

Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans

Testimony of Bethany Hamm
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Before the
United States Senate
Special Committee on Aging

November 28, 2018

I. Introduction

Chairman Collins, Ranking Member Casey, and Members of the Committee, I am Bethany Hamm, Acting Commissioner of the Maine Department of Health and Human Services. Thank you for the opportunity to present testimony today regarding this important topic.

My testimony today provides background information on Maine's Adult Protective Services and public guardianship program. I also outline recent changes to Maine's probate code that relate to guardianship of adults and how Maine DHHS anticipates recently enacted probate code changes will serve to protect adults under guardianship and conservatorship in Maine.

II. Maine Adult Protective Services and Public Guardianship

Maine DHHS is required by state law to carry out the mandates of the Adult Protective Services Act (APS Act).¹ In accordance with the APS Act, Maine's Adult Protective Services program within DHHS's Office of Aging and Disability Services is specifically responsible for the following:

- 1) Receiving, promptly investigating, and determining the validity of reports of alleged abuse, neglect, and exploitation of incapacitated and dependent adults and the substantial risk thereof;
- 2) Taking appropriate action, including providing or arranging for the provision of appropriate services and making referrals to law enforcement; and
- 3) Petitioning for guardianship or a protective order when all less restrictive alternatives have been tried and have failed to protect the incapacitated adult.

APS regularly investigates allegations of abuse, neglect, and exploitation that are reported through a State-wide APS Intake phone line and reported through a web referral form. Certain professionals are mandated by statute to make reports to APS.² During an investigation, APS may determine that an incapacitated adult needs a guardian or that a private guardian is subjecting an individual under guardianship to abuse, neglect,

¹ 22 M.R.S. ch. 958-A.

² 22 M.R.S. § 3477.

or exploitation. In these cases, APS will conduct a search for a suitable private guardian or, if there are no capable family or friends to take on the role, APS will petition for public guardianship. Public guardianship or conservatorship is only considered as a last resort.

Maine's Probate Code contains strict requirements related to providing notice to several parties as part of any guardianship petition. The allegedly incapacitated person, the person's spouse, parents, and adult children, any current guardian or caregiver, and an adult friend of the incapacitated person (if the person does not have family to notify) must receive notice. In any case where an allegedly incapacitated person seeks to contest a petition for guardianship, the court is required to appoint the individual with an attorney. Emergency petitions are considered by the courts only on a limited basis when an incapacitated person is at serious risk of immediate harm. Additional safeguards are built in to determine whether any issues exist with respect to whether the appointment is in the allegedly incapacitated person's best interest.

At the time DHHS is appointed public guardian for an individual, Maine's probate code requires that a guardianship plan be filed with the appropriate probate court. Each plan must include the following:

- The type of proposed living arrangement for the individual subject to guardianship;
- How the individual's financial needs will be met;
- How the individual's medical and other remedial needs will be met;
- How the individual's social needs will be met;
- A plan for the individual's continuing contact with relatives and friends; and
- A plan for the management of the individual's or protected person's estate in the case of a public conservatorship.

Thereafter, DHHS submits a report reviewing each of the guardianship plan areas on at least an annual basis (and more frequently as necessary).

Licensed social workers who serve as "guardian representatives" are assigned to maintain contact with each adult under guardianship and coordinate with service providers, medical professionals, and family and friends (if available) to ensure the health and safety of each adult under guardianship. Guardian representatives may also seek to terminate or modify a guardianship relationship if an individual no longer requires a guardian or if modification to the guardianship authority (including limitations to increase an individual's independence) would be appropriate. Currently, Maine DHHS has legal guardianship and conservatorship relationships with approximately 1,300 adults (a combination of full guardianships, limited guardianships, conservatorships only, and guardianship plus conservatorship relationships). Approximately 15 percent of the relationships are limited guardianship relationships.

III. Changes to Maine's Probate Code and Anticipated Improvements related to Adult Guardianship

During the most recent State legislative session, Maine enacted the Maine Uniform Probate Code (UPC) to recodify and revise the State's probate code. While the Maine Uniform Probate Code maintains the same requirements for public guardianship, a number of mandates relative to private guardianship of adults in the UPC are scheduled to go into effect July 1, 2019. Notable changes include the following:

- 1) Reporting requirements for private guardians;
- 2) A court-maintained system for monitoring guardianship reports; and
- 3) A strong focus on self-determination, supported decision making and alternative arrangements to guardianship as appropriate.

One significant provision in the Maine UPC establishes (for the first time in the State) the private guardian's duty to report annually on the condition of the adult and account for money and other property in the guardian's possession or subject to the guardian's control. The reports will contain information in thirteen areas, including actions that have been taken on behalf of the adult, the extent to which the adult has participated in decision making, whether the guardian has delegated any duties and the reasons therefore, plans for future care and support, and a recommendation as to the need for continued guardianship or any modifications to the scope of the guardianship.³

Concurrently, the Maine UPC effectuates a requirement for the courts to establish a system for monitoring and reviewing each report at least annually to determine:

- 1) Whether the report provides sufficient information to establish that the guardian has complied with the guardian's duties;
- 2) Whether the guardianship should continue; and
- 3) Whether the guardian's requested fees, if any, should be approved.

The court, in reviewing a guardian's report, may appoint a visitor to interview the guardian and the adult under guardianship or investigate any matter involving the guardianship. The court may also modify or terminate the guardianship due to a guardian's noncompliance with guardianship duties based on the information in the guardian report or lack thereof.

The Maine UPC also highlights the importance of exploring all options to limit or preclude the need for guardianship at the outset when appropriate, including the use of technological assistance and employing supported decision making. Similarly, the UPC language clearly outlines the duties of all guardians, emphasizing the duty to promote self-determination of the individual under guardianship and make decisions on behalf of the individual under guardianship that are consistent with the individual's current and prior direction, preferences, opinions, and values. Only if the individual under guardianship's beliefs are unknown or if the decision the individual would make would cause unreasonable harm, does the guardian then make decisions based on a "best interests of the adult" standard.⁴ This language underscores the viewpoint that autonomy should be preserved as much as possible, and an adult who has a guardian or conservator must still have a seat at the table when decisions are being made.

The Department anticipates that the Maine UPC's statutory requirements will substantially improve data collection on guardianship centralized through the State's court system. Similarly, requiring annual reporting of all guardians will allow the courts to more effectively provide oversight and bring concerns to the attention of appropriate entities, such as APS and law enforcement. The emphasis on reviewing all less

³ 18-C M.R.S.A. § 5-317.

⁴ 18-C M.R.S.A. § 5-313.

restrictive alternatives to guardianship in statute, alongside the requirement for annual review, will help to ensure that guardianship is not imposed unnecessarily and is removed if no longer needed.

Overall, the Maine Department of Health and Human Services is strongly committed to protecting the health and safety of incapacitated adults through its investigative and public guardianship functions. We believe that the UPC's focus on limited guardianships and other protective arrangements, as appropriate; the requirements for annual review; the establishment of a system to monitor guardianships; and the clear language on promoting self-determination are significant steps in guardianship reform in Maine. Thank you for inviting me to speak today and for taking the time to focus on this significant topic.