

MAINE STATE LEGISLATURE

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1 FIRST REGULAR SESSION
2

3 ONE HUNDRED AND TWELFTH LEGISLATURE
4

5 Legislative Document

No. 577

6
7 S.P. 218

In Senate, February 14, 1985

8 Referred to the Committee on Judiciary. Sent down for concurrence and
9 ordered printed. Ordered sent forthwith.

10 JOY J. O'BRIEN, Secretary of the Senate

Presented by Senator Carpenter of Aroostook.

11 Cosponsored by Representative Foster of Ellsworth, Representative Allen
of Washington and Senator Gauvreau of Androscoggin.

12 STATE OF MAINE
13

14 IN THE YEAR OF OUR LORD
15 NINETEEN HUNDRED AND EIGHTY-FIVE
16

17 AN ACT to Amend the Probate Code to Improve
18 Guardianship and Conservatorship
19 Proceedings.
20

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

23 Sec. 1. 18-A MRSa §5-101, as enacted by PL 1979,
24 c. 540, §1, is repealed and the following enacted in
25 its place:

26 §5-101. Definitions and use of terms

27 As used in this Code, unless the context other-
28 wise indicates, the following terms have the follow-
29 ing meanings.

30 (1) "Incapacitated person" means any person who
31 is mentally or physically impaired to the extent that
32 he is unable to perform essential activities of daily
33 living, or is unable to contract with another to per-
34 form these essential activities for him, with the re-

1 sult that he had unintentionally placed himself in
2 clear danger of imminent harm or injury.

3 (2) A "protective proceeding" is a proceeding
4 under the provisions of section 5-401 to determine
5 whether a person cannot manage or apply his estate to
6 obtain the basic necessities of shelter, food, cloth-
7 ing and medical care, or cannot contract with another
8 to manage or apply his estate in this manner for him,
9 with the result that he has unintentionally placed
10 himself in clear danger of imminent harm or injury.

11 (3) A "protected person" is a minor or other
12 person for whom a conservator has been appointed or
13 other protection order has been made.

14 (4) A "ward" is a person for whom a guardian has
15 been appointed. A "minor ward" is a minor for whom a
16 guardian has been appointed solely because of minori-
17 ty.

18 Sec. 2. 18-A M RSA §5-105, as enacted by PL 1979,
19 c. 540, §1, is repealed and the following enacted in
20 its place:

21 §5-105. Limited guardianships

22 In any case in which a guardian can be appointed
23 by the court, the judge shall grant the least re-
24 strictive powers to the guardian necessary to protect
25 the incapacitated person from harm or injury. The
26 judge shall enumerate the duties and powers in his
27 order in every instance of appointing a temporary or
28 permanent limited guardian, specifying whether the
29 ward retains the right:

30 (1) To vote, as defined in Title 21, section
31 241;

32 (2) To marry;

33 (3) To purchase food, clothing and incidentals;

34 (4) To make contracts, including a contract to
35 convey real estate, if applicable;

1 (5) To accept or reject medical treatment, in-
2 cluding admittance to a hospital, nursing home or
3 other facility;

4 (6) To travel;

5 (7) To make gifts;

6 (8) To drive a car; or

7 (9) To do other enumerated activities as speci-
8 fied by the ward.

9 In any case in which the judge decides the ward
10 may not retain one of these rights, he shall state
11 the reason for his decision in his order.

12 Sec. 3. 18-A MRSA §5-303, as amended by PL 1983,
13 c. 816, Pt. A, §8, is repealed and the following en-
14 acted in its place:

15 §5-303. Procedure for court appointment of a guardi-
16 an of an incapacitated person

17 (a) The incapacitated person or any person in-
18 terested in his welfare may petition for a finding of
19 incapacity and appointment of a guardian. In all
20 cases in which the petitioner is not the allegedly
21 incapacitated person, the nominee, upon filing his
22 acceptance but in no case less than 10 days before
23 the hearing on the petition's merits, shall file with
24 the court a written report describing in detail his
25 plan for the ward's care. A copy of such a plan
26 shall also be given to the allegedly incapacitated
27 person at least 10 days before the hearing. The plan
28 shall include, but not be limited to, the type of
29 proposed living arrangement for the ward, how the
30 ward's social needs will be met and a plan for the
31 ward's continuing contact with relatives and friends.

32 (b) Upon the filing of a petition, the court
33 shall set a date for hearing on the issues of inca-
34 capacity and the nominee's qualifications to serve.
35 The court shall appoint an attorney to represent the
36 allegedly incapacitated person in all cases in which
37 that person does not obtain counsel of his own choice
38 after service of the petition and notice of hearing
39 upon him.

1 (c) The person alleged to be incapacitated shall
2 be examined by a physician acceptable to the court,
3 whose examination shall not have been made earlier
4 than one month before the hearing on the petition's
5 merits and whose written report shall be submitted to
6 the court and the allegedly incapacitated person at
7 least 10 days before the hearing. This report must
8 describe:

9 (1) The time, place, duration of the examination
10 and history of previous care and treatment of the
11 allegedly incapacitated person;

12 (2) The allegedly incapacitated person's orien-
13 tation as to time, place and person;

14 (3) His diagnosed impairments, current treatment
15 for each, prognosis for each and limitations im-
16 posed on his functional capacity;

17 (4) All tests and procedures administered during
18 the examination, attaching the results of the
19 tests and procedures to the report;

20 (5) Opinion of type and degree of care needed
21 for each impairment, including any recommended
22 institutionalization; and

23 (6) Opinion of any imminent harm or injury like-
24 ly to occur, based on the physician's detailed
25 observations or conclusions that the person has
26 experienced inadequate shelter, food, clothing or
27 medical care.

