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**Maine Department of Health and Human Services
Working Group on Reporting Requirements for Guardians
Public Law 2007, Chapter 308**

**Final Report
Joint Standing Committee on Judiciary**

January 7, 2008

Working Group Participants

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Maine Department of Health and Human Services
Working Group on Reporting Requirements for Guardians
Final Report to Maine Legislature
Executive Summary
January 7, 2008

Public Law 2007, Chapter 308: “An Act Regarding the Reporting Requirements for Guardians and Conservators” implemented certain changes to the reporting provisions for conservators and also directed the Department of Health and Human Services (DHHS) to convene a work group to review the need for a practice requiring private guardians to make a detailed annual report to the Probate Court of the financial circumstances of the ward. A copy of Public Law 2007, Chapter 308 is attached as Appendix A.

The working group met three times during the fall. Individuals representing the following organizations participated in the meetings: the DHHS’ Adult Protective Services and Public Guardianship programs; Registers of Probate; Office of Attorney General; Disability Rights Center; Legal Services for the Elderly; the Muskie School of Public Service at the University of Southern Maine, and the Elder Law Section of the Maine State Bar Association.

This report summarizes the discussions of the working group and sets forth recommendations as relevant. Consensus was reached to propose statutory language which would require guardians to file a report on the condition and finances of their wards annually with the Probate Court. Such a report is already required to be filed by the public guardian.

Maine Department of Health and Human Services
Working Group on Reporting Requirements for Guardians

Final Report to Maine Legislature'
Joint Standing Committee on Judiciary
January 7, 2008

On June 18, 2007, Governor Baldacci signed into law Public Law 2007, Chapter 308: "An Act Regarding the Reporting Requirements for Guardians and Conservators." The Act implemented certain changes to the reporting provisions for conservators and also, relevant to this report, directed the Department of Health and Human Services (DHHS) to convene a work group to review the need for a practice requiring private guardians to make a detailed annual report to the Probate Court of the financial circumstances of the ward.

The working group met three times during the fall. Individuals representing the following organizations participated in the meetings: the DHHS' Adult Protective Services and Public Guardianship programs; Registers of Probate; Office of Attorney General; Disability Rights Center; Legal Services for the Elderly; the Muskie School of Public Service at the University of Southern Maine, and the Elder Law Section of the Maine State Bar Association.

This report summarizes the discussions of the working group and sets forth recommendations as relevant.

I. Background of Public Law 2007, Chapter 308

During the last legislative session, a bill (LD 354) was introduced that would have required both guardians and conservators to file annual accountings with the Probate Courts and would have required acceptance of those reports by the Probate Courts.

The intent of LD 354 was to provide greater protection to wards and protected persons against financial mismanagement by guardians and conservators. Opposition to the bill primarily related to the fiscal costs of the proposed requirements.

As enacted, the bill adds reporting requirements only to the conservatorship provisions of the Probate Code. Specifically, it requires a private conservator

appointed after January 1, 2008 to file an annual account with the court for approval. In addition, the bill as enacted includes a directive to DHHS to form a work group to evaluate additional reporting requirements with respect to guardianships.

It should be noted that many participants in this work group are also involved in the Maine Systems Transformation Grant. Awarded in November 2005, the Systems Transformation Grant is a 5-year grant from the U.S. Centers for Medicare and Medicaid Services under the direction of Maine DHHS and in partnership with the Muskie School of Public Service at the University of Southern Maine. One of the objectives of the grant is to increase choice and individual control for persons with impaired decision making capacity by developing and promoting alternatives to guardianship and conservatorship.

II. Current Reporting Requirements for Guardians

A. Generally

If a ward does not have real estate or significant assets, a guardian has limited authority to manage the ward's finances if no conservator has been appointed. If there is real estate or significant assets, a conservator is generally appointed.

If no conservator has been appointed, a guardian may receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward. See Title 18-A M.R.S.A. §5-312(a) (4) attached as part of Appendix B.

If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in the Probate Code, and the guardian must account to the conservator for funds expended. See Title 18-A M.R.S.A. §5-312(a) (6) attached as part of Appendix B.

There are approximately 1000 guardianship petitions filed annually statewide.

B. Private Guardians

There is no current requirement in Maine law for a guardian of an adult ward to file an annual report with the Probate Court, either on the condition of the ward or his or her finances. Whether a report is required falls within the discretion of each individual Probate Court and practice differs.

