearing notice be served by the  
28     visitor who will make reasonable effort to provide  
29     meaningful notice to the allegedly incapacitated per-  
30     son by explaining the meaning and possible conse-  
31     quences of the pending proceeding.

32            Sec. 5. 18-A MRSA §5-309, sub-§(c) is enacted to  
33     read:

34            (c) If they can be found within the State, no-  
35     tice shall be served personally on the spouse of the  
36     allegedly incapacitated person and on all the adult

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1 children of the allegedly incapacitated person, on  
2 the parents if no spouse or adult children can be  
3 found within the State or on the closest adult rela-  
4 tive or friend if no spouse, adult children or parent  
5 can be found within the State. Notice to the spouse,  
6 adult children, parent or adult relative or friend if  
7 they cannot be found within the State, shall be given  
8 as provided by court rule under section 1-401.

9       Sec. 6. 18-A MRSA §5-312, sub-§(a), ¶(5), as en-  
10 acted by PL 1979, c. 540, §1, is amended to read:

11       (5) A guardian is required to report the condi-  
12 tion of his ward and of the estate which has been  
13 subject to his possession or control, as ~~required~~  
14 ~~by the court or court rule~~ specified by the court  
15 at the time of the order.

16       The court on its own motion, or on the petition  
17 of any interested person, may appoint a visitor  
18 to review the guardian's report and determine if  
19 appropriate provisions for the care, comfort and  
20 maintainence of his ward and for the care and  
21 protection of his ward's property have been made.  
22 The visitor shall report his findings to the  
23 court in writing.

24       Sec. 7. 18-A MRSA §5-405, sub-§(a), as enacted  
25 by PL 1979, c. 540, §1, is amended to read:

26       (a) On a petition for appointment of a conserva-  
27 tor or other protective order, the person to be pro-  
28 tected, and, if they can be found within the State,  
29 his spouse ~~or, if none, an~~ and all adult ~~child~~  
30 children of the person, or if no spouse or adult  
31 ~~child~~ children of the person, the person's parents or  
32 closest adult relative or friend, must be served per-  
33 sonally with notice of the proceeding at least 14  
34 days before the date of the hearing if they can be  
35 ~~found within the State~~, or, if they cannot be found  
36 within the State, they must be given notice as pre-  
37 scribed by court rule under section 1-401. Waiver by

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1 the person to be protected is not effective unless he  
2 attends the hearing or, unless minority is the reason  
3 for the proceeding, waiver is confirmed in an inter-  
4 view with the visitor.

5 Sec. 8. 18-A MRSA §5-405, sub-§(a-1) is enacted  
6 to read:

7 (a-1) The court may order that the petition and  
8 hearing notice be served by the visitor on the pro-  
9 ected person. The visitor shall make reasonable ef-  
10 fort to provide the protected person with meaningful  
11 notice by explaining the meaning and possible conse-  
12 quences of the pending proceedings.

13 Sec. 9. 18-A MRSA §5-407, sub-§(b), as amended  
14 by PL 1983, c. 241, §2, is further amended to read:

15 (b) Upon receipt of a petition for appointment  
16 of a conservator or other protective order for rea-  
17 sons other than minority, the court shall set a date  
18 for hearing. Unless the person to be protected has  
19 counsel of his own choice, the court ~~may~~ shall ap-  
20 point one or more of the following: A visitor; a  
21 guardian ad litem or a lawyer to represent ~~him~~ who  
22 ~~then has the powers and duties of a guardian ad litem~~  
23 the person to be protected in the proceedings. If the  
24 alleged disability is physical illness or disability,  
25 advanced age, chronic use of drugs, or chronic intox-  
26 ication, the court may direct that the person to be  
27 protected be examined by a physician acceptable to  
28 the court, preferably a physician who is not con-  
29 nected with any institution in which the person is a  
30 patient or is detained. If the alleged disability is  
31 mental illness or mental deficiency, the court may  
32 direct that the person to be protected be examined by  
33 a physician or by a licensed psychologist acceptable  
34 to the court; preferably the physician or psycholo-  
35 gist shall not be connected with any institution in  
36 which the person is a patient or is detained. ~~The~~  
37 ~~court may send a visitor to interview the person to~~  
38 ~~be protected. The visitor may be a guardian ad litem~~

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1 ~~or an officer or employee of the court.~~ The physician  
2 or psychologist shall submit his report in writing to  
3 the court, providing diagnoses, a description of the  
4 person's actual mental and adaptive limitations and  
5 prognoses.

