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Maine Department of Health and Human Services
Working Group on Temporary Guardianship Laws
Resolve 2005, Chapter 91

Final Report
Joint Standing Committee on Judiciary

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2006

Final Report
January 13, 2006

Working Group Participants

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Hon. Susan Longley, Probate Judge, Waldo County
Susan Almy, Register, Penobscot County
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Maine Department of Health and Human Services
Working Group On Temporary Guardianship Laws
Final Report to Maine Legislature
Joint Standing Committee on Judiciary
Executive Summary
(January 13, 2006)

Resolve 2005, Chapter 91: “Resolve, Concerning Temporary Guardianship Laws” directed the Department to convene a working group to review the laws and practices concerning temporary guardianships to determine if wards are adequately protected and that due process afforded to wards is adequate.

The working group met five times during the fall. Individuals representing the following organizations participated in the meetings: the Department of Health and Human Services’ Adult Protective Services and Public Guardianship programs; Probate Judges; Probate Registers; Office of the Attorney General; Disability Rights Center; Legal Services for the Elderly; the Maine Hospital Association; and the Maine Medical Association.

This report summarizes the discussions of the working group and sets forth recommendations where relevant, some of which are supported by the working group as a whole and others which are split recommendations where consensus could not be reached.

The following is a summary of the issues discussed and the recommendations of the working group, if any:

1. Issue: Whether some type of notice should be provided to the allegedly incapacitated person (“AIP”) and others of the petition for temporary guardianship.
 - Recommendation: Consensus of the working group for recommended statutory change. The proposed language is attached as Appendix E.

2. Issue: Whether the term “emergency” as used in the current law for temporary guardianship should be clarified.
 - Recommendation: Split recommendation by the working group regarding whether a statutory change is necessary. The majority of

the working group recommended a statutory change to define the term. That proposed language is attached as Appendix F. There was concern on the part of the hospital representatives, however, that the proposed language would not allow for temporary appointments to facilitate placements from hospitals to other health care settings.

3. Issue: Whether changes are needed regarding qualifications and scheduling of visitors and guardians *ad litem*.
 - Recommendation: Consensus of the working group that no statutory change be recommended except for a clarification regarding the role of the visitor and guardian ad litem in advising the court regarding contested appointments. The proposed statutory language is attached as Appendix H.

4. Issue: Whether changes are needed to provide for the vacating of temporary guardianship orders.
 - Recommendation: Split recommendation by the working group. Some participants of the working group support a statutory change while many believe that the current law is adequate.

5. Issue: Whether changes are needed to address visitation rights of the ward by family and others.
 - Recommendation: Consensus of the working group that no statutory change be recommended since this issue goes beyond the scope of the Resolve.

6. Issue: Whether a statutory change is needed to address extension of temporary guardianship appointments beyond six months.
 - Recommendation: Split recommendation by the working group regarding whether a statutory change should be proposed to clarify the authority of the probate court to extend a temporary guardianship appointment beyond six months.

Maine Department of Health and Human Services
Working Group On Temporary Guardianship Laws

Final Report to Maine Legislature,
Joint Standing Committee on Judiciary
(January 13, 2006)

On June 7, 2005, Governor Baldacci signed Resolve 2005, Chapter 91: “Resolve, Concerning Temporary Guardianship Laws.” The Resolve directed the Department to convene a working group to review the laws and practices concerning temporary guardianships to determine if wards are adequately protected and that due process afforded to wards is adequate.¹ The working group is required to report to the Joint Standing Committee on Judiciary by January 15, 2006 with findings and recommendations.

The working group met five times during the fall. Individuals representing the following organizations participated in the meetings: the Department of Health and Human Services’ Adult Protective Services and Public Guardianship programs; Probate Judges; Probate Registers; Office of the Attorney General; Disability Rights Center; Legal Services for the Elderly; the Maine Hospital Association; and the Maine Medical Association.

