

MAINE STATE LEGISLATURE

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116th MAINE LEGISLATURE

SECOND REGULAR SESSION-1994

Legislative Document

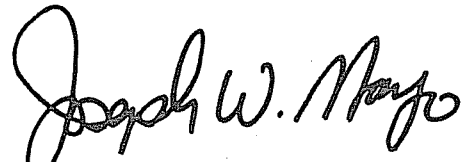
No. 1967

H.P. 1441

House of Representatives, March 4, 1994

An Act to Amend the Probate Code to Provide Greater Due Processing in Guardianship and Conservatorship Cases.

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


JOSEPH W. MAYO, Clerk

Presented by Representative COTE of Auburn.

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

2
3 Sec. 1. 18-A MRSA §5-303, sub-§§(b) and (c), as enacted by PL
4 1985, c. 440, §§1 and 13, are amended to read:

6 (b) Upon the filing of a petition, the court shall set a
7 date for hearing on the issues of incapacity and unless the
8 allegedly incapacitated person has ~~counsel of his own choice,~~
9 ~~unless it is indicated on the petition that the allegedly~~
10 ~~incapacitated person will attend the hearing or unless it is~~
11 ~~demonstrated that the appointment will serve no useful purpose is~~
12 already represented, the court shall appoint one or more of the
13 following: A visitor, a guardian ad litem or an attorney to
14 represent the allegedly incapacitated person in the proceeding.
15 If it comes to the court's attention that the allegedly
16 incapacitated person wishes to contest any aspect of the
17 proceeding or to seek any limitation of the proposed guardian's
18 powers, the court shall appoint an attorney to represent the
19 allegedly incapacitated person. The cost of this appointment
20 shall of the visitor, guardian ad litem or attorney must be paid
21 from the estate of the allegedly incapacitated person if the
22 court is satisfied sufficient funds are available. The person
23 alleged to be incapacitated shall must be examined by a physician
24 or by a licensed psychologist acceptable to the court who shall
25 submit his a report in writing to the court, providing diagnoses,
26 a description of the person's actual mental and functional
27 limitations and prognoses.

28 (c) If appointed, the visitor or guardian ad litem shall
29 interview the allegedly incapacitated person and the person who
30 is seeking appointment as guardian, and visit the present place
31 of abode of the person alleged to be incapacitated and the place
32 it is proposed that he the person will reside if the requested
33 appointment is made and. The visitor or guardian ad litem shall
34 submit his a report in writing to the court. The visitor or
35 guardian ad litem shall explain the meaning and possible
36 consequences of the requested appointment to the allegedly
37 incapacitated person and inquire if he the person wishes to
38 attend the hearing, to contest any aspect of the proceeding or to
39 seek any limitation of the proposed guardian's powers. If the
40 visitor or guardian ad litem determines that the person wants to
41 contest any issue or seek a limited appointment and that the
42 person does not have counsel of his that person's own choice, the
43 visitor or guardian ad litem shall so indicate in his the written
44 report to the court. The person alleged to be incapacitated is
45 entitled to be present at the hearing in person, and to see and
46 hear all evidence bearing upon his the person's condition. He
47 The person alleged to be incapacitated is entitled to be
48 represented by counsel, to present evidence, to cross-examine
49 witnesses, including the physician and the visitor. The issue
50

2 may be determined at a closed hearing if the person alleged to be
incapacitated or his the person's counsel so requests.

4 Sec. 2. 18-A MRSA §5-310, as amended by PL 1983, c. 620, is
repealed.

6 Sec. 3. 18-A MRSA §5-310-A is enacted to read:

8 **§5-310-A. Temporary guardians**

10 (a) When a person alleged to be incapacitated has no
12 guardian and an emergency exists and no other person appears to
14 have authority to act in the circumstances, upon appropriate
16 petition, the court may exercise the power of a guardian or may
18 enter an ex parte order appointing a temporary guardian to
20 address the emergency. A petition for temporary guardianship
22 must be accompanied by an affidavit that sets forth the factual
basis for the emergency and the specific powers requested by the
proposed guardian. In the order and in the letters of temporary
guardianship, the court shall specify the powers and duties of
the temporary guardian, limiting the powers and duties to those
necessary to address the emergency.