6 Sec. 10. 18-A MRSA §5-407, sub-§§(b-1) and (b-2)  
7 are enacted to read:

8 (b-1) If appointed, the visitor shall interview  
9 the person to be protected. The visitor shall ex-  
10 plain the meaning and possible consequences, includ-  
11 ing, but not limited to, those enumerated in sections  
12 5-424 and 5-425, of the requested appointment to the  
13 person to be protected and determine if he wishes to  
14 contest any aspect of the proceedings or seek any  
15 limitation of the proposed conservator's powers. If  
16 the visitor determines that the person wants to con-  
17 test any issue or seek a limited appointment and that  
18 the person does not have counsel of his own choice,  
19 the visitor shall so indicate in his written report  
20 to the court. The person to be protected is entitled  
21 to be present at the hearing in person and to see and  
22 hear all evidence bearing upon his condition. He is  
23 entitled to be represented by counsel, to present ev-  
24 idence, to cross examine witnesses, including the  
25 physician and the visitor. The issue may be deter-  
26 mined at a closed hearing if the person to be pro-  
27 TECTED or his counsel so request.

28 (b-2) The person nominated to serve as conserva-  
29 tor shall file a plan which, where relevant, shall  
30 include, but not be limited to, how the protected  
31 person's financial needs will be met, as well as a  
32 plan for the management of the protected person's es-  
33 tate.

34 Sec. 11. 18-A MRSA §5-407, sub-§(c), as enacted  
35 by PL 1979, c. 540, §1, is amended to read:

36 (c) After hearing, upon finding that the person  
37 to be protected has received meaningful notice of the



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1 proceedings, the person is unable to manage or apply  
2 his estate to necessary ends effectively, the nominee  
3 is qualified to serve as conservator and that a basis  
4 for the appointment of a conservator or other protec-  
5 tive order has been established, the court shall make  
6 an appointment or other appropriate protective order,  
7 except that the court shall not enter any order of  
8 default against the person to be protected unless all  
9 procedural requirements have been substantially met  
10 and there is a factual basis in the record to demon-  
11 strate that an order of default is appropriate.

12 Sec. 12. 18-A MRSA §5-407, sub-§(d) is enacted  
13 to read:

14 (d) Except as otherwise provided by law, all re-  
15 ports and plans required by this section shall be  
16 submitted to the court and all parties of record at  
17 least 10 days before any hearing on the petition.

18 Sec. 13. 18-A MRSA §5-408, as enacted by PL  
19 1979, c. 540, §1, is amended by adding before the  
20 first paragraph a new paragraph to read:

21 The court shall exercise the authority conferred  
22 in Parts 4 and 6 to encourage the development of max-  
23 imum self reliance and independence of the protected  
24 person and make protective orders only to the extent  
25 necessitated by the protected person's actual mental  
26 and adaptive limitations and other conditions war-  
27 ranteeing the procedure.

28 Sec. 14. 18-A MRSA §5-419, as enacted by PL  
29 1979, c. 540, §1, is repealed and the following en-  
30 acted in its place:

31 §5-419. Accounts

32 (a) Every conservator must account to the court  
33 for his administration of the trust as specified by  
34 the court at the time of the order and upon his res-  
35 ignation or removal. On termination of the protec-

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1     tive person's minority or disability, a conservator  
2     may account to the court or he may account to the  
3     former protected person or his personal representa-  
4     tive.

5             (b) Subject to appeal or vacation, within the  
6     time permitted, an order, made upon notice and hear-  
7     ing allowing an intermediate account of the conserva-  
8     tor, adjudicates as to his liabilities concerning the  
9     matters considered in connection therewith; and an  
10    order, made upon notice and hearing, allowing a final  
11    account adjudicates as to all previously unsettled  
12    liabilities of the conservator to the protected per-  
13    son or his successors relating to the conservator-  
14    ship. In connection with any account, the court may  
15    require a conservator to submit to a physical check  
16    of the estate he has controlled, to be made in any  
17    manner the court may specify.

18            (c) The court may appoint a visitor to review  
19    the conservator's accounts and determine if appropri-  
20    ate provision for the use, care and protection of the  
21    protected person's property has been made. The visi-  
22    tor shall report his findings to the court in writ-  
23    ing.

24                             STATEMENT OF FACT

25            This amendment makes many fewer changes in the  
26    Probate Code than those proposed in the original  
27    bill.

28            The primary changes in the Probate Code made in  
29    this amendment are:

30            1. Requiring a person seeking to become a guard-  
31    ian of an allegedly incapacitated person to file a  
32    plan with the court which describes the arrangements  
33    the guardian would make for the ward;

34            2. Requiring the Probate Court to appoint a vis-

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1     itor, guardian ad litem or attorney for an allegedly  
2     incapacitated person who has no counsel;

3             3. Requiring a visitor if appointed, to explain  
4     the consequences of guardianship to the allegedly in-  
5     capacitated person;

6             4. Requiring the Probate Court to appoint a  
7     guardian and make orders only to the extent necessi-  
8     tated by the incapacitated person's actual limita-  
9     tions;

10            5. Permitting the Probate Court to enter an or-  
11     der of default against an allegedly incapacitated  
12     person only if all procedural requirements have been  
13     met and the record contains a factual basis for the  
14     default order;

15            6. Requiring the court, at the time of the or-  
16     der, to specify when the guardian must report to the  
17     court on the ward's and the estate's condition; and

18            7. Making similar changes in the Probate Code  
19     provisions for conservatorship.

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Reported by the Majority for the Committee on Judiciary.  
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