In its initial meeting, the group outlined several issues for discussion, including:

- A. Whether some type of notice should be provided to the allegedly incapacitated person (“AIP”) and others of the petition for temporary guardianship;
- B. Whether the term “emergency” as used in the current law for temporary guardianships should be clarified;
- C. Whether changes are needed regarding visitors and guardians *ad litem*, including qualifications and scheduling of visits;
- D. Whether changes are needed to provide for the vacating of temporary guardianship orders;

¹ This Resolve is attached as Appendix A.

- E. Whether changes are needed to address visitation of the ward by family and others; and
- F. Whether changes are needed to address extension of temporary guardianship appointments beyond six months.

This report summarizes the findings of the working group on these topics. The report sets forth recommendations reached by the working group, some of which are supported by the working group as a whole and others of which are split recommendations where consensus could not be reached.

It is also important to note that although these issues were discussed in the context of the temporary guardianship laws, it is the intent of the working group that any recommendations that are included in this report be considered for the temporary conservatorship provisions as well.

I. Background of Resolve 2005, Chapter 91

During the last legislative session, a bill was introduced that would have made several changes to the temporary guardianship provisions. This bill, LD 105, is attached as Appendix B. The Department of Health and Human Services testified in opposition to the LD 105 due to concerns that the proposed changes would delay the appointment of temporary guardianships in emergency situations resulting in greater risk of harm to the incapacitated adult. Probate Court Registers also testified in opposition to the bill. Disability Rights Center and individuals involved in the circumstances that brought forth LD 105 testified in favor of the bill. Discussions with the parties did not result in consensus at that time as to what, if any, changes to the temporary guardianship laws were necessary.

LD 105 was passed as amended and became Resolve 2005, Chapter 91 which directed the Department to invite interested parties, including those that had been part of discussions on LD 105, to further discuss the temporary guardianship provisions and due process protections and to report back to the Joint Standing Committee on Judiciary by January 15, 2006.

II. Temporary Guardianship and the Probate Courts

The current statutory provisions regarding temporary guardians and temporary conservators are contained in the Maine Probate Code, Title 18-A MRSA section 5-310-A and section 5-408-A, respectively. These sections are attached as Appendix C (Temporary Guardianship Laws) and Appendix D (Temporary Conservatorship Laws).

The Probate Courts have exclusive jurisdiction over guardianship and conservatorship proceedings, in addition to estates and trusts, adoptions and name changes. There are 16 Probate Courts and judges, one for each county. The judges, who serve part time, are elected. The Probate Courts are not under the state court system but are under county jurisdiction. The Probate Courts operate on a budget determined by the county in which they sit.

From January 2005 to November 2005, there were approximately eight hundred and forty (840) guardianship proceedings statewide, including both public and private petitions. The number of guardianships ranged from less than ten in Franklin and Piscataquis counties to over one hundred and seventy in Cumberland county. Two hundred and seven (207) of the eight hundred and forty (840) were filed as temporary petitions.

The Department of Health and Human Services acts as public guardian and conservator for approximately one thousand four hundred (1400) individuals in the State. A public guardian is appointed only if there is no suitable private individual available.² On average the Office of Elder Services petitions for temporary guardianship approximately a dozen times per month statewide, while about fifty (50) individuals with mental retardation are placed under temporary guardianship each year.

The time scheduled by the Probate Courts for guardianship and conservatorship matters varies from court to court as does the time from temporary appointment to final order. Most courts estimate that generally the time from temporary appointment to final order is sixty days or less whereas some estimate up to five months.

² 18-A MRSA §5-602

III. Recommendations

A. Notice to the Allegedly Incapacitated Person (“AIP”) and Others

1. Current Law:

Section 5-310-A, allows for an *ex parte* order appointing a temporary guardian and does not require the giving of notice to the AIP or to others prior to entering the order. The temporary conservatorship provisions also allow for an *ex parte* order.