24 (b) When the court takes action to exercise the powers of a
26 guardian or to appoint a temporary guardian under subsection (a),
28 an expedited hearing must be held within 30 days of the signing
30 of the court order exercising the powers of a guardian or
32 appointing a temporary guardian. At the hearing, the petitioner
34 has the burden of showing, by a preponderance of the evidence,
36 that temporary guardianship continues to be necessary to address
38 the emergency. Notice of the expedited hearing must be served as
40 provided in section 5-309, except that the notice must be given
42 at least 5 days before the expedited hearing. Unless the
44 allegedly incapacitated person is already represented, the court
shall appoint one or more of the following: a visitor, a
guardian ad litem or an attorney to represent the allegedly
incapacitated person in the proceeding. If it comes to the
court's attention that the ward wishes to contest any aspect of
the temporary guardianship or to seek any limitation of the
court's or the temporary guardian's powers, the court shall
appoint an attorney to represent the ward. The cost of the
appointment of the visitor, guardian ad litem or attorney must be
paid from the estate of the allegedly incapacitated person if the
court is satisfied sufficient funds are available.

46 (c) At the expedited hearing, the court may render a
48 judgment authorizing the temporary guardianship to continue
beyond the original 30-day period, for a period not to exceed 6
months from the date of entry of the ex parte order. The
50 temporary guardianship terminates on the date specified in the

2 order or, if no date is specified in the order, at the end of
4 the 6-month period following the expedited hearing, or at any
6 prior time if the court determines the circumstances leading to
8 the order for temporary guardianship no longer exist or if a
10 hearing pursuant to section 5-303 has been held.

12 (d) If the court denies the request for an ex parte order
14 pursuant to subsection (a), the court may enter, in its
16 discretion, an order for an expedited hearing pursuant to
18 subsection (b). If the petitioner requests the entry of an order
20 of temporary guardianship pursuant to subsection (a) without
22 requesting an ex parte order, the court may hold an expedited
24 hearing pursuant to subsection (b).

26 (e) If an appointed guardian is not effectively performing
28 that guardian's duties and the court finds that the welfare of
30 the incapacitated person requires immediate action, it may
32 appoint, with or without notice, a temporary guardian for the
34 incapacitated person for a specified period not to exceed 6
36 months.

38 (f) A temporary guardian is entitled to the care and
40 custody of the ward and the authority of any permanent guardian
42 previously appointed by the court is suspended as long as a
44 temporary guardian has authority. A temporary guardian may not
46 seek the involuntary hospitalization of this ward in any
48 institution outside the State. A temporary guardian may be
50 removed at any time. A temporary guardian shall make any report
the court requires. In other respects, the provisions of this
Code concerning guardians apply to temporary guardians.

(g) A petition for temporary guardianship may be brought
before any judge if the judge of the county in which venue
properly lies is unavailable. If a judge, other than the judge
of the county in which venue properly lies, acts on a petition
for temporary guardianship, that judge shall issue a written
order and endorse upon it the date and time of the order. The
judge shall then immediately transmit or cause to be transmitted
that order to the register of the county in which venue properly
lies. An order issued by a judge of a county, other than the
county in which venue properly lies, is deemed to have been
entered in the docket on the date and at the time endorsed upon
it.

44 **Sec. 4. 18-A MRSA §5-407, sub-§(b), as amended by PL 1985, c.**
46 **440, §§8 and 13, is further amended to read:**

48 **(b) Upon receipt of a petition for appointment of a**
50 **conservator or other protective order for reasons other than**
minority, the court shall set a date for hearing. Unless the

