

# MAINE STATE LEGISLATURE

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L.D. 1402

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STATE OF MAINE
SENATE
122ND LEGISLATURE
FIRST SPECIAL SESSION

COMMITTEE AMENDMENT A to S.P. 491, L.D. 1402, Bill, "An Act To Provide Guidelines, Standards and Rights for Children and the Guardians Who Care for Them"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

Sec. 1. 18-A MRSA §5-101, sub-§§(1-A), (1-B) and (1-C) are enacted to read:

(1-A) The "best interest of the child" is determined according to this subsection.

(a) In determining the best interest of the child the court shall consider the following factors:

(1) The wishes of the party or parties as to custody;

(2) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference;

(3) The child's primary caregiver;

(4) The bonding and attachment between each party and the child;

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- (5) The interaction and interrelationship of the child with a party or parties, siblings and any other person who may significantly affect the child's best interest;
- (6) The child's adjustment to home, school and community;
- (7) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (8) The permanence, as a family unit, of the existing or proposed home;
- (9) The mental and physical health of all individuals involved;
- (10) The child's cultural background;
- (11) The capacity and disposition of the parties to give the child love, affection and guidance and to continue educating and raising the child in the child's culture and religion or creed, if any;
- (12) The effect on the child of the actions of an abuser if related to domestic violence that has occurred between the parents or other parties; and
- (13) All other factors having a reasonable bearing on the physical and psychological well-being of the child.

(b) The court may not consider any one of the factors set out in paragraph (a) to the exclusion of all others;

(1-B) "De facto guardian" means an individual with whom, within the 24 months immediately preceding the filing of a petition under section 5-204, subsection (d), a child has resided for the following applicable period and during which period there has been a demonstrated lack of consistent participation by the parent or legal custodian:

- (a) If the child at the time of filing the petition is under 3 years of age, 6 months or more, which need not be consecutive; or
- (b) If the child at the time of filing the petition is at least 3 years of age, 12 months or more, which need not be consecutive.

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2 "De facto guardian" does not include an individual who has a  
3 guardian's powers delegated to the individual by a parent or  
4 guardian of a child under section 5-104, adopts a child under  
5 Article 9 or has a child placed in the individual's care under  
6 Title 22, chapter 1071;

7 (1-C) "Demonstrated lack of consistent participation" means  
8 refusal or failure to comply with the duties imposed upon a  
9 parent by the parent-child relationship, including but not  
10 limited to providing the child necessary food, clothing, shelter,  
11 health care, education, a nurturing and consistent relationship  
12 and other care and control necessary for the child's physical,  
13 mental and emotional health and development.

14 In determining whether there has been a demonstrated lack of  
15 consistent participation in the child's life by the parent or  
16 legal custodian, the court shall consider at least the following  
17 factors:

18 (a) The intent of the parent, parents or legal custodian in  
19 placing the child with the person petitioning as a de facto  
20 guardian;

21 (b) The amount of involvement the parent, parents or legal  
22 custodian had with the child during the parent's, parents'  
23 or legal custodian's absence;

24 (c) The facts and circumstances of the parent's, parents'  
25 or legal custodian's absence;

26 (d) The parent's, parents' or legal custodian's refusal to  
27 comply with conditions for retaining custody set forth in  
28 any previous court orders; and

29 (e) Whether the nonconsenting parent, parents or legal  
30 custodian was previously prevented from participating in the  
31 child's life as a result of domestic violence or child abuse  
32 or neglect.

33 Serving as a member of the United States Armed Forces may not be  
34 considered demonstration of lack of consistent participation;

35 **Sec. 2. 18-A MRSA §5-204**, as amended by PL 2001, c. 554, §2  
36 and PL 2003, c. 689, Pt. B, §§6 and 7, is further amended to read:

37 **§5-204. Court appointment of guardian of minor; conditions**  
38 **for appointment**

39 The court may appoint a guardian or coguardians for an  
40 unmarried minor if:

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2 (a) All parental rights of custody have been terminated or suspended by circumstance or prior court order;

4 (b) Each living parent whose parental rights and responsibilities have not been terminated or the person who is the legal custodian of the unmarried minor consents to the guardianship and the court finds that the consent creates a condition that is in the best interest of the child; or

10 (c) The person or persons whose consent is required under subsection (b) do not consent, but the court finds by clear and convincing evidence that the person or persons have failed to respond to proper notice or a living situation has been created that is at least temporarily intolerable for the child even though the living situation does not rise to the level of jeopardy required for the final termination of parental rights, and that the proposed guardian will provide a living situation that is in the best interest of the child; or

20 (d) The person or persons whose consent is required under subsection (b) do not consent, but the court finds by a preponderance of the evidence that there is a de facto guardian and a demonstrated lack of consistent participation by the nonconsenting parent or legal custodian of the unmarried minor. The court may appoint the de facto guardian as guardian if the appointment is in the best interest of the child.

28 A guardian appointed by will as provided in section 5-202 whose appointment has not been prevented or nullified under section 5-203 has priority over any guardian who may be appointed by the court but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

36 If a proceeding is brought under subsection (c) or subsection (d), the nonconsenting parent or legal custodian is entitled to court-appointed legal counsel if indigent. In a contested action, the court may also appoint counsel for any indigent de facto guardian, guardian or petitioner when a parent or legal custodian has counsel.

