

MAINE STATE LEGISLATURE

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117th MAINE LEGISLATURE

FIRST REGULAR SESSION-1995

Legislative Document

No. 1164

H.P. 833

House of Representatives, April 4, 1995

An Act to Clarify Recent Amendments to the Laws on Guardianship and Conservatorship.

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 black ink that reads "Joseph W. Mayo".

JOSEPH W. MAYO, Clerk

Presented by Representative DONNELLY of Presque Isle.
Cosponsored by Representatives: MADORE of Augusta, ROBICHAUD of Caribou.

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

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Sec. 1. 18-A MRSA §5-303, sub-§§(b) and (c), as amended by PL 1993, c. 652, §1, are further amended to read:

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person is already represented by an attorney, the court shall appoint one or more of the following: A 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 allegedly incapacitated person wishes to contest any aspect of the proceeding or to seek any limitation of the proposed guardian's powers, the court shall appoint an attorney to represent the allegedly incapacitated person. The cost of this 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. The person alleged to be incapacitated must be examined by a physician or by a licensed psychologist acceptable to the court who shall submit a report in writing to the court, providing diagnoses, a description of the person's actual mental and functional limitations and prognoses.

(c) If appointed, the visitor or guardian ad litem shall interview the allegedly incapacitated person and the person who is seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will reside if the requested appointment is made. The visitor or guardian ad litem shall submit a report in writing to the court. The visitor or guardian ad litem shall explain the meaning and possible consequences of the requested appointment to the allegedly incapacitated person and inquire if the person wishes to attend the hearing, to contest any aspect of the proceeding or to seek any limitation of the proposed guardian's powers. If the visitor or guardian ad litem determines that the person wants to contest any issue or seek a limited appointment and that the person does not have counsel of that person's own choice, the visitor or guardian ad litem shall so indicate in the written report to the court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see and hear all evidence bearing upon the person's condition. The person alleged to be incapacitated is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the physician and, the visitor and the guardian ad litem. The issue may be determined at a closed hearing if the person alleged to be incapacitated or the person's counsel so requests.

Sec. 2. 18-A MRSA §5-310-A, sub-§(a-1) is enacted to read:

2 (a-1) If the court takes action to exercise the powers of a
3 guardian or to appoint a temporary guardian under subsection (a),
4 then the court, within 48 hours of taking the action, shall
5 appoint a visitor or a guardian ad litem to visit the allegedly
6 incapacitated person and make a report to the court within 10
7 days of the appointment. The visitor or guardian ad litem shall
8 serve the allegedly incapacitated person with a copy of the order
9 appointing the temporary guardian and shall explain the meaning
10 and consequences of the appointment. The visitor or guardian ad
11 litem shall inquire of the allegedly incapacitated person whether
12 that person wishes to contest any aspect of the temporary
13 guardianship or seek any limitation of the temporary guardian's
14 powers. The visitor or guardian ad litem shall advise the
15 allegedly incapacitated person of that person's right to contest
16 the temporary guardianship by requesting a hearing under
17 subsection (b) and shall advise the allegedly incapacitated
18 person of that person's right to be represented in the proceeding
19 by counsel of that person's own choice or by counsel appointed by
20 the court. The visitor or guardian ad litem shall also interview
21 the temporary guardian, except in cases where the court itself
22 has taken action to exercise the powers of a temporary guardian.
23 In the report to the court, the visitor or guardian ad litem
24 shall inform the court that the allegedly incapacitated person
25 has received a copy of the order appointing the temporary
26 guardian. The visitor or guardian ad litem shall advise the
27 court as to whether the allegedly incapacitated person wishes to
28 contest any aspect of the temporary guardianship or seek a
29 limitation of the temporary guardian's powers and whether the
30 allegedly incapacitated person is already represented by
31 counsel. The visitor or guardian ad litem shall also advise the
32 court whether any issue exists with respect to whether the
33 appointment of the temporary guardian is in the allegedly
34 incapacitated person's best interest.