2 person to be protected ~~has counsel of his own choice, unless it~~
3 ~~is indicated on the petition that the person to be protected will~~
4 ~~attend the hearing or unless it is demonstrated that the~~
5 ~~appointment will serve no useful purpose~~ is already represented,
6 the court shall appoint one or more of the following: A visitor;
7 a guardian ad litem or a lawyer to represent the person to be
8 protected in the proceedings. If it comes to the court's
9 attention that the allegedly incapacitated person wishes to
10 contest any aspect of the proceeding or to seek any limitation of
11 the proposed conservator's powers, the court shall appoint an
12 attorney to represent the allegedly incapacitated person. The
13 cost of this the appointment shall of the visitor, guardian ad
14 litem or attorney must be paid from the estate of the person to
15 be protected if the court is satisfied sufficient funds are
16 available. If the alleged disability is physical illness or
17 disability, ~~advanced age,~~ chronic use of drugs, or chronic
18 intoxication, the court may direct that the person to be
19 protected be examined by a physician acceptable to the court,
20 preferably a physician who is not connected with any institution
21 in which the person is a patient or is detained. If the alleged
22 disability is mental illness or mental deficiency, the court may
23 direct that the person to be protected be examined by a physician
24 or by a licensed psychologist acceptable to the court; preferably
25 the physician or psychologist shall not be connected with any
26 institution in which the person is a patient or is detained. The
27 physician or psychologist shall submit his a report in writing to
28 the court, providing diagnoses, a description of the person's
actual mental and functional limitations and prognoses.

30 **Sec. 5. 18-A MRSA §5-407, sub-§(b-1),** as enacted by PL 1985, c.
31 440, §§9 and 13, is amended to read:

32 (b-1) If appointed, the visitor or guardian ad litem shall
33 interview the person to be protected and the person who is
34 seeking appointment as conservator. The visitor or guardian ad
35 litem shall submit a report in writing to the court. The visitor
36 or guardian ad litem shall explain the meaning and possible
37 consequences of the requested appointment to the person to be
38 protected and inquire if he the person wishes to attend the
39 hearing, to contest any aspect of the proceedings or to seek any
40 limitation of the proposed conservator's powers. If the visitor
41 or guardian ad litem determines that the person wants to contest
42 any issue or seek a limited appointment and that the person ~~does~~
43 ~~not have counsel of his own choice is not already represented,~~
44 the visitor or guardian ad litem shall so indicate in his the
45 written report to the court. The person to be protected is
46 entitled to be present at the hearing in person and to see and
47 hear all evidence bearing upon his the person's condition. He
48 The person to be protected is entitled to be represented by
49 counsel, to present evidence, to cross examine witnesses,
50

2 including the physician and the visitor. The issue may be
determined at a closed hearing if the person to be protected or
his the person's counsel so request requests.

4
6 Sec. 6. 18-A MRSA §5-408, sub-§(1), as enacted by PL 1979, c.
540, §1, is amended to read:

8 (1) While a petition for appointment of a conservator or
10 other protective order is pending and after preliminary hearing
and without notice to others, the court has power to preserve and
12 apply the property of the person to be protected as may be
required for his the person's benefit or the benefit of his the
14 person's dependents, in accordance with the procedures set forth
in section 5-408-A.

16 Sec. 7. 18-A MRSA §5-408-A is enacted to read:

18 §5-408-A. Temporary conservator

20 (a) When a person is alleged to be in need of protection
22 and an emergency exists and no other person appears to have
24 authority to act in the circumstances, upon appropriate petition,
26 the court may exercise the power of a conservator or may enter an
28 ex parte order appointing a temporary conservator to preserve and
30 apply the property of the person to be protected as may be
32 required for that person's benefit or the benefit of that
34 person's dependents. The petition must be accompanied by an
affidavit that sets forth the factual basis for the emergency and
the specific powers requested by the proposed conservator. In
the order and in the letters of temporary conservatorship, the
court shall specify the powers and duties of the temporary
conservator, limiting the powers and duties to those necessary to
address the emergency.

36 (b) When the court takes action to exercise the powers of a
38 conservator or to appoint a temporary conservator under
40 subsection (a), an expedited hearing must be held within 30 days
42 of the signing of the court order exercising the powers of a
44 conservator or appointing a temporary conservator. At that
46 hearing, the petitioner has the burden of showing, by a
48 preponderance of the evidence, that temporary conservatorship
50 continues to be necessary to address the emergency. Notice of
the expedited hearing must be served as provided in section
5-405, except that the notice must be given at least 5 days
before the expedited hearing. Unless the protected person is
already represented, the court shall appoint one or more of the
following: a visitor, a guardian ad litem or an attorney to
represent the protected person in the proceeding. If it comes to
the court's attention that the protected person wishes to contest
any aspect of the temporary conservatorship or to seek any
limitation of the court's or the temporary conservator's powers,

