

# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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Legislative Document

No. 944

H.P. 647

House of Representatives, March 10, 2009

### **An Act To Increase the Evidentiary Standard Required To Establish a Guardianship**

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Reference to the Committee on Judiciary suggested and ordered printed.

*Millicent M. MacFarland*  
MILLICENT M. MacFARLAND  
Clerk

Presented by Representative BRYANT of Windham.  
Cosponsored by Senator BRYANT of Oxford and  
Representatives: BEAULIEU of Auburn, CASAVANT of Biddeford, HILL of York,  
KRUGER of Thomaston, NASS of Acton, WHEELER of Kittery, Senators: HOBBS of  
York, JACKSON of Aroostook.

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

2           **Sec. 1. 18-A MRSA §5-106** is enacted to read:

3           **§5-106. Burden of proof**

4           For purposes of this Article, unless stated otherwise, court findings must be made  
5           upon clear and convincing evidence, with the following exceptions.

6           (a). In an action to terminate a guardianship or conservatorship, pursuant to section  
7           5-307 or section 5-415, the petitioner bears the burden of proof by a preponderance of the  
8           evidence in support of termination and, if shown, the court shall order termination unless  
9           it is proven upon clear and convincing evidence that continuation of the guardianship is in  
10           the best interest of the ward.

11           (b). Findings made pursuant to section 5-401, subsection (2) must be made upon a  
12           preponderance of the evidence.

13           **Sec. 2. 18-A MRSA §5-310-A, sub-§(b)**, as amended by PL 1995, c. 203, §3, is  
14           further amended to read:

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

40           **Sec. 3. 18-A MRSA §5-408-A, sub-§(b)**, as amended by PL 1995, c. 203, §7, is  
41           further amended to read:

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

25

#### SUMMARY

26 This bill amends the Probate Code to require clear and convincing evidence to  
27 support court findings under the Probate Code in guardianship and conservatorship  
28 proceedings. The 2 exceptions are that findings necessary to remove a guardian or  
29 conservator must be made upon a preponderance of the evidence and that a conservator  
30 may be appointed if the court determines upon a preponderance of the evidence that  
31 property will be wasted or dissipated unless proper management is provided or that funds  
32 are needed for support, care and welfare.