28 (d) If it is alleged by the petitioner that the
29 allegedly incapacitated person suffers from any men-
30 tal illness, a psychiatrist or psychologist shall ex-
31 amine the person to evaluate and report upon any such
32 impairment according to the standards described in
33 subsection (c).

34 (e) The court may appoint a visitor who shall
35 interview the allegedly incapacitated person and the
36 nominee for appointment as guardian. He shall visit
37 the present residence of the person alleged to be in-
38 capacitated and the place it is proposed that he will
39 be detained or will reside if the nominee is ap-

1 pointed. He shall determine, if possible, whether
2 the person understands the notice served upon him,
3 understands the possible consequences of the guardi-
4 anship petition and hearing and wishes to attend the
5 hearing. He may arrange transportation to the hear-
6 ing for the allegedly incapacitated person. He shall
7 review the nominee's plan for the person's care and
8 maintenance to determine if it is the least restric-
9 tive plan appropriate to meet the person's needs.
10 The visitor will submit his written report to the
11 court and the allegedly incapacitated person at least
12 10 days before the hearing on the petition's merits.

13 (f) The person alleged to be incapacitated is
14 entitled to be present at the hearing in person and
15 to see and hear all evidence bearing upon his condi-
16 tion and the proceedings. He is entitled to be
17 represented by counsel, and an attorney shall be ap-
18 pointed for him in the circumstances described in
19 this section. He is entitled to present evidence and
20 to cross-examine witnesses, including the nominee,
21 physician and visitor. All hearings relating to the
22 petition may be closed to the public if the allegedly
23 incapacitated person or his counsel so requests.

24 (g) The person alleged to be incapacitated has
25 the right to be examined by a physician of his own
26 choice, if he makes known his choice.

27 (h) A stenographic or electronic record shall be
28 made of the proceedings in all guardianship hearings.
29 The record, all notes, exhibits and other evidence
30 shall be retained as part of the Probate Court
31 records for a period of 2 years from the date of the
32 hearing.

33 Sec. 4. 18-A MRSA §5-304, as amended by PL 1979,
34 c. 690, §18, is repealed and the following enacted in
35 its place:

36 §5-304. Findings; order of appointment

37 The court may appoint a guardian as requested if
38 it finds, based on clear and convincing proof, that
39 the person alleged to be incapacitated has received
40 meaningful notice of the proceedings as prescribed by
41 section 5-309, subsection (b), that the person for

1 whom a guardian is sought is incapacitated, that the
2 nominee is qualified to serve as guardian and that
3 the appointment is necessary as a means of providing
4 continuing care and supervision of the person of the
5 incapacitated person. In any case in which a full
6 and permanent guardian is appointed, the court shall
7 specifically state why a limited or limited and tem-
8 porary guardianship was insufficient.

9 A guardian shall not exercise control over the
10 ward's estate unless he has also been duly appointed
11 the ward's conservator. A petitioner may file a
12 joined petition for appointment as guardian and con-
13 servator so that both claims may be heard together.

14 In its order, the court may make separate find-
15 ings of fact and conclusions of law. If a party re-
16 quests separate findings and conclusions, within 5
17 days of notice of the decision, the court shall make
18 separate findings and conclusions.

19 Sec. 5. 18-A MRS §5-306, as enacted by PL 1979,
20 c. 540, §1, is repealed and the following enacted in
21 its place:

22 §5-306. Termination of guardianship for incapaci-
23 tated person

24 (a) The authority and responsibility of a guard-
25 ian for an incapacitated person terminates upon the
26 death of the guardian or ward, the determination of
27 incapacity of the guardian or upon removal or resig-
28 nation as provided in section 5-307. Testamentary ap-
29 pointment under an informally probated will termi-
30 nates if the will is later denied probate in a formal
31 proceeding. Termination does not affect a guardian's
32 liability for prior acts nor his obligation to ac-
33 count for funds and assets of his ward.

34 (b) If the guardian's authority terminates for
35 any of the reasons described in subsection (a), the
36 former guardian or the personal representative of his
37 estate, if he is deceased, shall file with the court
38 a final accounting of the ward's funds and assets and
39 surrender custody of all the ward's property to the
40 court within 30 days of the date of termination, if
41 any assets or property was under his control.

1 (c) If the guardian's authority terminates for
2 any reason described in subsection (a), other than
3 the death of the ward, and no successor guardian is
4 named by the court after a full hearing to determine
5 the necessity therefor, the ward shall automatically
6 regain all rights and the prior finding of incapacity
7 shall be voided. Nothing in this subsection bars a
8 subsequent petition for guardianship or conservator-
9 ship.

10 Sec. 6. 18-A MRSA §5-308, as enacted by PL 1979,
11 c. 540, §1, is amended to read:

12 §5-308. Visitor in guardianship proceedings

13 A visitor is, with respect to guardianship pro-
14 ceedings, a person who is trained in law, nursing,
15 social work, or has other significant qualifications
16 that make him suitable to perform the ~~function~~ func-
17 tions described in section 5-303, subsection (e), and
18 is an officer, employee or special appointee of the
19 court with no personal interest in the proceedings.

20 If the court determines that ordinary service in
21 hand of the petition and hearing notice would be in-
22 effective to give the allegedly incapacitated person
23 meaningful notice of his rights in connection with
24 the proceedings, the visitor will serve the petition
25 and hearing notice in person upon the allegedly inca-
26 pacitated person and make every reasonable effort to
27 explain the meaning and possible consequences of the
28 pending proceedings.

