

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

Date: 5/29/9

(Filing No. H-479)

JUDICIARY

Reproduced and distributed under the direction of the Clerk of the House.

STATE OF MAINE
HOUSE OF REPRESENTATIVES
124TH LEGISLATURE
FIRST REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 647, L.D. 944, Bill, "An Act To Increase the Evidentiary Standard Required To Establish a Guardianship"

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

Sec. 1. 18-A MRSA §5-304, sub-§(b), as amended by PL 2003, c. 323, §1, is further amended to read:

(b). The court may appoint a guardian or coguardians as requested if it is satisfied the court finds by clear and convincing evidence that the person for whom a guardian is sought is incapacitated, and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person and, if the allegedly incapacitated person has not attended the hearing, that an inquiry has been made as to whether that person wished to attend the hearing. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

Sec. 2. 18-A MRSA §5-304, sub-§(b-1) is enacted to read:

(b-1). If the allegedly incapacitated person files voluntary written consent to the appointment of a guardian with the court or appears in court and consents to the appointment, unless the court finds the consent suspect, the court may appoint a guardian or coguardians as requested upon a finding by a preponderance of the evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person. For the purposes of this subsection, voluntary written consent is valid only if the consent was obtained by a visitor, a guardian ad litem or an attorney representing the allegedly incapacitated person and the allegedly incapacitated person gave the consent outside the presence of the person or persons seeking guardianship.

Sec. 3. 18-A MRSA §5-304, sub-§(b-2) is enacted to read:

(b-2). If the allegedly incapacitated person has not attended the hearing, the court must determine if an inquiry has been made as to whether that person wished to attend the hearing.

COMMITTEE AMENDMENT

R. 676

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42

Sec. 4. 18-A MRSA §5-304, sub-§(c), as enacted by PL 1985, c. 440, §§2 and 13, is amended to read:

(c). In its order, the court may make separate findings of fact and conclusions of law. If a party requests separate findings and conclusions, within 5 days of notice of the decision, the court shall make them. As an alternative to the appointment of a guardian under subsection (b) or (b-1), the court may dismiss the proceeding or enter any other appropriate order.

Sec. 5. 18-A MRSA §5-307, as amended by PL 1979, c. 690, §19, is further amended to read:

§5-307. Removal or resignation of guardian; termination of guardianship

(a). On petition of the ward or any person interested in ~~his~~ the ward's welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept ~~his resignation~~ the guardian's resignation and make any other order ~~which~~ that may be appropriate.

(b). The ward or any person interested in ~~his~~ the ward's welfare may petition for an order that ~~he~~ the ward is no longer incapacitated, and for removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(c). Before removing a guardian, ~~or~~ accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

(d). In an action by the ward, upon presentation by the petitioner of evidence establishing a prima facie case that the ward is not incapacitated or the appointment is no longer necessary or desirable as a means of providing continuing care and supervision of the ward, the court shall order the termination unless the respondent proves by clear and convincing evidence that the ward is incapacitated and guardianship is necessary or desirable as a means of providing continuing care and supervision of the ward.

Sec. 6. 18-A MRSA §5-310-A, sub-§(c), as amended by PL 1995, c. 203, §3, is further amended to read:

(c). At the expedited hearing, the court may render a judgment authorizing the temporary guardianship to continue for a period not to exceed 6 months from the date of entry of the ex parte order. The temporary guardianship terminates on the date specified in the order or, if no date is specified in the order, 6 months following the date of 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 has been entered following a hearing pursuant to section 5-303 ~~has been entered~~ with findings made pursuant to section 5-304.

