

MAINE STATE LEGISLATURE

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122nd MAINE LEGISLATURE

SECOND REGULAR SESSION-2006

Legislative Document

No. 2087

H.P. 1475

House of Representatives, March 21, 2006

An Act To Implement Recommendations Concerning Temporary Guardian and Conservator Laws

Reported by Representative SIMPSON of Auburn for the Joint Standing Committee on
Judiciary pursuant to Resolve 2005, chapter 91.

Reference to the Committee on Judiciary suggested and ordered printed under Joint Rule
218.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

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

Sec. 1. 18-A MRSA §5-310-A, sub-§(a), as enacted by PL 1993, c. 652, §3, is further amended to read:

(a) When a person alleged to be incapacitated has no guardian and an emergency exists and no other person appears to have authority to act in the circumstances, upon appropriate petition, the court may exercise the power of a guardian or may enter an ex parte order appointing a temporary guardian to address the emergency in order to prevent serious, immediate and irreparable harm to the health or financial interests of the person alleged to be incapacitated. A petition for temporary guardianship 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.

(1) Except as otherwise provided in this section, prior to filing a petition under this subsection the petitioner shall provide notice orally or in writing to the following:

(i) The allegedly incapacitated person and the person's spouse, parents, adult children and any domestic partner known to the court;

(ii) Any person who is serving as guardian or conservator or who has care and custody of the allegedly incapacitated person; and

(iii) In case no other person is notified under subparagraph (i), at least one of the closest adult relatives of the allegedly incapacitated person or, if none, an adult friend, if any can be found.

(2) Notice under paragraph (1) must include the following information:

(i) The temporary authority that the petitioner is requesting;

(ii) The location and telephone number of the court in which the petition is being filed; and

(iii) The name of the petitioner and the intended date of filing.

(3) The petitioner shall state in the affidavit required

2 under this subsection the date, time, location and method of
4 providing the required notice under paragraph (1) and to
6 whom the notice was provided. The court shall make a
8 determination as to the adequacy of the method of providing
10 notice and whether the petitioner complied with the notice
12 requirements of this subsection. The requirements of
14 section 5-309 do not apply to this section.

16 (4) Notice is not required under this subsection in the
18 following circumstances:

20 (i) Giving notice will place the allegedly
22 incapacitated person at substantial risk of abuse,
24 neglect or exploitation;

26 (ii) Notice, if provided, would not be effective; or

28 (iii) Other good cause as determined by the court.

30 (5) If, prior to filing the petition, the petitioner did
32 not provide notice as required under this subsection, the
34 petitioner must state in the affidavit the reasons for not
36 providing notice. If notice has not been provided, the
38 court shall make a determination as to the sufficiency of
40 the reason for not providing notice before issuing a
42 temporary order.

44 **Sec. 2. 18-A MRSA §5-310-A, sub-§(a-1), as amended by PL 1997,**
46 **c. 35, §1, is further amended to read:**

48 (a-1) If the court takes action to exercise the powers of a
50 guardian or to appoint a temporary guardian under subsection (a),
then the court, within 2 days, excluding Saturdays, Sundays and
legal holidays, of taking the action, shall appoint a visitor or
a guardian ad litem to visit the allegedly incapacitated person
and make a report to the court within 10 days of the appointment
of the visitor or guardian ad litem. The visitor or guardian ad
litem shall serve the allegedly incapacitated person with a copy
of the order appointing the temporary guardian and shall explain
the meaning and consequences of the appointment. The visitor or
guardian ad litem shall inquire of the allegedly incapacitated
person whether that person wishes to contest any aspect of the
temporary guardianship or seek any limitation of the temporary
guardian's powers. The visitor or guardian ad litem shall advise
the allegedly incapacitated person of that person's right to
contest the temporary guardianship by requesting a hearing under
subsection (b) and shall advise the allegedly incapacitated
person of that person's right to be represented in the proceeding
by counsel of that person's own choice or by counsel appointed by
the court. The visitor or guardian ad litem shall also interview

2 the temporary guardian, except in cases where the court itself
has taken action to exercise the powers of a temporary guardian.
4 In the report to the court, the visitor or guardian ad litem
has received a copy of the order appointing the temporary
6 guardian. The visitor or guardian ad litem shall advise the
court ~~as--to--whether~~ if circumstances indicate the allegedly
8 incapacitated person wishes to contest any aspect of the
temporary guardianship or seek a limitation of the temporary
10 guardian's powers and whether the allegedly incapacitated person
is already represented by counsel. The visitor or guardian ad
12 litem shall also advise the court whether any issue exists with
respect to whether the appointment of the temporary guardian is
14 in the allegedly incapacitated person's best interest.