29 Sec. 7. 18-A MRSA §5-309, as enacted by PL 1979,
30 c. 540, §1, is repealed and the following enacted in
31 its place:

32 §5-309. Notices in guardianship proceedings

33 (a) In a proceeding for the appointment or re-
34 moval of a guardian of an incapacitated person other
35 than the emergency appointment of a temporary guardi-
36 an or temporary suspension of a guardian, notice of
37 hearing shall be given to each of the following:

38 (1) The ward or the allegedly incapacitated per-
39 son and his spouse, parents and adult children;

1 (2) Any person who is serving as his guardian,
2 conservator, custodian or who provides his care;
3 and

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

8 (b) Notice shall be served personally on the al-
9 legedly incapacitated person. In any instance in
10 which the petitioner or other interested party al-
11 leges that ordinary service in hand would not be ef-
12 fective to give the allegedly incapacitated person
13 meaningful notice of his rights in the proceedings,
14 the court shall appoint a visitor to serve the peti-
15 tion and notice of hearing upon the person and to
16 make every reasonable effort to explain the meaning
17 and possible consequences of the pending proceedings
18 to him, in addition to the visitor's other duties.

19 (c) If they can be found within the State, no-
20 tice shall be served personally on the spouse of the
21 allegedly incapacitated person, on all the adult
22 children of the allegedly incapacitated person if no
23 spouse can be found within the State, on the parents
24 if no spouse or adult child can be found within the
25 State or on the closest adult relative or friend if
26 no spouse, adult child or parent can be found within
27 the State. Notice to the spouse, adult children,
28 parents or adult relative or friend, if they cannot
29 be found within the State, shall be given as provided
30 by court rule under section 1-401

31 (d) No default of the person alleged to be inca-
32 pacitated may be entered, nor default judgment or-
33 dered, until the court has made an investigation to
34 determine if the person has the capacity to under-
35 stand the implications and consequences of default
36 and, if so, whether he has knowingly and voluntarily
37 chosen to default in the pending proceedings. The
38 court shall appoint a visitor who will have the au-
39 thority to make this investigation. If the person
40 alleged to be incapacitated has the capacity to un-
41 derstand and did not knowingly and voluntarily choose
42 to default, the court shall schedule another hearing
43 on the merits to enable the person to appear in per-
44 son.

1 Sec. 8. 18-A MRSA §5-312, as enacted by PL 1979,
2 c. 540, §1, is repealed and the following enacted in
3 its place:

4 §5-312. General powers and duties of guardian

5 (a) A guardian of an incapacitated person has
6 the same powers, rights and duties respecting his
7 ward that a parent has respecting his unemancipated
8 minor child, except that a guardian is not legally
9 obligated to provide from his own funds for the ward
10 and is not liable to 3rd persons for acts of the ward
11 solely by reason of the parental relationship. In
12 particular, and without qualifying the foregoing, a
13 guardian has the following powers and duties, except
14 as modified by order of the court:

15 (1) To the extent that it is consistent with the
16 terms of any order by a court of competent juris-
17 isdiction relating to detention or commitment of
18 the ward, he is entitled to custody of the person
19 of his ward and may establish the ward's place of
20 abode within or without this State, and may place
21 the ward in any hospital or other institution for
22 care in the same manner as otherwise provided by
23 law;

24 (2) If entitled to custody of his ward, he shall
25 make provision for the care, comfort and mainte-
26 nance of his ward and, whenever appropriate, ar-
27 range for his training, education, therapy and
28 rehabilitation. Without regard to custodial
29 rights of the ward's person, he shall take rea-
30 sonable care of his ward's realty, clothing, fur-
31 niture, vehicles and other personal effects and
32 commence protective proceedings if other property
33 of his ward is in need of protection;

34 (3) A guardian may give any consent or approval
35 that may be necessary to enable the ward to re-
36 ceive medical or other professional care, coun-
37 sel, treatment or service;

38 (4) A guardian is required to report the condi-
39 tion of his ward and of the estate if any has
40 been subject to his possession or control at
41 least annually and at any time when ordered by

1 the court. Such a report shall be made in writ-
2 ing, filed with the court and will include an as-
3 sessment of the plan for the ward and recommenda-
4 tions for any modifications necessary, descrip-
5 tion of the current health status of the ward and
6 any significant changes in his condition since
7 the last report, description of any hospitaliza-
8 tion of the ward or any changes in residence and
9 a listing of the locations of the ward's personal
10 property. The court may appoint a visitor to re-
11 view the guardian's annual report and determine
12 if the plan or any suggested modifications con-
13 tinue to be the least restrictive plan appropri-
14 ate to meet the ward's needs. A copy of the
15 guardian's annual report shall be given to the
16 ward, as well as a copy of any visitor's review
17 of such a report; and

18 (5) If a conservator has been appointed, all of
19 the ward's estate received by the guardian in ex-
20 cess of those funds expended to meet current ex-
21 penses for support, care and education of the
22 ward must be paid to the conservator for manage-
23 ment, as provided in this Code, and the guardian
24 must account to the conservator for funds ex-
25 pended.

26 (b) Any guardian of one for whom a conservator
27 also has been appointed shall control the custody and
28 care of the ward, and is entitled to receive reason-
29 able sums for his services and for room and board
30 furnished to the ward as agreed upon between him and
31 the conservator, provided that the amounts agreed
32 upon are reasonable under the circumstances. The
33 guardian may request the conservator to expend the
34 ward's estate by payment to 3rd persons or institu-
35 tions for the ward's care and maintenance.

