

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)



115th MAINE LEGISLATURE

FIRST REGULAR SESSION-1991

Legislative Document

No. 1875

S.P. 704

In Senate, May 20, 1991

Submitted by the Department of Human Services pursuant to Joint Rule 24.
Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script, reading "Joy J. O'Brien".

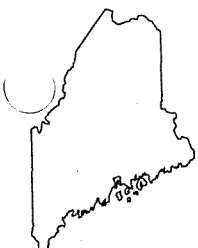
JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator HOLLOWAY of Lincoln
Cosponsored by Senator GAUVREAU of Androscoggin, Representative KUTASI of
Bridgton and Representative SIMONDS of Cape Elizabeth.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-ONE

An Act to Clarify the Role of Guardians Ad Litem and Visitors in
Guardianship and Conservatorship Cases.



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

Sec. 1. 18-A MRSA §5-303, as amended by PL 1989, c. 858, §2, is repealed and the following enacted in its place:

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

(a) An allegedly incapacitated person or any person interested in the allegedly incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.

(b) The person nominated to serve as guardian shall file a plan that includes, but is not limited 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 how the ward will maintain contact with relatives and friends.

(c) Upon the filing of a petition, the court shall set a date for hearing and appoint a guardian ad litem or visitor to represent the allegedly incapacitated person in the proceeding, unless it is demonstrated that:

(1) The allegedly incapacitated person has counsel of the allegedly incapacitated person's choice;

(2) The allegedly incapacitated person will attend the hearing; or

(3) The appointment will serve no useful purpose.

(d) The responsibilities of a guardian ad litem or visitor are:

(1) To conduct an investigation to determine whether it is in the best interest of the allegedly incapacitated person to grant the petition for guardianship. As part of this investigation, the visitor or guardian ad litem shall interview the allegedly incapacitated person and the person who is seeking appointment as guardian and visit the allegedly incapacitated person's present place of abode and the proposed place of abode in which the allegedly incapacitated person will reside if the requested appointment is made. The visitor or guardian ad litem shall interview any persons who reside with, care for or have legal responsibility for the allegedly incapacitated person, including an existing guardian, an agent under a durable power of attorney or a designee under a living will. The visitor or guardian ad litem may also interview anyone whom

2 the visitor or guardian ad litem believes to have
3 information bearing on the proposed guardianship, such as
4 relatives or friends of the allegedly incapacitated person.
5 The visitor or guardian ad litem shall review all available
6 records bearing on the condition of the ward. Upon
7 completion of the investigation, the guardian ad litem or
8 visitor shall submit a report in writing to the court;

9
10 (2) To explain the meaning and possible consequences of the
11 requested appointment to the allegedly incapacitated person
12 and inquire if the allegedly incapacitated person wishes to
13 attend the hearing, contest any aspect of the proceeding or
14 seek any limitation of the proposed guardian's powers. The
15 visitor or guardian ad litem shall do everything possible to
16 help the allegedly incapacitated person exercise the
17 allegedly incapacitated person's rights in the guardianship
18 proceeding;

19
20 (3) To serve notice of the guardianship proceeding on the
21 allegedly incapacitated person and on others if appointed by
22 the court to do so; and

23
24 (4) To prepare a written report for the court that includes:

25 (i) A statement of the allegedly incapacitated
26 person's wishes regarding the proposed guardianship;

27 (ii) Whether the allegedly incapacitated person wants
28 to contest any issue or seek a limited appointment;

29
30 (iii) Whether the allegedly incapacitated person has
31 an attorney of the allegedly incapacitated person's
32 choice; and

33
34 (iv) The facts of the case and specific
35 recommendations to the court, including the basis for
36 those recommendations, concerning the following: the
37 condition of the allegedly incapacitated person and the
38 allegedly incapacitated person's need for a guardian;
39 the suitability of the proposed guardian; alternative
40 persons, if any, who would be more suitable to serve as
41 guardian; and appropriate limitations on the guardian's
42 powers.

43
44 (e) The cost of the appointment of a guardian ad litem or
45 visitor must be paid from the estate of the allegedly or
46 incapacitated person if the court is satisfied that sufficient
47 funds are available.

48
49
50 (f) When there has been an allegation of abuse, neglect or
exploitation of an allegedly incapacitated person in a petition

2 or other papers filed with the court, the court may hear the
4 testimony of the allegedly incapacitated person in chambers with
6 only the guardian ad litem and counsel present, as long as the
8 statements made are a matter of record.

10 (g) The allegedly incapacitated person must be examined by
12 a physician or a licensed psychologist acceptable to the court
14 who shall submit a report in writing to the court that provides
16 diagnoses, a description of the allegedly incapacitated person's
18 actual mental and functional limitations and prognoses.