2. Recommendation:

- a. Notice to AIP.** The working group recommends a statutory change that would require notice to the AIP prior to the filing of the petition for temporary guardianship or temporary conservatorship except in certain limited circumstances. Exception to notice would include situations where the giving of notice would place the AIP at substantial risk of abuse, neglect or exploitation, where the giving of notice would not be effective; or for other good cause as determined by the court. The public guardianship program supports this proposal provided the exception exists to address those few but significant cases where the provision of notice increases the risk of harm to the AIP. The notice proposed for purposes of this section could be provided orally or in writing and would not be subject to the same notice requirements contained in section 5-309 or section 5-405.
- b. Notice to Others.** The working group also recommends that notice be given to the same individuals who currently receive notice under Section 5-309. Since the public guardianship program must already demonstrate that there is no willing and suitable private individual available, this proposal does not represent a significant change in practice for public petitions. There is some concern as to whether this notification procedure to others would be overly burdensome to private individuals seeking temporary guardianship or temporary conservatorship, and thus discourage individuals from seeking private appointments. Generally, the working group felt the benefits of

notification outweighed any inconvenience to the petitioner and would further serve to protect the AIP. The same exceptions for the provision of notice outlined above in subsection (a) would apply here as well.

The proposed statutory language is attached as Appendix E.

B. Definition of Emergency

1. Current Law:

Current law requires the showing of an emergency prior to a temporary appointment being made. The law does not provide a definition of that term. Specifically, section 5-310-A (a) states “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.”

The temporary conservatorship provision contains similar language.

2. Split Recommendation:

The majority of the working group recommended a statutory change to further define the term “emergency.” There was concern expressed that the definition remain flexible enough to address unforeseen circumstances. The language used for temporary restraining orders was looked at as a reference model. The proposed statutory language is attached as Appendix F. The same statutory language is proposed for the temporary conservatorship provision in Section 5-408-A.

There was significant concern on the part of the hospital representatives to the working group that the proposed statutory language would not allow for the appointment of a temporary guardian in some situations where a decision maker is needed for an AIP to discharge that individual from a hospital to a nursing

facility or other health care setting. It was pointed out that the AIP benefits from timely discharge from a hospital setting since that setting is the most restrictive setting and is financially costly. It can also be a source of infection to the AIP. Furthermore, the AIP may be better served by receiving treatment or therapy in a more appropriate setting. Under the proposed language, it may not always be possible, however, to show irreparable harm.

C. Qualifications and Scheduling of Visitor/Guardian *ad Litem*

1. Current Law:

Section 5-308 requires that a visitor be trained in law, nursing, social work or have other significant qualifications that makes the individual suitable to perform the function. This section is not limited to temporary appointments but covers all guardianship proceedings of incapacitated adults. This section is attached as Appendix G.

Section 5-310-A requires that if a court appoints a temporary guardian, it must appoint a visitor or guardian *ad litem* to visit the AIP within 2 days (excluding Saturdays, Sundays and legal holidays). The visitor or guardian *ad litem* must make a report to the court within 10 days of being appointed.

2. Recommendation:

The following issues were discussed regarding visitors and guardians *ad litem*: qualifications and training; liability of visitors and guardians *ad litem*; and scheduling of visits and reports.

The working group felt that the issues of qualifications, training and liability went beyond the scope of the Resolve since these issues affect all guardianship appointments.

No change was recommended to the current statute regarding scheduling of visits to the AIP and timing of the reports. In some of the rural counties, there are very limited numbers of visitors and guardians *ad litem* with significant travel time involved. Some

courts have designated pools of guardians *ad litem* and others rely on local attorneys. One court does not utilize visitors but relies on a pool of guardians *ad litem*.

A statutory change is proposed for temporary guardianships and temporary conservatorships regarding when the visitor or guardian *ad litem* must advise the court that the appointment is being contested. The proposed change in language more accurately reflects current practice. Current law states that the visitor or guardian *ad litem* must advise the court when “the AIP wishes to contest” the proceeding. The proposed change is intended to broaden the language to allow the visitor or guardian *ad litem* to base his or her recommendation on other considerations or circumstances that may be present and observed. The proposed statutory language is attached as Appendix H.

D. Vacating Temporary Guardianship Orders

1. Current Law:

The court may enter an *ex parte* order appointing a temporary guardian to address the emergency. The court, within 2 days (excluding Saturdays, Sundays and legal holidays) of taking the action shall appoint a visitor or guardian *ad litem* to visit the AIP 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 advise the AIP of that person’s right to contest the temporary guardianship by requesting a hearing and shall advise the AIP of that person’s right to be represented by counsel.