36 Sec. 9. 18-A MRSA §5-401, as enacted by PL 1979,
37 c. 540, §1, is repealed and the following enacted in
38 its place:

39 §5-401. Protective proceedings

40 Upon petition and after notice and hearing in ac-
41 cordance with the provisions of this Part, the court
42 may appoint a conservator, a limited conservator, a

1 limited and temporary conservator or make other protective
2 order, granting the least restrictive powers
3 to the conservator necessary to prevent harm or injury
4 to the person to be protected, if the circumstances
5 described in subsection 1 or 2 are determined
6 to exist:

7 (1) Appointment of a conservator or other protective
8 order may be made in relation to the estate and affairs
9 of a minor if the court determines that a minor owns
10 money or property that requires management or protection
11 which cannot otherwise be provided, has or may have
12 business affairs which may be jeopardized or prevented
13 by his minority or that funds are needed for his support
14 and education and that protection is necessary or desirable
15 to obtain or provide funds.

16 (2) Appointment of a conservator or other protective
17 order may be made in relation to the estate and affairs
18 of a person if the court determines, based upon clear and
19 convincing proof, that (i) the person cannot manage or
20 apply his estate to obtain the basic necessities of
21 shelter, food, clothing and medical care, or cannot
22 contract with another to manage and apply his estate
23 in this manner for him, with the result that he has
24 unintentionally placed himself in clear danger of
25 imminent harm or injury; or (ii) the person to be
26 protected has disappeared; or (iii) the person to be
27 protected is being detained outside the United States
28 by a foreign power.

29 Sec. 10. 18-A MRSA §5-405, as enacted by PL
30 1979, c. 540, §1, is amended to read:

31 §5-405. Notice

32 (a) On a petition for appointment of a conservator
33 or other protective order, the person to be protected
34 and his spouse or, if none, ~~an adult child~~ all
35 adult children of the person, or if no spouse or
36 adult child of the person, the person's parents, must
37 be served personally with notice of the proceeding at
38 least 14 days before the date of the hearing if they
39 can be found within the State, ~~or, if.~~ If they cannot
40 be found within the State, they must be given notice
41 as prescribed by court rule under section 1-401.
42 Waiver by the person to be protected is not effective

1 unless he attends the hearing or, unless minority is
2 the reason for the proceeding, waiver is confirmed in
3 an interview with the visitor.

4 (b) Notice of a petition for appointment of a
5 conservator or other initial protective order, and of
6 any subsequent hearing, must be given to any person
7 who has filed a request for notice under section
8 5-406 and to interested persons and other persons as
9 the court may direct. Except as otherwise provided in
10 subsection (a), notice shall be given as prescribed
11 by court rule under section 1-401.

12 (c) In any instance in which the petitioner or
13 other interested party alleged that ordinary service
14 in hand of the petition and hearing notice would not
15 give the person to be protected meaningful notice of
16 his rights in connection with the proceedings and if
17 the location of the person to be protected is known,
18 a visitor shall be appointed to serve the petition
19 and hearing notice in person upon him and make every
20 reasonable effort to explain the meaning and possible
21 consequences of the pending proceedings to him.

22 Sec. 11. 18-A MRSA §5-407, as amended by PL
23 1983, c. 241, §2, is repealed and the following en-
24 acted in its place:

25 §5-407. Procedure concerning hearing and order on
26 original petition

27 (a) Upon receipt of a petition for appointment
28 of a conservator or other protective order because of
29 minority, the court shall set a date for hearing on
30 the matters alleged in the petition. If, at any time
31 in the proceeding, the court determines that the in-
32 terests of the minor are or may be inadequately
33 represented, it may appoint an attorney to represent
34 the minor, giving consideration to the choice of the
35 minor if 14 years of age or older. A lawyer appointed
36 by the court to represent a minor has the powers and
37 duties of a guardian ad litem.

38 (b) Upon receipt of a petition for appointment
39 of a conservator or other protective order for rea-
40 sons other than minority, the court shall set a date
41 for hearing on the issues of the person's need for

1 protection as defined in section 5-401 and the
2 nominee's qualifications to serve as conservator.
3 The court shall appoint an attorney to represent the
4 person to be protected in all cases in which that
5 person does not obtain counsel of his own choice af-
6 ter service of the petition and notice of hearing
7 upon him.

8 (c) if the petitioner states that the person to
9 be protected needs a conservator or other protective
10 order because he is impaired mentally or physically,
11 the person shall be examined by a physician accept-
12 able to the court, whose examination shall not have
13 been made earlier than one month before the hearing
14 on the petition's merits and whose written report
15 shall be submitted to the court and the person to be
16 protected at least 10 days before such a hearing. If
17 it is alleged by the petitioner that the person suf-
18 fers from any mental illness or deficiency, a psychi-
19 atrist or licensed psychologist shall examine the
20 person to evaluate and report upon any such impair-
21 ment according to the standards described in this
22 section. The physician's or psychologist's report
23 must describe:

24 (1) The time, place, duration of the examination
25 and history of previous care and treatment of the
26 person to be protected;

27 (2) The person's orientation as to time, place
28 and person;

29 (3) His diagnosed impairments, current treat-
30 ments for each, prognosis for each and limita-
31 tions imposed on the person's functional capaci-
32 ty;

33 (4) All tests and procedures administered during
34 the examination, attaching the results of the
35 tests and procedures to the report;

36 (5) Opinion of any imminent harm or injury to
37 the person likely to occur, based on the
38 physician's detailed observations or conclusions
39 that the person has experienced inadequate shel-
40 ter, food, clothing or medical care; and

1 (6) The person's capacity to understand the ex-
2 tent, value and nature of his estate, how to se-
3 ecure the basic necessities of shelter, food,
4 clothing and medical care, the cost of these ba-
5 asic necessities and whether he has the means to
6 pay for them.