20 (h) The allegedly incapacitated person is entitled: to be
22 present at the hearing; to see and hear all evidence bearing on
24 the allegedly incapacitated person's condition; to be represented
26 by counsel; to present evidence; and to cross-examine witnesses,
28 including the physician or psychologist and the visitor or
30 guardian ad litem. The issue may be determined at a closed
32 hearing if the allegedly incapacitated person or the allegedly
34 incapacitated person's counsel so requests.

36 (i) Except as otherwise provided by law, all reports and
38 plans required by this section must be submitted to the court and
40 all parties of record at least 10 days before any hearing on the
42 petition.

44 Sec. 2. 18-A MRSA §5-308, as enacted by PL 1979, c. 540, §1,
46 is repealed and the following enacted in its place:

48 §5-308. Visitors and guardians ad litem in guardianship
50 proceedings

52 (a) A visitor is, with respect to guardianship proceedings,
54 a person who is trained in nursing or social work or has other
56 significant qualifications that make the visitor suitable to
58 perform the functions of a visitor. A guardian ad litem is, with
60 respect to guardianship proceedings, a person trained in law. A
62 visitor or guardian ad litem is an officer, employee or special
64 appointee of the court with no personal interest in the
66 proceedings.

68 (b) The appointment of a visitor or guardian ad litem ends
70 once the court has issued an order on a petition for or
72 concerning a guardianship, except that the court may order that
74 the appointment continue for a period not to exceed 6 months if
76 necessary to protect the interests of the ward. Prior to the
78 expiration of this extended appointment, the court may extend the
80 appointment for an additional period not to exceed 6 months,
82 after reviewing the case and concluding that good cause exists
84 for such an extension. A visitor or guardian ad litem who is
86 appointed to serve for an additional period shall submit a
88 written report to the court that meets the requirements of
90 section 5-303, subsection (d) and assesses whether the guardian
92 is adequately performing the guardian's duties.

2 Sec. 3. 18-A MRSA §5-407, as amended by PL 1989, c. 858, §3,
4 is repealed and the following enacted in its place:

6 §5-407. Procedure concerning hearing and order on original
 petition

8 (a) The person to be protected, any person who is
10 interested in the estate, affairs or welfare of the person to be
12 protected, including the parent, guardian, or custodian of the
14 person to be protected, or any person who would be adversely
 affected by lack of effective management of the property and
 affairs of the person to be protected may petition for the
 appointment of a conservator or other appropriate protective
 order.

16 (b) The person nominated to serve as conservator shall
18 file, to the extent that pertinent information is reasonably
20 available to the nominee, a plan that includes, but is not
22 limited to, how the financial needs of the person to be protected
 will be met and how the estate of the person to be protected will
 be managed.

24 (c) Upon the filing of a petition, the court shall set a
26 date for a hearing.

28 (1) If the petition for conservator or other protective
30 order is due to minority, the court shall appoint an
32 attorney to represent the minor if at any time in the
34 proceeding the court determines that the interests of the
 minor are or may be inadequately represented, giving
 consideration to the choice of the minor if the minor is 14
 years of age or older. An attorney appointed by the court
 to represent a minor has the powers and duties of a guardian
 ad litem.

36 (2) If the petition for appointment of a conservator or
38 other protective order is based on reasons other than
40 minority, the court shall appoint a visitor, a guardian ad
42 litem or an attorney to represent the person to be
44 protected, unless it is demonstrated that the person to be
 protected has counsel of that person's choice, the person to
 be protected will attend the hearing or the appointment will
 serve no useful purpose.

46 (i) If appointed, the visitor or guardian ad litem
48 shall:

50 (A) Conduct an investigation to determine whether
 it is in the best interest of the person to be
 protected to grant the petition for

conservatorship. As part of the investigation, the visitor or guardian ad litem shall interview the person to be protected and the person who is seeking appointment as conservator. The visitor or guardian ad litem shall interview any persons who reside with, care for or have legal responsibility for the person to be protected, including an existing guardian, conservator or agent under a power of attorney. The visitor or guardian ad litem may also interview anyone whom the visitor or guardian ad litem believes to have information bearing on the proposed conservatorship, such as relatives or friends of the person to be protected. The visitor or guardian ad litem shall review all available records bearing on the ability of the person to be protected to manage effectively the estate of the person to be protected;

(B) Explain the meaning and possible consequences of the requested appointment to the person to be protected and inquire if the person to be protected wishes to attend the hearing to contest any aspect of the proceedings or seek any limitation of the proposed conservator's powers. The visitor or guardian ad litem shall do everything possible to help the person to be protected to exercise the rights of the person to be protected in the conservatorship proceeding;

(C) Serve notice of the conservatorship proceeding on the person to be protected and on others if appointed by the court to do so; and

(D) Prepare a written report for the court that includes: a statement of the wishes of the person to be protected regarding the proposed conservatorship; whether the person to be protected wants to contest any issue or seek a limited appointment; whether the person to be protected has an attorney of the person's choice; and the facts of the case and specific recommendations to the court, including the basis for those recommendations, concerning the following: the condition of the person to be protected and the ability of the person to be protected to manage effectively the estate of the person to be protected; whether there is a need for conservatorship; the suitability of the proposed conservator; alternative persons, if any, who would be more suitable to serve as conservator; and appropriate limitations on the conservator's powers.