If it comes to the court’s attention through the report of the visitor or guardian *ad litem* or otherwise, that the AIP wishes to contest any aspect of the temporary guardianship or seek a limitation of the temporary guardian’s powers, or that any issue exists with respect to whether the temporary guardianship is in the AIP’s best interests, the court shall hold an expedited hearing within 40 days of the entry of the *ex parte* order.

2. Split Recommendation:

Some members of the working group support a statutory change that would allow the AIP to make a motion to vacate the order appointing the temporary guardian within several days in order to better protect the due process interests of the AIP. It is felt that accelerating the current process is necessary so that the ward has the ability to effectively protect his or her interests. To expedite the procedure, it was suggested that the issues could be limited to whether the temporary guardian is an appropriate guardian, whether the treatment or procedure is appropriate, and whether there is actually an emergency. Others in the working group felt it would not be possible to keep issues limited in this way since capacity is the underlying issue to the appointment of a temporary guardian.

Many members of the working group believed that the current law is adequate and that no changes are necessary. It was felt that courts are able and in fact do schedule hearing very quickly as the circumstances warrant in a particular case. It was also noted that a family member or other third party presently has the ability to go into court at any time and request an *ex parte* petition to vacate the original order. Providing the additional notice to the AIP and others as proposed in Section III.A.2 would also provide greater input at the beginning of the process. Requiring a set timeframe for every case would have significant fiscal and scheduling implications for the courts.

Under current practice, cases for guardianship may be transferred and heard in an adjoining county. It was suggested that perhaps this practice could be reviewed and expanded upon to utilize the court system more efficiently on a statewide basis.

E. Visitation by Family and Others

1. Current Law:

There is no provision in the temporary guardianship section specifically addressing visitation although the authority to decide

visitation is part of the general duties and powers of a guardian. A guardian is obligated to act in the best interests of the ward.

2. Recommendation:

The working group felt that this issue went beyond the scope of the Resolve. Any change should be addressed to all guardianships and not be limited to temporary appointments. In addition, although the public program supports involving the ward in decisions about visitation where appropriate, it has significant concerns about the AIP having authority to decide visitation issues in light of the dynamics involved in abuse situations where certain visitation may not be in the ward's best interests.

F. Extensions of Temporary Guardianship Appointments

1. Current Law:

Current law states that the court may authorize a temporary guardianship to continue for a period not to exceed 6 months from the date of entry of the *ex parte* order. Practice varies in different courts as to whether a temporary appointment may be extended and under what circumstances. Some courts do not allow any extensions; some allow an extension if both parties agree (often due to scheduling issues in contested cases); some courts allow an extension if an emergency can be shown provided the emergency arises from facts different from the original petition; and some courts allow extensions provided a continuing emergency can be shown on the same facts as the original petition.

2. Split recommendation:

Several members of the working group were concerned that in a few counties, temporary appointments have expired prior to a final order being issued. This leaves the AIP at risk. With some exception, however, there was not strong support from the working group to address this issue through a statutory change.

Some members of the group were concerned that providing a specific mechanism for extensions might increase the number of cases where a final order is not issued within 6 months. One group

member suggested a statutory change to allow for extensions upon agreement by the parties or if showing of a continued emergency could be made regardless of it being the same of a different set of facts. It was further suggested that the courts could monitor the number of cases that are extended beyond the initial six month period so that a report could be made back to the legislature to determine the effect of this statutory change.

Appendix A

CHAPTER 91

H.P. 81 - L.D. 105

Resolve, Concerning Temporary Guardianship Laws

Sec. 1. Convene working group on temporary guardianship laws. Resolved: That the Department of Health and Human Services convene a working group that includes, but is not limited to, representatives of the Disability Rights Center and the Probate Courts to review the laws and practices concerning temporary guardianships to determine if wards are adequately protected and the due process afforded to wards is adequate. The working group shall report to the Joint Standing Committee on Judiciary by January 15, 2006 with findings and recommendations. The Joint Standing Committee on Judiciary may submit legislation to the Second Regular Session of the 122nd Legislature in response to the report.