16 **Sec. 3. 18-A MRSA §5-408-A, sub-§(a), as enacted by PL 1993, c.**
18 **652, §7, is amended to read:**

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

36 (1) Except as otherwise provided in this section, prior to
38 filing a petition under this subsection the petitioner shall
provide notice orally or in writing to the following:

40 (i) The person alleged to be in need of protection and
42 the person's spouse, parents, adult children and any
domestic partner known to the court;

44 (ii) Any person who is serving as guardian or
46 conservator or who has care and custody of the person
alleged to be in need of protection; and

48 (iii) In case no other person is notified under
50 subparagraph (i), at least one of the closest adult
relatives of the person alleged to be in need of

2 protection or, if none, an adult friend, if any can be
3 found.

4 (2) Notice under paragraph (1) must include the following
5 information:

6 (i) The temporary authority that the petitioner is
7 requesting;

8 (ii) The location and telephone number of the court in
9 which the petition is being filed; and

10 (iii) The name of the petitioner and the intended date
11 of filing.

12 (3) The petitioner shall state in the affidavit required
13 under this subsection the date, time, location and method of
14 providing the required notice under paragraph (1) and to
15 whom the notice was provided. The court shall make a
16 determination as to the adequacy of the method of providing
17 notice and whether the petitioner complied with the notice
18 requirements of this subsection. The requirements of
19 section 5-405 do not apply to this section.

20 (4) Notice is not required under this subsection in the
21 following circumstances:

22 (i) Giving notice will place the person alleged to be
23 in need of protection at substantial risk of abuse,
24 neglect or exploitation;

25 (ii) Notice, if provided, would not be effective; or

26 (iii) Other good cause as determined by the court.

27 (5) If, prior to filing the petition, the petitioner did
28 not provide notice as required under this subsection, the
29 petitioner must state in the affidavit the reasons for not
30 providing notice. If notice has not been provided, the
31 court shall make a determination as to the sufficiency of
32 the reason for not providing notice before issuing a
33 temporary order.

34 **Sec. 4. 18-A MRSA §5-408-A, sub-§(a-1), as amended by PL 1997,**
35 **c. 35, §2, is further amended to read:**

36 (a-1) If the court takes action to exercise the powers of a
37 conservator or to appoint a temporary conservator under
38 subsection (a), then the court, within 2 days, excluding
39 Saturdays, Sundays and legal holidays, of taking the action,
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shall appoint a visitor or a guardian ad litem to visit the protected person and make a report to the court within 10 days of the appointment of the visitor or guardian ad litem. The visitor or guardian ad litem shall serve the protected person with a copy of the order appointing the temporary conservator and shall explain the meaning and consequences of the appointment. The visitor or guardian ad litem shall inquire of the protected person whether that person wishes to contest any aspect of the temporary conservatorship or seek any limitation of the temporary conservator's powers. The visitor or guardian ad litem shall advise the protected person of that person's right to contest the temporary conservatorship by requesting an expedited hearing under subsection (b) and shall advise the protected person of that person's right to be represented by counsel of that person's own choice or by counsel appointed by the court. The visitor or guardian ad litem shall also interview the temporary conservator, except in cases where the court itself has taken action to exercise the powers of a temporary conservator. In the report to the court, the visitor or guardian ad litem shall inform the court that the protected person has received a copy of the order appointing the temporary conservator and shall advise the court ~~as to whether~~ if circumstances indicate that the protected person wishes to contest any aspect of the temporary conservatorship or seek a limitation of the temporary conservator's powers and whether the protected person is already represented by counsel. The visitor or guardian ad litem shall also advise the court whether any issue exists with respect to whether the appointment of the temporary conservator is in the protected person's best interest.

SUMMARY

This bill is submitted by the Joint Standing Committee on Judiciary pursuant to Resolve 2005, chapter 91. It is based on recommendations included in the report submitted by the Department of Health and Human Services prepared pursuant to the same resolve. The bill addresses notice and other issues involving the appointment of temporary guardians and conservators by the Probate Courts.

This bill requires that before a person files a petition for a temporary guardianship or conservatorship, notice of the petition must be given to the allegedly incapacitated person or the person alleged to be in need of protection as well as specific family members or others involved in the life of that person. The specifics of the notice are listed. Notice is not required in certain circumstances: if notice will place the person at substantial risk of abuse, neglect or exploitation; if notice would not be effective; and if other good cause is determined by

2 the court. If the petitioner does not provide notice before
filing the petition, the petitioner must include in the affidavit
4 that fact and the reason notice was not provided. The court
determines the sufficiency of the reason.

6 This bill provides guidance to the Probate Courts in the
determination of whether an emergency exists that necessitates
8 the appointment of a temporary guardian or conservator. The
court may make such an appointment in order to prevent serious,
10 immediate and irreparable harm to the health or financial
interests of the person.

12 This bill changes the law regarding when the visitor or
guardian ad litem shall advise the court that the appointment of
14 the temporary guardian or conservator is being contested. The
change is intended to broaden the language to allow the visitor
16 or guardian ad litem to base the recommendation on other
considerations or circumstances that may be present and observed.
18