42 If a proceeding is brought under subsection (b) or subsection (c) or subsection (d), the court may order a parent to pay child support in accordance with Title 19-A, Part 3. When the Department of Health and Human Services provides child support enforcement services, the Commissioner of Health and Human Services may designate employees of the department who are not attorneys to represent the department in court if a hearing

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is held. The commissioner shall ensure that appropriate training is provided to all employees who are designated to represent the department under this paragraph.

If the court appoints a limited guardian, the court shall specify the duties and powers of the guardian, as required in section 5-105, and the parental rights and responsibilities retained by the parent of the minor.

Sec. 3. 18-A MRSA §5-206, as amended by PL 1993, c. 686, §2 and affected by §13, is further amended to read:

§5-206. Court appointment of guardian of minor; qualifications; priority of minor's nominee

The court may appoint as guardian any person, or as coguardians more than one person, whose appointment is in the best ~~interests~~ interest of the minor. The court shall set forth in the order of appointment the basis for determining that the appointment is in the best interest of the minor. The court shall appoint a person nominated by the minor, if the minor is 14 years of age or older, unless the court finds the appointment contrary to the best ~~interests~~ interest of the minor. The court may not appoint a guardian for a minor child who will be removed from this State for the purpose of adoption.

Sec. 4. 18-A MRSA §5-211, sub-§(b), as enacted by PL 1979, c. 540, §1, is amended to read:

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer ~~he~~ the proceedings to the other court, whichever is in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall must be sent to the court in which acceptance of appointment is filed.

Sec. 5. 18-A MRSA §5-212, sub-§(d), as enacted by PL 1995, c. 623, §2, is amended to read:

(d) The court may not terminate the guardianship in the absence of the guardian's consent unless the court finds by a preponderance of the evidence that the termination is in the best interest of the ward. The guardian petitioner has the burden of showing by a preponderance of the evidence that ~~continuation~~ termination of the guardianship is in the best interest of the

ward. If the court does not terminate the guardianship, the court may dismiss subsequent petitions for termination of the guardianship unless there has been a substantial change of circumstances.

**Sec. 6. 18-A MRSA §5-212, sub-§(e) is enacted to read:**

(e) In a contested action, the court may appoint counsel for any indigent guardian or petitioner.'

## SUMMARY

This amendment replaces the bill.

It adds 3 concepts to the definitional section of the article of the Probate Code governing guardians.

This amendment adds to the statute the factors to be considered in determining the best interest of the child. In addition to the specific factors, the court may consider all other factors having a reasonable bearing on the physical and psychological well-being of the child.

This amendment adds a definition of "de facto guardian." A person who meets the definition of de facto guardian is given standing to petition the Probate Court for appointment as a guardian. A person meets the definition of de facto guardian if that person has lived with the child in question for either 6 months or 12 months, depending on the age of the child, of the 24 months immediately preceding the filing of the petition for guardianship, and during those periods the parent or legal custodian has demonstrated a lack of consistent participation in the child's life. A de facto guardian does not include an individual who has a child placed in the individual's care under the child protection laws, or pursuant to the adoption laws or under a delegation by the parent or guardian.

This amendment also adds a definition of "demonstrated lack of consistent participation," which means a refusal or failure to comply with the duties imposed upon a parent by the parent-child relationship. The court is to consider at least 5 specific factors in determining whether there is a demonstrated lack of consistent participation by the parent. Service as a member of the military services may not be considered to be a demonstration of lack of consistent participation.

This amendment adds specific language concerning the appointment of coguardians. Although the statute currently

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2 allows appointment of coguardians, the intent of this amendment  
is to ensure the Probate Court's authority to appoint 2 or more  
4 persons as coguardians of a child even if all the coguardians do  
not reside together with the child at all times. This allows  
6 appointment of a coguardian to serve as a backup for a coguardian  
with whom the child may usually reside.

8 This amendment adds a new provision to provide for  
appointment of persons who qualify as de facto guardians as legal  
10 guardians if the appointment is in the best interest of the  
child. The appointment may be made without the consent of the  
12 parents or legal custodians otherwise required to consent to a  
guardianship.

14 This amendment allows the Probate Court to appoint counsel  
16 for an indigent de facto guardian, guardian or petitioner in a  
contested appointment proceeding when the parent or legal  
18 custodian has counsel.

20 This amendment provides that the Probate Court may order a  
parent to pay child support when a de facto guardian is appointed  
22 guardian for the child.

24 This amendment requires the court to set forth in all orders  
making appointments of guardians the basis for determining that  
26 the appointment is in the best interest of the child.

28 This amendment corrects a typographical error.

30 This amendment provides that when a person seeks to  
terminate a guardianship against the guardian's consent, the  
32 person seeking to change the status quo has the burden of proving  
by a preponderance of the evidence that the termination of the  
34 guardianship is in the best interest of the ward. In a contested  
termination proceeding, the court may appoint counsel for any  
36 indigent guardian or petitioner.

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