36 **Sec. 3. 18-A MRSA §5-310-A, sub-§§(b) and (c), as enacted by PL**
37 **1993, c. 652, §3, are amended to read:**

38 ~~(b) When the court takes action to exercise the powers of a~~
39 ~~guardian or to appoint a temporary guardian under subsection (a),~~
40 ~~an expedited hearing must be held within 30 days of the signing~~
41 ~~of the court order exercising the powers of a guardian or~~
42 ~~appointing a temporary guardian. If the court has exercised~~
43 ~~temporary guardianship powers or has issued an ex parte order~~
44 ~~under subsection (a), and if it comes to the court's attention,~~
45 ~~through the report of the visitor or guardian ad litem or~~
46 ~~otherwise, that the allegedly incapacitated person wishes to~~
47 ~~contest any aspect of the temporary guardianship or seek a~~
48 ~~limitation of the temporary guardian's powers, or that an issue~~
49 ~~exists with respect to whether the temporary guardianship is in~~
50 ~~the allegedly incapacitated person's best interest.~~

2 the allegedly incapacitated person's best interest, the court
3 shall hold an expedited hearing within 40 days of the entry of
4 the ex parte order under subsection (a). The court may continue
5 the expedited hearing if the petitioner and the attorney for the
6 allegedly incapacitated person, or, if none, the visitor or the
7 guardian ad litem, agree to such a continuance. The court may
8 continue the hearing on its own motion due to circumstances
9 beyond the control of the court and the parties, provided the
10 hearing is held within 60 days of the signing of the ex parte
11 order. If the appointment of a guardian is contested by the
12 allegedly incapacitated person and the person is not already
13 represented by an attorney, the court shall appoint counsel to
14 represent the allegedly incapacitated person in the proceeding.
15 The cost of the appointment of the visitor, guardian ad litem or
16 attorney must be paid from the estate of the allegedly
17 incapacitated person if the court is satisfied that sufficient
18 funds are available. At the hearing, the petitioner has the
19 burden of showing, by a preponderance of the evidence, that
20 temporary guardianship continues to be necessary to address-
21 the emergency provide the person with continuing care, protection or
22 support pending a final hearing. Notice of the expedited hearing
23 must be served as provided in section 5-309, except that the
24 notice must be given at least 5 days before the expedited
25 hearing, and notice need not be served on any person whose
26 address or present whereabouts is unknown and can not be
27 ascertained by due diligence. Unless-~~the-allegedly-incapacitated~~
28 ~~person-is-already-represented,-the-court-shall-appoint-one-or~~
29 ~~more-of-the-following:-a-visitor,-a-guardian-ad-litem-or-an~~
30 ~~attorney-to-represent-the-allegedly-incapacitated-person-in-the~~
31 ~~proceeding.-If-it-comes-to-the-court's-attention-that-the-ward~~
32 ~~wishes-to-contest-any-aspect-of-the-temporary-guardianship-or-to~~
33 ~~seek-any-limitation-of-the-court's-or-the-temporary-guardian's~~
34 ~~powers,-the-court-shall-appoint-an-attorney-to-represent-the~~
35 ~~ward.-The-cost-of-the-appointment-of-the-visitor,-guardian-ad~~
36 ~~litem-or-attorney-must-be-paid-from-the-estate-of-the-allegedly~~
37 ~~incapacitated-person-if-the-court-is-satisfied-sufficient-funds~~
38 are available. The court may waive service of the expedited
39 hearing on any person, other than the allegedly incapacitated
40 person, upon a showing of good cause.

41 (c) At the expedited hearing, the court may render a
42 judgment authorizing the temporary guardianship to continue
43 ~~beyond-the-original-30-day-period,~~ for a period not to exceed 6
44 months from the date of entry of the ex parte order. The
45 temporary guardianship terminates on the date specified in the
46 order or, if no date is specified in the order, ~~at-the-end-of-the~~
47 ~~6-month-period~~ 6 months following the expedited-hearing, date of
48 entry of the ex parte order or at any prior time if the court
determines the circumstances leading to the order for temporary

guardianship no longer exist or if a judgment following a hearing
pursuant to section 5-303 has been held entered.