Title 18-A M.R.S.A. §5-312(a) (5) states that a guardian is required to report on the condition of his or her ward and of the estate which has been subject to the guardian's possession or control, as specified by the court at the time of the initial order, at the time of a subsequent order or as provided by court rule. See Appendix B

C. Public Guardians

Title 18-A M.R.S.A. §5-607(2) requires the public guardian at least annually, and at any time ordered by the court, to review the case of every person under public guardianship. The report is filed with the court. See Appendix C. Each report must evaluate the plan for the ward that was filed with the court and make recommendations for modifications if considered necessary or appropriate. The guardianship plan includes a section regarding the ward's financial situation.

III. Recommendations

The work group recommends that the Probate Code be amended to extend to private guardians the annual reporting requirement that currently only applies to the public guardian. A draft of the proposed language is attached as Appendix D. This proposed language adds a reporting requirement in the general guardianship provisions (Part 3 of Article V). The proposed language also deletes the current reporting language in the public guardianship provisions (Part 6 of Article V). The latter change has been proposed since the general guardianship provisions contained in Part 3 apply to both private and public guardians. Retaining the language in Part 6 would be duplicative and inconsistent with the intent of Part 6 which is to set forth requirements that are unique to the public programs.

This language was supported by the work group for several reasons, including:

- The consensus language is not limited to financial reporting. The work group recognized that financial reporting addresses only one aspect of monitoring the ward's condition.
 - The reporting requirements contained in the consensus language are currently required for public wards. This added protection will now also be afforded to individuals under private guardianship.
 - The consensus language balances the need for greater protection with the administrative burdens to the courts and to private guardians.
- Note: The consensus language does not require the court to approve the report. The practice of the courts may vary depending on time and resources. Although there was a great deal of discussion of this point, the work group recognized the administrative cost this places on the Probate Courts if required to approve annual guardianship reports, particularly since the courts will need to approve annual financial reports filed by individuals appointed as conservator after January 1, 2008. It was felt that it would be helpful to evaluate the implementation of the new conservatorship requirements prior to extending any court approval requirement to annual filings by guardians.
 - The work group felt that even without requiring court approval, a requirement to submit an annual report would have a deterrent effect on wrongdoing.
- The consensus language recommends that the reporting requirement apply to all guardians appointed after a specific date. It will not apply to already established guardianships.
 - The consensus language adds more specific requirements regarding the guardian's obligation to maintain financial records.

IV. Additional Recommendations

The working group recognizes that this recommendation represents a reasonable starting point for better monitoring and serving individuals under guardianship. Most members of this working group are also involved in the Maine Systems Transformation Grant. Work under that grant includes improving the tools and resources for identifying appropriate alternatives to guardianship and conservatorship; improving tools and resources for determining appropriateness of guardianship and conservatorship and, as necessary, reviewing and making recommendations for amendments to the guardianship statute or rules to enhance choice and individual control for persons with impaired decision making capacity.

- It is the recommendation of this work group that the issues discussed by this group be further developed and refined as part of the work done pursuant to the Maine Systems Transformation Grant, including consideration of specific information, financial or otherwise, that should be required as part of the annual filing.

APPENDIX A

Public Law 2007, Chapter 308

PUBLIC Law, Chapter 308

SIGNED on 2007-06-18 - First Regular Session - 123rd Legislature

LR 879

Item 1

An Act Regarding the Reporting Requirements of Conservators

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

Sec. 1. 18-A MRSA §5-419, sub-§(a), as amended by PL 2001, c. 280, §2, is further amended to read:

(a). Every conservator shall account to the court for the administration of the trust as specified by the court at the time of the initial order or at the time of a subsequent order or as provided by court rule and upon resignation or removal. ~~On termination of the protected person's minority or disability, a conservator may account to the court or may account to the former protected person or that person's personal representative. Prior to the termination of the protected person's minority, the conservator shall account to the court and the protected person.~~ Notwithstanding any other duty to render an accounting, a private conservator appointed after January 1, 2008 shall file an annual account with the court for approval. The court, for good cause shown by a conservator who is the spouse or domestic partner of the protected person, may waive or modify the duty to file an annual account. The annual account must be approved by the court before the conservator's obligation to file the annual account ends.