Appendix B LD 105

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 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 and notice to the person alleged to be incapacitated, the court may exercise the power of a guardian or may enter an *ex parte* order appointing a temporary guardian to address the emergency. 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, including any power to consent to medication of the incapacitated person. In the order and in the letters of temporary guardianship, the court shall specify the powers and duties of the temporary guardian whom the court has found to be qualified for the particular situation of the incapacitated person, limiting the powers and duties to those necessary to address the emergency and providing to the incapacitated person, to the greatest extent possible, power to control visitation of the incapacitated person with family and friends. In any proceeding under this subsection, the person alleged to be incapacitated has the right to retained or appointed counsel.

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

(a-1) If the court takes action to exercise the powers of a 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 whom the court has found to be qualified for the particular situation of the incapacitated person to visit the allegedly incapacitated person and make a report to the court within ~~10~~ 5 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 the temporary guardian, except in cases where the court itself has taken action to exercise the powers of a temporary guardian. In the report to the court, the visitor or guardian ad litem shall inform the court that the allegedly incapacitated person has received a copy of the order appointing the temporary guardian. The visitor or guardian ad litem shall advise the court as to whether the allegedly incapacitated person wishes to contest any aspect of the temporary guardianship or seek a limitation of the temporary guardian's powers and whether the allegedly incapacitated 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 guardian is in the allegedly incapacitated person's best interest.

SUMMARY

This bill amends the temporary guardianship proceedings in the Maine Revised Statutes, Title 18-A. The bill requires notice to the allegedly incapacitated person prior to appointment of a temporary guardian and provides the right to retained or appointed counsel. The bill requires an application for temporary guardianship to set forth the factual basis for any power requested for the guardian to consent to medication. The bill allows the allegedly incapacitated person the power to control, to the extent possible, visitation with family and friends. The bill requires the temporary guardian and the guardian ad litem or visitor to be qualified to serve in that capacity. The bill shortens the time period for the report of the guardian ad litem or visitor to the court from 10 days from the date of appointment to 5 days from that date.

Appendix C Temporary Guardianship Laws

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§5-310-A. Temporary guardians

(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. 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. [1993, c. 652, §3 (new).]

(a-1) If the court takes action to exercise the powers of a 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 the temporary guardian, except in cases where the court itself has taken action to exercise the powers of a temporary guardian. In the report to the court, the visitor or guardian ad litem shall inform the court that the allegedly incapacitated person has received a copy of the order appointing the temporary guardian. The visitor or guardian ad litem shall advise the court as to whether the allegedly incapacitated person wishes to contest any aspect of the temporary guardianship or seek a limitation of the temporary guardian's powers and whether the allegedly incapacitated 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 guardian is in the allegedly incapacitated person's best interest. [1997, c. 35, §1 (amd).]

(b) If the court has exercised temporary guardianship powers or has issued an ex parte order under subsection (a), and if it comes to the court's attention, through the report of the visitor or guardian ad litem

or otherwise, that the allegedly incapacitated person wishes to contest any aspect of the temporary guardianship or seek a limitation of the temporary guardian's powers, or that an issue exists with respect to whether the temporary guardianship is in the allegedly incapacitated person's best interest, the court shall hold an expedited hearing within 40 days of the entry of the ex parte order under subsection (a). The court may continue the expedited hearing if the petitioner and the attorney for the allegedly incapacitated person, or, if none, the visitor or the guardian ad litem, agree to such a continuance. The court may continue the hearing on its own motion due to circumstances beyond the control of the court and the parties, provided the hearing is held within 60 days of the signing of the ex parte order. If the appointment of a guardian is contested by the allegedly incapacitated person and the person is not already represented by an attorney, the court shall appoint counsel to represent the allegedly incapacitated person in the proceeding. The cost of the appointment of the visitor, guardian ad litem or attorney must be paid from the estate of the allegedly incapacitated person if the court is satisfied that sufficient funds are available. At the hearing, the petitioner has the burden of showing, by a preponderance of the evidence, that temporary guardianship continues to be necessary to provide the person with continuing care, protection or support pending a final hearing. Notice of the expedited hearing must be served as provided in section 5-309, except that the notice must be given at least 5 days before the expedited hearing, and notice need not be served on any person whose address or present whereabouts is unknown and can not be ascertained by due diligence. The court may waive service of the expedited hearing on any person, other than the allegedly incapacitated person, upon a showing of good cause. [1995, c. 203, §3 (amd).]