Sec. 4. 18-A MRSA §5-407, sub-§(b), as amended by PL 1993, c.
652, §4, is further amended to read:

(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected is already represented by an attorney, the court shall appoint one or more of the following: A a visitor; a guardian ad litem or a lawyer to represent the person to be protected in the proceedings. If it comes to the court's attention that the ~~allegedly-incapacitated~~ person to be protected wishes to contest any aspect of the proceeding or to seek any limitation of the proposed conservator's powers, the court shall appoint an attorney to represent the ~~allegedly--incapacitated~~ person to be protected. The cost of the appointment of the visitor, guardian ad litem or attorney must be paid from the estate of the person to be protected if the court is satisfied sufficient funds are available. If the alleged disability is physical illness or disability, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician acceptable to the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. If the alleged 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 acceptable to the court; preferably the physician or psychologist shall not be 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, providing diagnoses, a description of the person's actual mental and functional limitations and prognoses.

Sec. 5. 18-A MRSA §5-407, sub-§(b-1), as amended by PL 1993, c.
652, §5, is further amended to read:

(b-1) If appointed, 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 submit a report in writing to the court. The visitor or guardian ad litem shall explain the meaning and possible consequences of the requested appointment to the person to be protected and inquire if the person wishes to attend the hearing, to contest any aspect of the proceedings or to seek any limitation of the proposed conservator's powers. If the visitor or guardian ad litem determines that the person wants to contest any issue or seek a limited appointment and that the person is not already represented by an attorney, the visitor or guardian

ad litem shall so indicate in the written report to the court.
2 The person to be protected is entitled to be present at the
hearing in person and to see and hear all evidence bearing upon
4 the person's condition. The person to be protected is entitled
to be represented by counsel, to present evidence, to ~~ex~~
6 ~~amine~~ cross-examine witnesses, including the physician ~~and,~~ the
visitor and the guardian ad litem. The issue may be determined
8 at a closed hearing if the person to be protected or the person's
counsel so requests.

10 **Sec. 6. 18-A MRSA §5-408-A, sub-§(a-1)** is enacted to read:

12 (a-1) If the court takes action to exercise the powers of a
14 conservator or to appoint a temporary conservator under
subsection (a), then the court, within 48 hours of taking the
16 action, shall appoint a visitor or a guardian ad litem to visit
the protected person and make a report to the court within 10
18 days of the appointment of the temporary conservator. The
visitor or guardian ad litem shall serve the protected person
20 with a copy of the order appointing the temporary conservator and
shall explain the meaning and consequences of the appointment.
22 The visitor or guardian ad litem shall inquire of the protected
person whether that person wishes to contest any aspect of the
24 temporary conservatorship or seek any limitation of the temporary
conservator's powers. The visitor or guardian ad litem shall
26 advise the protected person of that person's right to contest the
temporary conservatorship by requesting an expedited hearing
28 under subsection (b) and shall advise the protected person of
that person's right to be represented by counsel of that person's
30 own choice or by counsel appointed by the court. The visitor or
guardian ad litem shall also interview the temporary conservator,
32 except in cases where the court itself has taken action to
exercise the powers of a temporary conservator. In the report to
34 the court, the visitor or guardian ad litem shall inform the
court that the protected person has received a copy of the order
36 appointing the temporary conservator and shall advise the court
as to whether the protected person wishes to contest any aspect
38 of the temporary conservatorship or seek a limitation of the
temporary conservator's powers and whether the protected person
40 is already represented by counsel. The visitor or guardian ad
litem shall also advise the court whether any issue exists with
42 respect to whether the appointment of the temporary conservator
is in the protected person's best interest.