7 (d) In all cases in which the petitioner is not
8 the person to be protected, the nominee, upon filing
9 his acceptance, but in no case less than 10 days be-
10 fore the hearing on the petition's merits, shall file
11 with the court a written report describing in detail
12 his plan for the management and application of the
13 protected person's estate. A copy of such a plan
14 shall also be given to the person to be protected at
15 least 10 days before the hearing. The plan shall in-
16 clude, but not be limited to, a description of how
17 the protected person's financial needs will be met,
18 how his known income will be disbursed, how his as-
19 sets will be managed or invested, how his debts will
20 be paid and any plan to convey, sell, liquidate,
21 abandon or encumber any tangible or intangible asset
22 of the estate.

23 (e) The court may appoint a visitor who shall
24 interview the person to be protected and the nominee
25 for appointment as conservator. He shall determine
26 whether the person understands the notice served upon
27 him, understands the possible consequences of the
28 conservatorship petition and hearing and wishes to
29 attend the hearing. He may arrange transportation to
30 the hearing for the person to be protected. He shall
31 review the nominee's plan for the estate's management
32 and application to determine if it is the least re-
33 strictive plan appropriate to meet the person's
34 needs. The visitor will submit his written report to
35 the court and the person to be protected at least 10
36 days before the hearing on the petition's merits.

37 (f) The person to be protected is entitled to be
38 present at the hearing in person and to see and hear
39 all evidence bearing upon his condition and the pro-
40 ceedings. He is entitled to be represented by coun-
41 sel, and an attorney shall be appointed for him in
42 the circumstances described in this section. He is
43 entitled to present evidence and to cross-examine
44 witnesses, including the nominee, physician and visi-

1 tor. All hearings relating to the petition may be
2 closed to the public if the person to be protected or
3 his counsel requests that it be closed.

4 (g) A conservator shall not exercise physical
5 control over the protected person as if a guardian
6 unless he has also been appointed the protected
7 person's guardian. A petitioner may file a joined
8 petition for appointment as guardian and conservator
9 so that both claims may be heard together.

10 (h) A stenographic or electronic record shall be
11 made of the proceedings in all conservatorship hear-
12 ings. The record, all notes, exhibits and other evi-
13 dence shall be retained as part of the Probate Court
14 records for a period of 2 years from the date of the
15 hearing.

16 Sec. 12. 18-A MRSA §5-407-A is enacted to read:
17 §5-407-A. Findings; order of appointment

18 The court may appoint a conservator if it finds,
19 based on clear and convincing proof, that the person
20 alleged to need protection has received meaningful
21 notice of the proceedings as prescribed by section
22 5-405, that the person for whom a conservator is
23 sought is in need of protection as defined in section
24 5-401, that the nominee is qualified to serve as con-
25 servator and that the appointment is necessary as a
26 means of providing continuing management of the es-
27 tate of the protected person. In any case in which a
28 full and permanent conservator is appointed, the
29 court shall specifically state why a limited or lim-
30 ited and temporary conservatorship was insufficient.

31 In its order, the court may make separate find-
32 ings of fact and conclusions of law. If a party re-
33 quests separate findings and conclusions, within 5
34 days of notice of the decision, the court shall make
35 them.

36 Sec. 13. 18-A MRSA §5-408, as enacted by PL
37 1979, c. 540, §1, is repealed and the following en-
38 acted in its place:

39 § 5-408. Permissible court orders

1 (a) If a petition for appointment of conservator
2 or other protective order has been filed and the pe-
3 tioner has requested an interim order because an
4 emergency exists, the court may exercise the power of
5 a conservator pending notice and hearing only if
6 clearly necessary to prevent imminent harm or injury
7 to the person to be protected and only to the least
8 restrictive extent necessary to prevent that harm or
9 injury. The court shall make written order describ-
10 ing the powers it will exercise and stating the find-
11 ings of fact supporting such an order.

12 (b) If an appointed conservator is not effec-
13 tively performing his duties and the court further
14 finds that the protected person is clearly in danger
15 of imminent harm or injury as a result, the court
16 may, with or without notice, appoint a temporary con-
17 servator for the protected person for a specified pe-
18 riod not to exceed 6 months. In making such an ap-
19 pointment, the court shall suspend the original con-
20 servator's authority to act and shall grant only such
21 limited powers to the temporary conservator as are
22 clearly necessary to prevent harm or injury to the
23 protected person. A temporary conservator may be re-
24 moved at any time. A temporary conservator shall
25 make any report the court requires. In other re-
26 spects, the provisions of this Code concerning con-
27 servators apply to temporary conservators.

28 (c) After hearing and upon determining that a
29 basis for an appointment or other protective order
30 exists with respect to a minor without other disabili-
31 ty, the court has all those powers over the estate
32 and affairs of the minor which are or might be neces-
33 sary for the best interest of the minor, his family
34 and members of his household.

35 (d) After hearing and upon determining that a
36 basis for an appointment or other protective order
37 exists, the court shall grant the least restrictive
38 powers to the conservator necessary to protect the
39 protected person from harm or injury. The judge
40 shall enumerate the duties and powers in his order in
41 every instance of appointing a temporary or permanent
42 limited conservator, specifying whether the protected
43 person retains the right:

- 1 (1) To purchase shelter, food, clothing or other
2 specified incidentals and to have access to a
3 reasonable amount of his income to make the pur-
4 chases;
- 5 (2) To make gifts;
- 6 (3) To convey or release contingent and expect-
7 ant interests in property including marital prop-
8 erty rights and any rights of survivorship inci-
9 dent to joint tenancy or tenancy by the entirety;
- 10 (4) To create and fund a trust for the benefits
11 of himself or others, for which he or another is
12 named as trustee;
- 13 (5) To exercise or release his powers as trust-
14 ee, personal representative, custodian for mi-
15 nor, conservator or donee of a power of appoint-
16 ment;
- 17 (6) To exercise options to purchase securities
18 or other property;
- 19 (7) To exercise his rights to elect options and
20 change beneficiaries under insurance and annuity
21 policies and to surrender the policies for their
22 cash value;
- 23 (8) To exercise his right to an elective share
24 in the estate of his deceased spouse;
- 25 (9) To renounce any interest by testate or in-
26 testate succession or by inter vivos transfer;
- 27 (10) To choose the type, duration and amounts of
28 investments of his cash and cashable assets; or
- 29 (11) To do other enumerated activities as speci-
30 fied by the protected person.
- 31 In any case in which the judge decides the protected
32 person may not retain one of these rights, he shall
33 state the reason for his decision in this order.
- 34 (e) The court may exercise or direct the exer-
35 cise of its authority to exercise or release powers

1 of appointment of which the protected person is do-
2 nee, to renounce interests, to make gifts in trust or
3 otherwise exceeding 20% of any year's income of the
4 estate or to change beneficiaries under insurance and
5 annuity policies, only if satisfied, after notice and
6 hearing, that it is in the best interests of the pro-
7 ected person, and that he either is incapable of
8 consenting or has consented to the proposed exercise
9 of power.

10 (f) An order made pursuant to this section de-
11 termining that a basis for appointment of a conserva-
12 tor or other protective order exists has no effect on
13 the capacity of the protected person.

14 Sec. 14. 18-A MRSA §5-409, as enacted by PL
15 1979, c. 540, §1, is repealed and the following en-
16 acted in its place:

17 §5-409. Protective arrangements and single transac-
18 tions authorized

19 (a) If it is established after notice and hear-
20 ing described in this Part that a basis clearly ex-
21 ists as described in section 5-401 for a limited
22 court order affecting management of the protected
23 person's estate, the court shall appoint a limited
24 conservator. The limited conservator shall act in
25 accordance with the court's detailed instructions to
26 authorize, direct or ratify any contract, trust or
27 other transaction necessary to prevent imminent harm
28 or injury to the protected person. These transac-
29 tions may include, but are not limited to:

30 (1) Payment, delivery, deposit or retention of
31 funds or property;

32 (2) Sale, mortgage, lease or other transfer of
33 property;

34 (3) Entry into an annuity contract, a contract
35 for life care, a deposit contract or a contract
36 for training and education;

37 (4) Addition to or establishment of a suitable
38 trust; or

1 (5) Applications for any or all public or pri-
2 vate assistance programs for which the protected
3 person might be or become eligible.

4 (b) Before approving any transaction under this
5 section, the court shall determine whether the nomi-
6 nee is qualified to handle the proposed transaction.
7 The court shall require a limited conservator ap-
8 pointed under this section to furnish a bond condi-
9 tioned upon faithful discharge of all duties de-
10 scribed in the court's order, with sureties as the
11 court shall specify.

12 (c) If appropriate, the court shall state in its
13 order the duration of the limited conservator's au-
14 thority and set a deadline by which the subject
15 transaction shall be completed. A limited conserva-
16 tor appointed under this section shall serve until
17 discharge by order of the court after approval of
18 this report to the court and protected person of all
19 matters done pursuant to the order of appointment.
20 He shall file his report with the court and give a
21 copy to the protected person within 30 days of com-
22 pleting the ordered transaction. Discharge does not
23 affect his liability for prior acts nor his obliga-
24 tion to account for his handling of any fund or as-
25 sets of the protected person. In any other respects
26 the provisions of this Code concerning conservators
27 apply to limited conservators.

28 Sec. 15. 18-A MRSA §5-418, as enacted by PL
29 1979, c. 540, §1, is amended to read:

30 §5-418. Inventory and records

31 Within 90 60 days after his appointment, every
32 conservator shall prepare and file with the appoint-
33 ing court a complete inventory of the estate of the
34 protected person as of the date of his appointment
35 together with his oath or affirmation that it is com-
36 plete and accurate so far as he is informed an ac-
37 count of his management of the estate up to the date
38 of filing. The inventory shall state specifically
39 where each item of personal property is located. The
40 conservator shall provide his oath or affirmation
41 that the inventory and account are complete and accu-
42 rate as far as he could determine after careful in-

1 quiry. The conservator shall provide a copy thereof
2 of the inventory and account to the protected person
3 if he can be located, has attained the age of 14
4 years, and has sufficient mental capacity to under-
5 stand these matters, and to any parent or guardian
6 with whom the protected person resides. The conserva-
7 tor shall keep suitable full and accurate records of
8 his administration and exhibit the same on request of
9 any interested person.

10 Sec. 16. 18-A MRSA §5-419, as enacted by PL
11 1979, c. 540, §1, is repealed and the following en-
12 acted in its place:

13 §5-419. Accounts

14 (a) A conservator is required to report the con-
15 dition of the protected person's estate that has been
16 subject to his possession or control at least annual-
17 ly and at any time when order by the court. The re-
18 port shall be made in writing, filed with the court,
19 and will provide an accounting of all money received,
20 money expended, reasons for each expenditure, proper-
21 ty bought or sold, reasons for each purchase or sale
22 and all other transactions made. The report shall
23 specifically state where each item of personal prop-
24 erty is located. The report shall also include a
25 plan for the management and application of the pro-
26 ected person's estate in the next year. A copy of
27 the report shall be given to the protected person if
28 he can be located and has attained the age of 14
29 years, as well as to any parent who can be located
30 and any guardian.

31 (b) Every conservator shall account to the court
32 for his administration of the trust upon his resigna-
33 tion or removal within 60 days, and shall give a copy
34 of the account to the protected person if he can be
35 located and has attained the age of 14 years, as well
36 as to any parent who can be located and any guardian.