Sec. 7. 18-A MRSA §5-401, sub-§(2), as enacted by PL 1979, c. 540, §1, is amended to read:

1 (2). Appointment of a conservator or other protective order may be made in relation
2 to the estate and affairs of a person if the court determines ~~that (i)~~: by clear and
3 convincing evidence that the person is unable to manage his the person's property and
4 affairs effectively for reasons such as mental illness, mental deficiency, physical illness or
5 disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign
6 power, or disappearance; and (ii) by a preponderance of the evidence that the person has
7 property which that will be wasted or dissipated unless proper management is provided;
8 or that funds are needed for the support, care and welfare of the person or those entitled to
9 be supported by him the person and that protection is necessary or desirable to obtain or
10 provide funds. If the allegedly incapacitated person files voluntary written consent to the
11 appointment of a conservator with the court or appears in court and consents to the
12 appointment, unless the court finds the consent suspect, the court may appoint a
13 conservator or coconservator as requested upon a finding by a preponderance of the
14 evidence that the person is unable to manage the person's property and affairs effectively
15 for reasons such as mental illness, mental deficiency, physical illness or disability,
16 chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or
17 disappearance. For the purposes of this subsection, voluntary written consent is valid only
18 if the consent was obtained by a visitor, a guardian ad litem or an attorney representing
19 the allegedly incapacitated person and the allegedly incapacitated person gave the consent
20 outside the presence of the person or persons seeking conservatorship.

21 **Sec. 8. 18-A MRSA §5-408-A, sub-§(c)**, as amended by PL 1995, c. 203, §7, is
22 further amended to read:

23 (c). At the expedited hearing, the court may render a judgment authorizing the
24 temporary conservatorship to continue for a period not to exceed 6 months from the date
25 of entry of the ex parte order. The temporary conservatorship terminates on the date
26 specified in the order or, if no date is specified in the order, 6 months following the date
27 of entry of the ex parte order, or at any prior time if the court determines the
28 circumstances leading to the order for temporary conservatorship no longer exist or if a
29 judgment has been entered following a hearing pursuant to section 5-407 ~~has been~~
30 entered with findings made pursuant to section 5-401.

31 **Sec. 9. 18-A MRSA §5-430**, as amended by PL 2007, c. 308, §2, is further
32 amended to read:

33 **§5-430. Termination of proceeding**

34 The protected person, the protected person's personal representative, the conservator
35 or any other interested person may petition the court to terminate the conservatorship. A
36 ~~protected person seeking termination is entitled to the same rights and procedures as in an~~
37 ~~original proceeding for a protective order.~~ In an action to terminate a conservatorship
38 brought by the protected person, upon presentation by the petitioner of evidence
39 establishing a prima facie case that the person is able to manage the person's property and
40 affairs, the court shall order the termination unless the respondent proves by clear and
41 convincing evidence that the person is unable to manage the person's property and affairs
42 effectively for reasons such as mental illness, mental deficiency, physical illness or
43 disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign
44 power or disappearance. The court, upon determining after notice and hearing that the
45 ~~minority or disability of the protected person has ceased that a conservatorship is no~~

1 longer necessary, shall terminate the conservatorship upon approval of a final account.
2 Upon termination, title to assets of the estate passes to the former protected person or to
3 the former protected person's successors subject to provision in the order for expenses of
4 administration or to conveyances from the conservator to the former protected person or
5 the former protected person's successors, to evidence the transfer.'

6 **SUMMARY**

7 This amendment replaces the bill.

8 This amendment clarifies that the clear and convincing standard applies only to
9 nontemporary, adult guardianships and conservatorships in which the protected person
10 does not consent to the guardianship or conservatorship. Consent is valid only if the
11 alleged incapacitated person appears in court or provides voluntary written consent. It
12 also clarifies that in conservatorship proceedings a court must find by clear and
13 convincing evidence that the person is unable to manage the person's property or affairs
14 but can find by a preponderance of the evidence that the person has property that needs
15 protection. Finally, the amendment also clarifies the procedure for the termination of
16 guardianship and conservatorship by a protected person. These provisions provide that
17 the protected person must present a prima facie case that guardianship or conservatorship
18 is not necessary and then the burden shifts to the respondent to show by clear and
19 convincing evidence that the conservatorship or guardianship is necessary.