(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 following a hearing pursuant to section 5-303 has been entered. [1995, c. 203, §3 (amd).]

(d) If the court denies the request for an ex parte order pursuant to subsection (a), the court may enter, in its discretion, an order for an expedited hearing pursuant to subsection (b). If the petitioner requests the entry of an order of temporary guardianship pursuant to subsection (a) without requesting an ex parte order, the court may hold an expedited hearing pursuant to subsection (b). [1993, c. 652, §3 (new).]

(e) If an appointed guardian is not effectively performing that guardian's duties and the court finds that the welfare of the incapacitated person requires immediate action, it may appoint, with or without notice, a temporary guardian for the incapacitated person for a specified period not to exceed 6 months. [1993, c. 652, §3 (new).]

(f) A temporary guardian is entitled to the care and custody of the ward and the authority of any permanent guardian previously appointed by the court is suspended as long as a temporary guardian has authority. A temporary guardian may not seek the involuntary hospitalization of this ward in any institution outside the State. A temporary guardian may be removed at any time. A temporary guardian shall make any report the court requires. In other respects, the provisions of this Code concerning guardians apply to temporary guardians. [1993, c. 652, §3 (new).]

(g) A petition for temporary guardianship may be brought before any judge if the judge of the county in which venue properly lies is unavailable. If a judge, other than the judge of the county in which venue properly lies, acts on a petition for temporary guardianship, that judge shall issue a written order and endorse upon it the date and time of the order. The judge shall then immediately transmit or cause to be transmitted that order to the register of the county in which venue properly lies. An order issued by a judge of a county, other than the county in which venue properly lies, is deemed to have been entered in the docket on the date and at the time endorsed upon it. [1993, c. 652, §3 (new).]

PL 1993, Ch. 652, §3 (NEW).

PL 1995, Ch. 203, §2,3 (AMD).

PL 1997, Ch. 35, §1 (AMD).

Appendix D

Temporary Conservatorship Laws

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§5-408-A. Temporary conservator

(a) When a person is alleged to be in need of protection 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 conservator or may enter an ex parte order appointing a temporary conservator to preserve and apply the property of the person to be protected as may be required for that person's benefit or the benefit of that person's dependents. The petition must be accompanied by an affidavit that sets forth the factual basis for the emergency and the specific powers requested by the proposed conservator. In the order and in the letters of temporary conservatorship, the court shall specify the powers and duties of the temporary conservator, limiting the powers and duties to those necessary to address the emergency. [1993, c. 652, §7 (new).]

(a-1) If the court takes action to exercise the powers of a conservator or to appoint a temporary conservator 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 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 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. [1997, c. 35, §2 (amd).]

(b) If the court has exercised temporary guardianship powers or has issued an ex parte order under subsection (a), and if it comes to the court's attention, through the report of the visitor or guardian ad litem or otherwise, that the protected person wishes to contest any aspect of the temporary conservatorship or to seek a limitation of the temporary conservator's powers, or if it appears that there is an issue with respect to

