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

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

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

§ 5-106. Burden of proof

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

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

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

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

(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.

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

(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.

SUMMARY

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