44 **Sec. 7. 18-A MRSA §5-408-A, sub-§§(b) and (c)**, as enacted by PL
46 1993, c. 652, §7, are amended to read:

48 ~~(b) When the court takes action to exercise the powers of a~~
~~conservator or to appoint a temporary conservator under~~
50 ~~subsection (a), an expedited hearing must be held within 30 days~~

2 of the signing of the court order exercising the powers of a
3 conservator or appointing a temporary conservator. If the court
4 has exercised temporary guardianship powers or has issued an ex
5 parte order under subsection (a), and if it comes to the court's
6 attention, through the report of the visitor or guardian ad litem
7 or otherwise, that the protected person wishes to contest any
8 aspect of the temporary conservatorship or to seek a limitation
9 of the temporary conservator's powers, or if it appears that
10 there is an issue with respect to whether the temporary
11 conservatorship is in the protected person's best interest, the
12 court shall hold an expedited hearing within 40 days of the
13 signing of the ex parte order under subsection (a). The court
14 may continue the expedited hearing if the petitioner and the
15 attorney for the protected person, or, if none, the visitor or
16 guardian ad litem, agree to such a continuance. The court may
17 continue the hearing on its own motion due to circumstances
18 beyond the control of the court and the parties, provided the
19 hearing is held within 60 days of the signing of the ex parte
20 order. If the appointment of a conservator is contested by the
21 protected person and the person is not already represented by an
22 attorney, the court shall appoint counsel to represent the person
23 in the proceeding. The cost of the appointment of the visitor,
24 guardian ad litem or attorney must be paid from the estate of the
25 protected person if the court is satisfied that sufficient funds
26 are available. At that hearing, the petitioner has the burden of
27 showing, by a preponderance of the evidence, that temporary
28 conservatorship continues to be necessary to address--the
29 emergency protect and preserve the person's estate pending final
30 hearing. Notice of the expedited hearing must be served as
31 provided in section 5-405, except that the notice must be given
32 at least 5 days before the expedited hearing, and notice need not
33 be served on any person whose address or present whereabouts is
34 unknown and can not be ascertained by due diligence. Unless the
35 protected person is already represented, the court shall appoint
36 one or more of the following:--a visitor,--a guardian ad litem or
37 an attorney to represent the protected person in the proceeding.
38 If it comes to the court's attention that the protected person
39 wishes to contest any aspect of the temporary conservatorship or
40 to--seek--any--limitation--of--the--court's--or--the--temporary
41 conservator's powers,--the court--shall--appoint--an--attorney--to
42 represent the protected person.--The cost of the appointment of
43 the visitor,--guardian ad litem or attorney must be paid from the
44 estate of the person to be protected if the court is satisfied
45 sufficient funds are available. The court may waive service of
46 the expedited hearing on any person, other than the person to be
47 protected, upon a showing of good cause.

48 (c) At the expedited hearing, the court may render a
49 judgment authorizing the temporary conservatorship to continue
50 beyond the original 30-day period, for a period not to exceed 6

2 months from the date of entry of the ex parte order. The
temporary conservatorship terminates on the date specified in the
order or, if no date is specified in the order, ~~at the end of the~~
4 ~~6-month period~~ 6 months following the ~~expedited hearing~~ date of
entry of the ex parte order, or at any prior time if the court
6 determines the circumstances leading to the order for temporary
conservatorship no longer exist or if a judgment following a
8 hearing pursuant to section 5-407 has been ~~held~~ entered.

10 **Sec. 8. 18-A MRSA §5-408-A, sub-§(g) is enacted to read:**

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

24
26 **STATEMENT OF FACT**

28 In the Second Regular Session of the 116th Legislature,
amendments were made to the law on guardianship and
30 conservatorship. This bill makes technical changes to the recent
amendments which would correct errors and inconsistencies and
32 address problems in implementation of the law.

34 First, the bill adopts uniform terminology with respect to
the appointment of counsel for proposed wards and protected
36 persons. Second, the bill specifically allows for
cross-examination of the guardian ad litem. Third, the bill
38 streamlines notice requirements in temporary guardianship and
conservatorship cases, dispensing with the requirement of
40 published notice on parties whose whereabouts is unknown and
allowing the court to waive notice on interested parties where
42 good cause is shown. Fourth, the bill clarifies the petitioner's
burden of proof at the expedited hearing regarding the temporary
44 guardian or conservator. Fifth, the bill clarifies the duration
of a temporary guardianship or conservatorship, to run 6 months
46 from date of the ex parte appointment. Finally, the bill makes
it clear that a petition for temporary conservatorship can be
48 heard on interchange in cases in which the judge in a particular
county is unavailable.