whether the temporary conservatorship is in the protected person's best interest, the court shall hold an expedited hearing within 40 days of the signing of the ex parte order under subsection (a). The court may continue the expedited hearing if the petitioner and the attorney for the protected person, or, if none, the visitor or guardian ad litem, agree to such a continuance. The court may continue the hearing on its own motion due to circumstances beyond the control of the court and the parties, provided the hearing is held within 60 days of the signing of the ex parte order. If the appointment of a conservator is contested by the protected person and the person is not already represented by an attorney, the court shall appoint counsel to represent the person in the proceeding. The cost of the appointment of the visitor, guardian ad litem or attorney must be paid from the estate of the protected person if the court is satisfied that sufficient funds are available. At that hearing, the petitioner has the burden of showing, by a preponderance of the evidence, that temporary conservatorship continues to be necessary to protect and preserve the person's estate pending final hearing. Notice of the expedited hearing must be served as provided in section 5-405, except that the notice must be given at least 5 days before the expedited hearing, and notice need not be served on any person whose address or present whereabouts is unknown and can not be ascertained by due diligence. The court may waive service of the expedited hearing on any person, other than the person to be protected, upon a showing of good cause. [1995, c. 203, §7 (amd).]

(c) At the expedited hearing, the court may render a judgment authorizing the temporary conservatorship to continue for a period not to exceed 6 months from the date of entry of the ex parte order. The temporary conservatorship 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 conservatorship no longer exist or if a judgment following a hearing pursuant to section 5-407 has been entered. [1995, c. 203, §7 (amd).]

(d) If the court denies the request for an ex parte order pursuant to subsection (a), the court may enter, in its discretion, an order for an expedited hearing pursuant to subsection (b). If the petitioner requests the entry of an order of temporary conservatorship pursuant to subsection (a) without requesting an ex parte order, the court may hold an expedited hearing pursuant to subsection (b). [1993, c. 652, §7 (new).]

(e) If an appointed conservator is not effectively performing that conservator's duties and the court finds that an emergency exists that requires the appointment of a temporary successor conservator in order to preserve and apply the property of the protected person for the protected person's benefit or the benefit of the protected person's dependents, it may appoint, with or without notice, a temporary successor conservator for the protected person for a specified period not to exceed 6 months. [1993, c. 652, §7 (new).]

(f) A temporary conservator has all the powers of a permanent conservator provided in this code, unless expressly limited by the court. A temporary successor conservator has the same powers as the previously appointed conservator, unless the court indicates otherwise in the letters of appointment. The authority of a previously appointed conservator is suspended as long as the temporary conservator has authority. A temporary conservator may be removed at any time. A temporary conservator shall account to the court at the termination of the temporary conservatorship. [1993, c. 652, §7 (new).]

(g) A petition for temporary conservatorship may be brought before any judge if the judge of the county in which venue properly lies is unavailable. If a judge other than the judge of the county in which venue properly lies acts on a petition for temporary conservatorship, that judge shall issue a written order and endorse upon it the date and time of the order. The judge shall then immediately transmit or cause to be transmitted that order to the register of the county in which venue properly lies. An order issued by a judge of a county other than the county in which venue properly lies is deemed to have been entered in the docket on the date and at the time endorsed upon it. [1995, c. 203, §8 (new).]

PL 1993, Ch. 652, §7 (NEW).

PL 1995, Ch. 203, §6-8 (AMD).

PL 1997, Ch. 35, §2 (AMD).

Appendix E

Issue A: Notice to the Allegedly Incapacitated Person and Other

Amend Section 5-310-A and 5-408-A to include the following:

ALTERNATIVE ONE FOR subsection (a)

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

- (1) The allegedly incapacitated person and the spouse, domestic partner, parents and adult children of the allegedly incapacitated person
- (2) Any person who is serving as guardian, conservator or who has care and custody;
- (3) In case no other person is notified under subsection (1), at least one close adult relative of the allegedly incapacitated person or, if none is known or can reasonably be found, an adult friend, if one is known and can reasonably be found.

ALTERNATIVE TWO FOR subsection (a)

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

- (1) The allegedly incapacitated person and the person's spouse, parents, adult children and any domestic partner known to the court;
- (2) Any person who is serving as guardian, conservator or who has care and custody;
- (3) In case no other person is notified under subsection (1), at least one close adult relative of the allegedly incapacitated person or, if none, an adult friend, if any can be found.