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

7 (c) At the expedited hearing, the court may render a
8 judgment authorizing the temporary conservatorship to continue
9 beyond the original 30-day period, for a period not to exceed 6
10 months from the date of entry of the ex parte order. The
11 temporary conservatorship terminates on the date specified in the
12 order or, if no date is specified in the order, at the end of the
13 6-month period following the expedited hearing, or at any prior
14 time if the court determines the circumstances leading to the
15 order for temporary conservatorship no longer exist or if a
16 hearing pursuant to section 5-407 has been held.

17 (d) If the court denies the request for an ex parte order
18 pursuant to subsection (a), the court may enter, in its
19 discretion, an order for an expedited hearing pursuant to
20 subsection (b). If the petitioner requests the entry of an order
21 of temporary conservatorship pursuant to subsection (a) without
22 requesting an ex parte order, the court may hold an expedited
23 hearing pursuant to subsection (b).

24 (e) If an appointed conservator is not effectively
25 performing that conservator's duties and the court finds that an
26 emergency exists that requires the appointment of a temporary
27 successor conservator in order to preserve and apply the property
28 of the protected person for the protected person's benefit or the
29 benefit of the protected person's dependents, it may appoint,
30 with or without notice, a temporary successor conservator for the
31 protected person for a specified period not to exceed 6 months.

32 (f) A temporary conservator has all the powers of a
33 permanent conservator provided in this code, unless expressly
34 limited by the court. A temporary successor conservator has the
35 same powers as the previously appointed conservator, unless the
36 court indicates otherwise in the letters of appointment. The
37 authority of a previously appointed conservator is suspended as
38 long as the temporary conservator has authority. A temporary
39 conservator may be removed at any time. A temporary conservator
40 shall account to the court at the termination of the temporary
41 conservatorship.

42 STATEMENT OF FACT

43 The Maine Probate Code provides procedures for the
44 appointment of guardians and conservators for adults who are

2 incapacitated or unable to manage their own affairs. This bill
3 seeks to provide greater due process to adults who are subject to
4 guardianship and conservatorship proceedings, referred to as
5 "wards" or "protected persons," first, by guaranteeing that a
6 visitor, guardian ad litem or attorney will be appointed in every
7 proceeding and second, by providing notice and an opportunity for
8 a hearing in proceedings for temporary guardianship and
9 conservatorship.

10 The bill requires that a visitor, guardian ad litem or
11 attorney be appointed in every guardianship or conservatorship
12 proceeding. These provisions also ensure that a proposed ward or
13 protected person who wishes to contest the guardianship or
14 conservatorship will have the benefit of counsel in doing so.

15 The bill amends provisions governing temporary proceedings
16 that allow for the appointment of a guardian or conservator in an
17 emergency.
18

19 Current law allows the appointment to take place without
20 notice to the person who is the subject of the proceedings and
21 without the opportunity for a hearing. A temporary guardian or
22 conservator, appointed in this way, may serve for as long as 6
23 months. In 1991, a federal district court struck down Oregon's
24 temporary guardianship statute because it violated the proposed
25 ward's due process rights under the United States Constitution.
26 If similar challenges in the State are successful, families and
27 public agencies will be without procedures to seek prompt
28 protection for incapacitated adults in emergency situations.
29 This bill seeks to preserve temporary guardianship and
30 conservatorship while providing greater due process to wards and
31 protected people.
32

33 This bill continues to allow the prompt emergency
34 appointment of a temporary guardian or conservator through an ex
35 parte hearing. The bill, however, changes the law to meet the
36 constitutional challenges that have been raised. The bill
37 requires that a petitioner file an affidavit with the court
38 setting forth facts alleging an emergency and the need for the
39 appointment of a temporary guardian or conservator. The bill
40 requires prompt notice to the ward or protected person following
41 the temporary appointment as well as the opportunity for a
42

2 postappointment hearing in which that person is able to challenge
the appropriateness of the appointment.

4

6

8 This document has not yet been reviewed to determine the
10 need for cross-reference, stylistic and other technical
amendments to conform existing law to current drafting standards.