37 (c) Subject to appeal or vacation within the
38 time permitted, an order, made after notice and hear-
39 ing, allowing an intermediate or final account of a
40 conservator, adjudicates as to his liabilities con-
41 cerning the matters considered in connection with the
42 account. In connection with any account, the court

1 may require a conservator to submit to a physical
2 check of the estate in his control, to be made in any
3 manner the court may specify.

4 Sec. 17. 18-A MRSA §5-420, as enacted by PL
5 1979, c. 540, §1, is amended to read:

6 §5-420. Conservators; title by appointment

7 The appointment of a full conservator vests in
8 him title as trustee to all property of the protected
9 person, presently held or thereafter acquired, in-
10 cluding title to any property theretofore held for
11 the protected person by custodians or attorneys in
12 fact. The appointment of a limited or temporary con-
13 servator vests in him title as trustee only to the
14 property specified in the court's order and only for
15 the period specified in the case of a temporary ap-
16 pointment. The appointment of a conservator is not a
17 transfer or alienation within the meaning of general
18 provisions of any federal or state statute or regula-
19 tion, insurance policy, pension plan, contract, will
20 or trust instrument, imposing restrictions upon or
21 penalties for transfer or alienation by the protected
22 person of his rights or interest, but this section
23 does not restrict the ability of persons to make spe-
24 specific provision by contract or dispositive instrument
25 relating to a conservator.

26 Sec. 18. 18-A MRSA §5-424, as enacted by PL
27 1979, c. 540, §1, is amended to read;

28 §5-424. Powers of conservator in administration

29 (a) A conservator has all of the powers con-
30 ferred herein and any additional powers conferred by
31 law on trustees in this State. In addition, a conser-
32 vator of the estate of an unmarried minor, as to whom
33 no one has parental rights, has the duties and powers
34 of a guardian of a minor described in section 5-209
35 until the minor attains the age of 18 or marries, but
36 the parental rights so conferred on a conservator do
37 not preclude appointment of a guardian as provided by
38 Part 2.

39 (b) ~~A conservator has power without court autho-~~
40 ~~rization or confirmation, to invest and reinvest~~

1 funds of the estate as would a trustee Unless other-
2 wise restrained by court order, a conservator has
3 power without court authorization or confirmation to
4 invest and reinvest funds of the estate as would a
5 trustee.

6 (c) A conservator, acting reasonably in efforts
7 to accomplish the purpose for which he was appointed,
8 may act without court authorization or confirmation,
9 te Unless otherwise restrained by court order, a con-
10 servator, acting reasonably in efforts to accomplish
11 the purpose for which he was appointed, may act with-
12 out court authorization or confirmation to:

13 (1) Collect, hold and retain assets of the es-
14 tate including land in another state, until, in
15 his judgment, disposition of the assets should be
16 made, and the assets may be retained even though
17 they include an asset in which he is personally
18 interested;

19 (2) Receive additions to the estate;

20 (3) Continue or participate in the operation of
21 any business or other enterprise;

22 (4) Acquire an undivided interest in an estate
23 asset in which the conservator, in any fiduciary
24 capacity, holds an undivided interest;

25 (5) Invest and reinvest estate assets in accord-
26 ance with subsection (b);

27 (6) Deposit estate funds in a bank including a
28 bank operated by the conservator;

29 (7) Acquire or dispose of an estate asset in-
30 cluding land in another state for cash or on
31 credit, at public or private sale; and to manage,
32 develop, improve, exchange, partition, change the
33 character of, or abandon an estate asset;

34 (8) Make ordinary or extraordinary repairs or
35 alterations in buildings or other structures, to
36 demolish any improvements, to raze existing or
37 erect new party walls or buildings;

- 1 (9) Subdivide, develop, or dedicate land to public
2 use; to make or obtain the vacation of plats
3 and adjust boundaries; to adjust differences in
4 valuation on exchange or to partition by giving
5 or receiving considerations; and to dedicate
6 easements to public use without consideration;
- 7 (10) Enter for any purpose into a lease as les-
8 sor or lessee with or without option to purchase
9 or renew for a term within or extending beyond
10 the term of the conservatorship;
- 11 (11) Enter into a lease or arrangement for ex-
12 ploration and removal of minerals or other natu-
13 ral resources or enter into a pooling or
14 unitization agreement;
- 15 (12) Grant an option involving disposition of an
16 estate asset, to take an option for the acquisi-
17 tion of any asset;
- 18 (13) Vote a security, in person or by general or
19 limited proxy;
- 20 (14) Pay calls, assessments, and any other sums
21 chargeable or accruing against or on account of
22 securities;
- 23 (15) Sell or exercise stock subscription or con-
24 version rights; to consent, directly or through a
25 committee or other agent, to the reorganization,
26 consolidation, merger, dissolution, or liquida-
27 tion of a corporation or other business enter-
28 prise;
- 29 (16) Hold a security in the name of a nominee or
30 in other form without disclosure of the conserva-
31 torship so that title to the security may pass by
32 delivery, but the conservator is liable for any
33 act of the nominee in connection with the stock
34 so held;
- 35 (17) Insure the assets of the estate against
36 damage or loss, and the conservator against lia-
37 bility with respect to third persons;