(b) Notice shall include the following information: the temporary authority that the petitioner will request, the location and telephone number of the court in which the petition is being filed; the name of the petitioner and the intended date of filing. The petitioner shall state in the affidavit that must be filed with the court before a temporary appointment may be made, the date, time, location and method of providing the foregoing notice and to whom notice was provided. The court shall make a determination as to the adequacy of the method of providing notice and whether the petitioner complied with the notice requirements of this subsection. The requirement of

section 5-309*/5-405** do not apply to this section. [**if amending temporary guardianship provision /**if amending temporary conservatorship provision*]

(c) Notice shall not be required under this section in the following circumstances: 1) giving notice will place the allegedly incapacitated person at substantial risk of abuse, neglect or exploitation; 2) notice, if provided, would not be effective; or 3) other good cause as determined by the court.

(d) If, prior to filing the petition, the petitioner did not provide notice as described in subsection (a), the petitioner must state in the affidavit the reasons for not providing notice. In cases where no notice has been provided, the court shall make a determination as to the sufficiency of the reason for not providing notice before issuing a temporary order.

Appendix F
Issue B: Definition of Emergency

Amend section 5-310-A and 5-408-A to read:

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 order appointing a temporary guardian in order to prevent serious, immediate and irreparable harm to the health or financial interests of the allegedly incapacitated adult.

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

Appendix G

Section 5-308: Maine Law on Visitor Qualifications

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§5-308. Visitor in guardianship proceedings

A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, social work, or has other significant qualifications that make him suitable to perform the function, and is an officer, employee or special appointee of the court with no personal interest in the proceedings. [1979, c. 540, § 1 (new).]

PL 1979, Ch. 540, §1 (NEW).

Appendix H
Issue C: Visitor/Guardian *ad Litem*

Amend section 5-310-A (a-1) to read:

(a-1) If the court takes action to exercise the powers of a 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 the temporary guardian, except in cases where the court itself has taken action to exercise the powers of a temporary guardian. In the report to the court, the visitor or guardian *ad litem* shall inform the court that the allegedly incapacitated person has received a copy of the order appointing the temporary guardian. The visitor or guardian *ad litem* shall advise the court if circumstances indicate that as to whether the allegedly incapacitated person wishes to contest any aspect of the temporary guardianship or seek a limitation of the temporary guardian's powers and whether the allegedly incapacitated 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 guardian is in the allegedly incapacitated person's best interest.

[Similar change to be made to section 5-408-A (a-1) Temporary Conservatorship provision]



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John Elias Baldacci
Governor

January 13, 2006

Brenda M. Harvey
Acting Commissioner

Senator Barry J. Hobbins
3 State House Station
Augusta ME 04333

Representative Deborah L. Pelletier-Simpson
2 State House Station
Augusta, ME 04333

Re: **Resolve 2005, Chapter 91: Final Report of Working Group on Temporary Guardianship Laws**

Dear Senator Hobbins and Representative Pelletier-Simpson:

I am pleased to provide you with the enclosed report on temporary guardianship laws.

During the last legislative session, LD 105 (An Act to Amend the Laws Pertaining to Temporary Guardianship) was passed as amended and became Resolve 2005, Chapter 91 (Resolve, Concerning Temporary Guardianship Laws).

The Resolve directed the Department of Health and Human Services to convene a working group to review the laws and practices concerning temporary guardianships to determine if wards are adequately protected and that due process afforded to wards is adequate. The Department convened this group, which met five times during the fall. Individuals representing the following organizations participated in these meetings: the Department of Health and Human Services' Adult Protective Services and Public Guardianship programs; Probate Judges; Probate Registers; Office of the Attorney General; Disability Rights Center; Legal Services for the Elderly; the Maine Hospital Association; and the Maine Medical Association.

The enclosed report summarizes the discussions of the working group and sets forth recommendations, some of which are supported by the working group as a whole and others which are split recommendations where consensus could not be reached. Even in cases where consensus could not be reached, a thoughtful exchange of ideas and perspectives was shared.

The Department will be glad to answer questions from your committee.

Sincerely,

Brenda M. Harvey
Acting Commissioner

BMH/klv

cc: Participants, Working Group on Temporary Guardianship Laws

Our vision is Maine people enjoying safe, healthy and productive lives.