## MAINE STATE LEGISLATURE

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## 122nd MAINE LEGISLATURE

## FIRST REGULAR SESSION-2005

Legislative Document

No. 1179

S.P. 407

In Senate, March 8, 2005

An Act To Establish Duties for Persons Who Hold Durable Powers of Attorney or Act as Responsible Parties for Residents of Long-term Care Facilities

Reference to the Committee on Judiciary suggested and ordered printed.

JOY J. O'BRIEN Secretary of the Senate

Presented by Senator MARTIN of Aroostook.

Cosponsored by Senators: MAYO of Sagadahoc, ROSEN of Hancock, ROTUNDO of Androscoggin, Representatives: CRAVEN of Lewiston, FISCHER of Presque Isle, MILLS of Farmington, PINGREE of North Haven.

Sec. 1. 18-A MRSA §5-510 is enacted to read:
§5-510. Duties owed by persons who hold durable powers of
attorney or act as responsible parties for residents
of long-term care facilities
(a) As used in this section, unless the context otherwise
indicates, the following terms have the following meanings.
(1) "Agent" means an individual who holds a power of
attorney or otherwise acts as a responsible party for
payment of financial obligations of and on behalf of a
principal.
(0) "
(2) "Long-term care facility" means a nursing facility or
unit licensed pursuant to Title 22, chapter 405 or an
assisted living facility or program or a residential care
facility licensed pursuant to Title 22, chapter 1663 or 1664.
(3) "Principal" means a resident of a long-term care
facility.
(4) "Principal's resources" includes assets, income,
pensions, cash benefits, insurance proceeds and other
resources available or belonging to the principal.
(b) An agent is subject to the duties, obligations and
procedures set forth in this section.
(c) In exercising a power of attorney or otherwise acting
as a responsible party for payment of financial obligations of
and on behalf of a principal, an agent is under a fiduciary duty
to observe the standards observed by a prudent person dealing
with the property of another. The agent may not engage in self-dealing that is contrary to the interests of the principal.
seri-dearing that is contrary to the interests or the principal.
(d) If a principal may be eligible for coverage of health
care expenses by the Medicare and MaineCare programs or any other
federal and state public health insurance program, the agent
shall promptly apply for coverage and shall comply with the
requirements governing these programs. If the principal is
covered by any private health insurance or long-term care
insurance that provides benefits for the care provided by the
long-term care facility, the agent shall take appropriate action
to claim these benefits. Except for any exclusions or allowances
provided for under a public health insurance program, the agent
shall apply the principal's resources to make timely payment to

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

the long-term care facility for services rendered to the principal.

(e) If there is reasonable cause to believe that an agent has breached fiduciary duty as set forth in subsection (c), the Department of Health and Human Services, the long-term care ombudsman under Title 22, chapter 1453 or the affected long-term care facility may file a petition in Probate Court. The petitioner may request the court to:

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- (1) Determine whether the agent's acts or omissions are in breach of the fiduciary duty owed to the principal;
- (2) Compel the agent to submit an accounting or report of any actions and omissions on behalf of the principal;
  - (3) Seek restitution from the agent of any misappropriated resources of the principal;
- 20 (4) Terminate the power of attorney; or
- 22 (5) Take other action appropriate to the circumstances.
- 24 The court shall hold an expedited hearing within 30 days of the filing of the petition, or within a shorter period of time, for 26 good cause shown in any matter that requires a timely decision affecting health care or to forestall the misappropriation of the principal's resources. The court may make orders and decrees and 28 take other actions that are necessary or proper in making 30 determinations on matters presented by a petition filed under this subsection. In any transfer of the principal's resources to the agent or any person designated by the agent occurring after 32 the date of admission to a long-term care facility and made for 34 less than full consideration when the transfer is not authorized under a gift provision in the durable power of attorney, it is presumed that the transfer was not a gift. The agent may 36 overcome the presumption if the agent proves by a preponderance of the evidence that the transfer was authorized and was not the result of fraud, undue influence, misrepresentation or 40 self-dealing.
- 42 (f) A court, after hearing pursuant to subsection (e), may terminate or revoke the power of attorney or terminate the agent's functioning as responsible party for a principal upon determination that:
- (1) The agent has breached the agent's fiduciary duty to the principal or engaged in self-dealing;

	(2) At the time of the determination, the principal lacks
2	the capacity to give or revoke a power of attorney; or
4	(3) The termination of the power of attorney is in the best
c	interest of the principal.
6	If the pager of attempts is nearly as terminated by the result
8	If the power of attorney is revoked or terminated by the court, the petitioner may request that the principal or the court
10	appoint a suitable person to serve as substitute agent under a new power of attorney if the principal is competent but unable to
	manage assets. If the principal is incompetent and there is no
12	suitable private person available and willing to assume responsibilities for asset management, the petition may seek a
14	public conservator in Probate Court pursuant to Part 6.
16	(g) If a court determines that an agent has breached the
1.0	agent's fiduciary duties, misappropriated a principal's resources
18	or engaged in self-dealing, the court shall order prompt restitution to the principal and, when appropriate, to the
20	long-term care facility from the agent's personal assets if
	necessary. In such a case, or if the agent fails without
22	reasonable cause or justification to submit an accounting or report as required by the court under subsection (e), the court
24	may order the agent to pay reasonable attorney's fees and costs
	to the petitioner. The court may enter orders and take other
26	action as appropriate to the circumstances.
28	(h) The duties of an agent under this section and any
	related cause of action survive the death of the principal. The
30	cause of action for breach of fiduciary duty or self-dealing is
2.2	against the agent individually. The long-term care facility may
32	also file a claim for any uncompensated services against the principal's estate following the principal's death.
34	principal's estate rorrowing the principal's death.
	Sec. 2. 22 MRSA §1826, sub-§2, ¶I, as enacted by PL 1985, c.
36	291, §1, is amended to read:
38	I. No contract or agreement may contain a provision which that provides for the payment of atterneys attorney's fees
40	or any other cost of collecting payments from the resident, except that attorney's fees and costs may be collected
42	against any agent under a power of attorney who breaches the
16	agent's fiduciary duty as set forth in Title 18-A, section
44	<u>5-510</u> .
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	SUMMARY
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50	This bill establishes duties on the part of persons who hold
50	durable powers of attorney or act as responsible parties for

residents of long-term care facilities and provides mechanisms
for enforcing those duties. The bill also permits collection of attorney's fees and costs from persons who breach the duties established by this bill.