Prior to the termination of the protected person's minority, the conservator shall account to the court and the protected person. On termination of the protected person's minority or disability, a conservator shall file a final accounting with the court and that accounting must be approved by the court before the conservator's obligation to account ends. The conservator shall provide a copy of the final accounting to the former protected person or that person's personal representative at the time it is filed with the court.

Sec. 2. 18-A MRSA §5-430, as enacted by PL 1979, c. 540, §1, is amended to read:

§ 5-430. Termination of proceeding

The protected person, ~~his~~ the protected person's personal representative, the conservator or any other interested person may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an

original proceeding for a protective order. The court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, ~~may~~ shall terminate the conservatorship upon approval of a final account. Upon termination, title to assets of the estate passes to the former protected person or to ~~his~~ the former protected person's successors subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected ~~persons~~ person or ~~his~~ the former protected person's successors, to evidence the transfer.

Sec. 3. Guardian annual report working group. The Commissioner of Health and Human Services shall convene a working group consisting of staff from the Department of Health and Human Services, Adult Protective Services and interested parties, including, but not limited to, representatives of registers of probate, Legal Services for the Elderly, Disability Rights Center, attorneys in private practice, members of the public and such other persons as may be necessary to review the need for a practice requiring private guardians to make a detailed annual report to the Probate Court of the financial circumstances of the ward. The working group shall report its findings and recommendations to the Joint Standing Committee on Judiciary by January 11, 2008.

Appendix B

Title 18-A, Probate Code

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§5-312. General powers and duties of guardian

(a) A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to 3rd persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this State, and may place the ward in any hospital or other institution for care in the same manner as otherwise provided by law.

(2) If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

(3) A guardian may give or withhold consents or approvals related to medical or other professional care, counsel, treatment or service for the

ward. Except as authorized by a court of competent jurisdiction, a guardian shall make a health-care decision in accordance with the ward's individual instructions, if any, and other wishes expressed while the ward had capacity to the extent known to the guardian. Otherwise, the guardian shall make the decision in accordance with the guardian's determination of the ward's best interest. In determining the ward's best interest, the guardian shall consider the ward's personal values to the extent known to the guardian. A decision of a guardian to withhold or withdraw life-sustaining treatment is effective without court approval unless the guardian's decision is made against the advice of the ward's primary physician and in the absence of instructions from the ward made while the ward had capacity.

(4) If no conservator for the estate of the ward has been appointed, he may:

(i) Institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(ii) Receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward; but, he may not use funds from his ward's estate for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

(5) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as specified by the court at the time of the initial order or at the time of a subsequent order or as provided by court rule.

The court on its own motion, or on the petition of any interested person, may appoint a visitor to review the guardian's report and determine if appropriate provisions for the care, comfort and maintenance of his ward and for the care and protection of his ward's property have been made. The visitor shall report his findings to the court in writing.

(6) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian

must account to the conservator for funds expended.

(b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to 3rd persons or institutions for the ward's care and maintenance.

APPENDIX C

Title 18-A, Probate Code

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§5-607. Duties and powers of a public guardian or conservator

A public guardian or conservator has the same powers, rights and duties respecting his ward or the protected person as provided for guardians and conservators by the other parts of this Article except as otherwise specifically provided in this Part, including the following particular provisions:

(1) If a public guardian places his ward in any facility described in Title 22, sections 5 and 1811, such placement shall be made only if the facility is duly licensed. In the event that the license of any such facility is suspended or revoked, the public guardian having any ward placed therein shall remove such ward and effect an appropriate placement of the ward as soon as practicable after knowledge of the suspension or revocation of the license.

(2) The public guardian or conservator at least annually, and at any time when ordered by the court, shall review the case of every person for whom the public guardian or conservator is acting under this Part. A report of each review shall be filed with the court. Each review shall contain an examination and evaluation of the plan for the ward or protected person and recommendations for a modification thereof, as deemed appropriate or necessary.

(3) The public guardian or conservator shall keep books of account or other records showing separately the principal amount received, increments thereto and disbursements therefrom for the benefit of the ward or protected

person, and such other records as are appropriate for the particular situation, together with the name of the ward or protected person, the source from which the money was received and the purpose for which the money was expended.