2 (3) The cost of the appointment of the visitor, guardian ad
4 litem or attorney must be paid from the estate of the person
6 to be protected if the court is satisfied that sufficient
 funds are available.

8 (d) If the alleged disability of the person to be protected
10 is physical illness or disability, chronic use of drugs or
12 chronic intoxication, the court may direct that the person to be
14 protected be examined by a physician acceptable to the court,
16 preferably a physician who is not connected with any institution
18 in which the person is a patient or is detained. If the alleged
20 disability is mental illness or mental deficiency, the court may
 direct that the person to be protected be examined by a physician
 or by a licensed psychologist who is not connected with any
 institution in which the person is a patient or is detained. The
 physician or psychologist shall submit a report in writing to the
 court that provides diagnoses, a description of the actual mental
 and functional limitations of the person to be protected and
 prognoses.

22 (e) The person to be protected is entitled: to be present
24 at the hearing; to see and hear all evidence bearing upon the
26 condition of the person to be protected; to be represented by
28 counsel; to present evidence; and to cross-examine witnesses,
30 including the physician or psychologist and the visitor or
 guardian ad litem. The issue may be determined at a closed
 hearing if the person to be protected or the counsel of the
 person to be protected so requests.

32 (f) When there has been an allegation of abuse, neglect or
34 exploitation of the person to be protected in a petition or other
36 papers filed with the court, the court may hear the testimony of
 the person to be protected in chambers with only the guardian ad
 litem and counsel present, as long as the statements made are a
 matter of record.

38 (g) After hearing, upon finding that a basis for the
40 appointment of a conservator or other protective order has been
42 established, the court shall make an appointment or other
 appropriate protective order.

44 Sec. 4. 18-A MRSA §5-407-A is enacted to read:

46 §5-407-A. Visitors and guardians ad litem in conservatorship
 proceedings

48 (a) A visitor is, with respect to conservatorship
50 proceedings, a person who is trained in nursing or social work or
 has other significant qualifications that make the visitor
 suitable to perform the functions of a visitor. A guardian ad

litem is, with respect to conservatorship proceedings, a person trained in law. A visitor or guardian ad litem is an officer, employee or special appointee of the court with no personal interest in the proceedings.

(b) The appointment of a visitor or guardian ad litem ends once the court has issued an order for or concerning a conservatorship, except that the court may order that the appointment continue for a period not to exceed 6 months if necessary to protect the interests of the person to be protected. Prior to the expiration of this extended appointment, the court may extend the appointment for an additional period not to exceed 6 months, after reviewing the case and concluding that good cause exists for such an extension. A visitor or guardian ad litem who is appointed to serve for an additional period shall submit a written report to the court that meets the requirements of section 5-407 and assesses whether the conservator is adequately performing the conservator's duties.

STATEMENT OF FACT

By repealing and replacing the Maine Revised Statutes, Title 18-A, sections 5-303, 5-308 and 5-407, this bill reorganizes the current provisions of the Probate Code on guardianship and conservatorship into a format that makes them more readily usable as a reference for practitioners. By enacting Title 18-A, section 5-407-A, the bill clarifies the role of visitors and guardians ad litem and establishes specific requirements for them in conducting investigations and making reports. When guardianship or conservatorship is sought in order to protect an incapacitated adult, the Probate Court usually appoints a visitor or guardian ad litem to investigate the case and submit a report to the court. Currently, the Probate Code gives little guidance to visitors and practically no guidance to guardians ad litem as to their roles in these proceedings. The new section seeks to strengthen the provisions pertaining to visitors and guardians ad litem. Except for this new section, the bill retains the meaning of the existing statute.

The bill sets forth the general role of a visitor or guardian ad litem in guardianship cases, which is to investigate and report to the court and help the allegedly incapacitated person exercise the allegedly incapacitated person's rights in the proceeding. It retains the requirements in the current law applicable to visitors and makes them applicable as well to guardians ad litem. It also places the additional requirements on visitors and guardians ad litem to interview people other than the allegedly incapacitated person who may have useful information bearing on the proposed guardianship, to review records and to communicate the wishes of the allegedly incapacitated person to the court.

2 The bill makes clear what has, in practice, been the
difference between visitors and guardians ad litem; visitors are
4 trained in social work or nursing or have other significant
qualifications, while guardians ad litem are trained in law.
6 This bill also sets limitations on the time period a visitor or
guardian ad litem may serve, while allowing the court to extend
8 the appointment for good cause. These provisions ensure that
visitors and guardians ad litem meet minimal standards but do not
10 exceed their proper roles in the proceedings.