- 1 (18) Borrow money to be repaid from estate as-
2 sets or otherwise; to advance money for the pro-
3 tection of the estate or the protected person,
4 and for all expenses, losses, and liability sus-
5 tained in the administration of the estate or be-
6 cause of the holding or ownership of any estate
7 assets and the conservator has a lien on the es-
8 tate as against the protected person for advances
9 so made;
- 10 (19) Pay or contest any claim; to settle a claim
11 by or against the estate or the protected person
12 by compromise, arbitration, or otherwise; and to
13 release, in whole or in part, any claim belonging
14 to the estate to the extent that the claim is un-
15 collectible;
- 16 (20) Pay taxes, assessments, compensation of the
17 conservator, and other expenses incurred in the
18 collection, care, administration and protection
19 of the estate;
- 20 (21) Allocate items of income or expense to ei-
21 ther estate income or principal, as provided by
22 law, including creation of reserves out of income
23 for depreciation, obsolescence, or amortization,
24 or for depletion in mineral or timber properties;
- 25 (22) Pay any sum distributable to a protected
26 person or his dependent without liability to the
27 conservator, by paying the sum to the distributee
28 or by paying the sum for the use of the distribu-
29 tee either to his guardian or if none, to a rela-
30 tive or other person with custody of his person;
- 31 (23) Employ persons, including attorneys, audi-
32 tors, investment advisors, or agents, even though
33 they are associated with the conservator to ad-
34 vise or assist him in the performance of his ad-
35 ministrative duties; to act upon their recommen-
36 dation without independent investigation; and in-
37 stead of acting personally, to employ one or more
38 agents to perform any act of administration,
39 whether or not discretionary;
- 40 (24) Prosecute or defend actions, claims or pro-
41 ceedings in any jurisdiction for the protection

1 of estate assets and of the conservator in the
2 performance of his duties; and

3 (25) Execute and deliver all instruments which
4 will accomplish or facilitate the exercise of the
5 powers vested in the conservator.

6 Sec. 19. 18-A MRSA §5-425, sub-§(a), as enacted
7 by PL 1979, c. 540, §1, is amended to read:

8 (a) A Unless otherwise restrained by court or-
9 der, a conservator may expend or distribute income or
10 principal of the estate without court authorization
11 or confirmation for the support, education, care or
12 benefit of the protected person and his dependents in
13 accordance with the following principles:

14 (1) The conservator is to consider recommenda-
15 tions relating to the appropriate standard of
16 support, education and benefit for the protected
17 person made by a parent or guardian, if any. He
18 may not be surcharged for sums paid to persons or
19 organizations actually furnishing support, educa-
20 tion or care to the protected person pursuant to
21 the recommendations of a parent or guardian of
22 the protected person unless he knows that the
23 parent or guardian is deriving personal financial
24 benefit therefrom, including relief from any per-
25 sonal duty of support, or unless the recommenda-
26 tions are clearly not in the best interests of
27 the protected person.

28 (2) The conservator is to expend or distribute
29 sums reasonably necessary for the support, educa-
30 tion, care or benefit of the protected person
31 with due regard to (i) the size of the estate,
32 the probable duration of the conservatorship and
33 the likelihood that the protected person, at some
34 future time, may be fully able to manage his af-
35 fairs and the estate which has been conserved for
36 him; (ii) the accustomed standard of living of
37 the protected person and members of his house-
38 hold; (iii) other funds or sources used for the
39 support of the protected person.

1 (3) The conservator may expend funds of the es-
2 tate for the support of persons legally dependent
3 on the protected person and others who are mem-
4 bers of the protected person's household who are
5 unable to support themselves, and who are in need
6 of support.

7 (4) Funds expended under this subsection may be
8 paid by the conservator to any person, including
9 the protected person to reimburse for expendi-
10 tures which the conservator might have made, or
11 in advance for services to be rendered to the
12 protected person when it is reasonable to expect
13 that they will be performed and where advance
14 payments are customary or reasonably necessary
15 under the circumstances.

16 Sec. 20. 18-A MRSA §5-426, as enacted by PL
17 1979, c. 540, §1, is repealed and the following en-
18 acted in its place:

19 §5-426. Enlargement or limitation of powers of con-
20 servator

21 Subject to the restrictions in section 5-408,
22 subsection (e), the court may confer on a conservator
23 at the time of appointment or later additional powers
24 as described in section 5-408, subsections (c) and
25 (d), section 5-424 or 5-425, if, after notice and
26 hearing, it determines that the conservator's exer-
27 cise of the additional powers is clearly necessary to
28 prevent imminent harm or injury to the protected per-
29 son. The court may, at the time of appointment or
30 later, limit the powers of a conservator, previously
31 conferred by the court. If the court confers limited
32 powers on a conservator, the limitations shall be
33 clearly endorsed on the letters of appointment.

1

STATEMENT OF FACT

2 An adult placed under guardianship in Maine suf-
3 fers a loss of every personal freedom and most civil
4 rights. His guardian may decide where he lives, what
5 medical care he receives, what contact he has with
6 family and friends, and, if no conservator is ap-
7 pointed, how his money and assets will be managed.
8 An adult placed under conservator is not found inca-
9 pacitated, but he nevertheless loses control over the
10 handling of his money and assets; the conservator ac-
11 tually takes title to these.

12 The Probate Code changes proposed in this bill
13 are intended to provide more meaningful notice to the
14 person alleged to be incapacitated and to his family
15 and friends; to require higher standards of medical
16 evidence; to separate the role of guardian from that
17 of conservator, making it clear that there is a dif-
18 ferent test for the appointment of each; and to grant
19 more due process protection to the person alleged to
20 be incapacitated throughout the proceedings, most
21 importantly by giving him appointed counsel if he has
22 none of his own choice.

23 These issues were discussed at the most recent
24 Blaine House Conference on Aging and are a priority
25 of the Maine Committee on Aging. The proposed
26 changes are in large part responses to findings made
27 in the guardianship study recently conducted by Legal
28 Services for the Elderly, Inc.

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