(4) The public guardian, in the absence of available next of kin, may authorize the performance of an autopsy upon the body of the deceased ward. The public guardian, in the absence of available next of kin, or in the event that next of kin refuses to assume responsibility therefor, shall cause any deceased ward to be suitably buried and shall have authority to expend funds of the ward for that purpose, and in the event the ward is without funds at the time of death, the public guardian shall cause him to be suitably buried at public expense, as in the case of the burial of any other deceased indigent person.

APPENDIX D

Proposed Language

Sec. 1. 18-A MRSA §5-312, sub-§(a) is amended to read:

(a) A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to 3rd persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this State, and may place the ward in any hospital or other institution for care in the same manner as otherwise provided by law.

(2) If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

(3) A guardian may give or withhold consents or approvals related to medical or other professional care, counsel, treatment or service for the ward. Except as authorized by a court of competent jurisdiction, a guardian shall make a health-care decision in accordance with the ward's individual instructions, if any, and other wishes expressed while the ward had capacity to the extent known to the guardian. Otherwise, the guardian shall make the decision in accordance with the guardian's determination of the ward's best interest. In determining the ward's best interest, the guardian shall consider the ward's personal values to the extent known to the guardian. A decision of a guardian to withhold or withdraw life-sustaining treatment is effective without court approval unless the guardian's decision is made against the advice of the ward's primary physician and in the absence of instructions from the ward made while the ward had capacity.

(4) If no conservator for the estate of the ward has been appointed, he may:

(i) Institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(ii) Receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward; but, he may not use funds from his ward's estate for room and board which he, his spouse, parent,

or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

~~(5) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as specified by the court at the time of the initial order or at the time of a subsequent order or as provided by court rule.~~

(5) A guardian shall review the personal and financial condition of the ward, at least annually, and at any time when ordered by the court. A report of the review shall be filed with the court. Each review shall contain an examination and evaluation of the plan for the ward and recommendations for a modification thereof, as deemed appropriate or necessary.

The court on its own motion, or on the petition of any interested person, may appoint a visitor to review the guardian's report and determine if appropriate provisions for the care, comfort and maintenance of his ward and for the care and protection of his ward's property have been made. The visitor shall report his findings to the court in writing.

(6) The guardian shall keep records showing separately for each year the amount of all money received by the guardian, all additions to the amount and all payments and disbursements there from for the benefit of the ward, and such other records as are appropriate for the particular situation, together with the name of the ward, the source from which the money was received and the purpose for which the money was expended. Upon the request of the court, these records shall be produced for inspection by the court, or a person appointed by the court.

~~(6)~~ (7) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian must account to the conservator for funds expended.

- (b)** Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to 3rd persons or institutions for the ward's care and maintenance.

Sec. 2. 18-A MRSA §5-607 is amended to read:

A public guardian or conservator has the same powers, rights and duties respecting his ward or the protected person as provided for guardians and conservators by the other parts of this Article except as otherwise specifically provided in this Part, including the following particular provisions:

(1) If a public guardian places his ward in any facility described in Title 22, sections 5 and 1811, such placement shall be made only if the facility is duly licensed. In the event that the license of any such facility is suspended or revoked, the public guardian having any ward placed therein shall remove such ward and effect an appropriate placement of the ward as soon as practicable after knowledge of the suspension or revocation of the license.

~~—(2) The public guardian or conservator at least annually, and at any time when ordered by the court, shall review the case of every person for whom the public guardian or conservator is acting under this Part. A report of each review shall be filed with the court. Each review shall contain an examination and evaluation of the plan for the ward or protected person and recommendations for a modification thereof, as deemed appropriate or necessary.~~

~~—(3) The public guardian or conservator shall keep books of account or other records showing separately the principal amount received, increments thereto and disbursements therefrom for the benefit of the ward or protected person, and such other records as are appropriate for the particular situation, together with the name of the ward or protected person, the source from which the money was received and the purpose for which the money was expended.~~

(4) (2) The public guardian, in the absence of available next of kin, may authorize the performance of an autopsy upon the body of the deceased ward. The public guardian, in the absence of available next of kin, or in the event that next of kin refuses to assume responsibility therefore, shall cause any deceased ward to be suitably buried and shall have authority to expend funds of the ward for that purpose, and in the event the ward is without funds at the time of death, the public guardian shall cause him to be suitably buried at public expense, as in the case of the burial of any other deceased indigent person.