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February 25, 2020

The Honorable Donna Bailey, Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, Maine 04333-0100

Re: Maine Uniform Probate Code Requirement of Bond for Public Guardian and Public Conservator

Dear Representative Bailey:

I am writing to follow up on a request for advice relating to whether the current requirement in the Maine Probate Code that the State furnish a surety bond covering public guardianships and public conservatorships serves a purpose and whether the statute should be retained in law or modified. As discussed below, the requirement of the surety bond does not appear to serve any purpose and repeal of the statute may be appropriate.

As noted in your request, Maine law requires a public guardian or public conservator to furnish a surety bond sufficient to cover all the persons subject to a public guardian or public conservator. 18-C M.R.S. § 5-710 (2019). Your request further noted that the Law Court has held that the State is immune from suit for tort claims of breach of fiduciary duty relating to a public conservator and that the Legislature did not waive sovereign immunity by virtue of requiring a bond. *Perry v. Dean*, 2017 ME 35, 156 A.3d 742. In *Perry v. Dean*, 2017 ME 35, 156 A.3d 742, the Law Court left open the question of whether sovereign immunity is a defense in an action brought against the surety.

After the Law Court's decision in *Perry v. Dean*, Perry brought suit against the surety in state court. The surety removed the case to the federal district court for the District of Maine. *Perry v. Fidelity and Deposit Company of Maryland*, 2019 WL 847733 (D. Me. 2019). The federal court certified the question of whether an action against a surety could be brought when the state was immune from suit. *Id.* The certified question was not decided by the Law Court because the case was resolved.

While the litigation was pending in federal court in 2018, the Legislature enacted L.D. 123, *An Act to Recodify and Revise the Maine Probate Code*. L.D. 123 (128th Legis. 2017). L.D. 123

retained the surety bond requirement. 18-C M.R.S. § 5-710 (2019). You have asked whether the requirement of a surety bond for public guardians or conservators should be maintained. As applied in the context of a public guardianship or conservatorship, the bond requirement does not further the purpose of providing a financial guarantee. See Report of the Commission's Study and Recommendations Concerning Maine Probate Law (Oct. 1978) ("Commission Report"), at 213 (available at <http://www.cleaves.org/MPLRCReport1978.pdf>), at 223 (discussing argument that "a person with assets insufficient to meet possible fiduciary liabilities cannot properly be appointed administrator of an estate without the bond as a source of indemnity for creditors and potential distributees."). This rationale explains why certain financial institutions are exempt from the bond requirement. 18-C M.R.S. § 5-416 (2019). The bond is not necessary because it is assumed that such institutions will have sufficient assets to compensate for any wrongdoing. Similarly, in the case of a public guardian or public conservator, where the State is the guardian/conservator, there is no need for a bond because the State has sufficient assets.¹

Unlike insurance, a bond does not insulate the State from financial exposure. It is a basic principle that a surety is entitled to indemnification from its principal. As the Maine Probate Law Revision Commission ("Probate Commission") stated: "The surety who has indemnified the injured parties is provided a remedy by subrogation against the breaching fiduciary – the typical institutional surety being better able than most legatees or creditors to bear the credit strain of pursuing the wrongdoing fiduciary in litigation." Report of the Commission's Study and Recommendations Concerning Maine Probate Law (Oct. 1978) ("Commission Report"), at 213 (available at <http://www.cleaves.org/MPLRCReport1978.pdf>); see also *F.D.I.C. v. Ins. Co. of N. Am.*, 105 F.3d 778, 786 (1st Cir. 1997) ("An insurer, upon the occurrence of the contingency, must bear the ultimate loss, while a surety is entitled to indemnity in case the surety is compelled to perform."); *Washington Intern. Ins. Co. v. Superior Court*, 62 Cal.App.4th 981, 989 (Cal. Ct. App. 1998) ("While an insurer has no right of subrogation against its insured, a surety has every right to reimbursement from its principal."); *Couch on Insurance* (3rd ed.), § 1.18 ("A surety is ordinarily entitled to indemnity from the principal in case the surety is compelled to perform.").

¹ The bond also is unnecessary because, given the Law Court's decision in *Perry v. Dean* that the State is immune from suit under the Maine Tort Claims Act, it is the view of this Office that a court would find the surety also immune. "The rule of law which governs the liability of sureties upon bonds generally is that the surety is not liable unless the principal is and, therefore, may plead any defense available to the principal." *Phelps v. Dawson*, 97 F.2d 339, 341 (8th Cir. 1938); see also *Rhode Island Hosp. Trust Nat. Bank v. Ohio Cas. Ins. Co.*, 789 F.2d 74, 78 (1st Cir. 1986) ("The basic rule on the liability of sureties is that 'the surety is not liable to the creditor unless his principal is liable[;] thus he may plead the defenses which are available to his principal.'"). This is the question that was certified to the Maine Law Court but was not decided because the matter was settled. Regardless of whether the surety would be found immune, as discussed above, in the case of the public guardianship or conservatorship, the surety bond does not serve any purpose because the State will have sufficient assets to satisfy a claim.

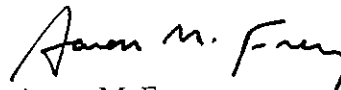
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Repeal of 18-C M.R.S. §5-710 may be appropriate as it does not appear to serve any purpose. One of the options mentioned in your letter is the option of the Legislature waiving Maine's sovereign immunity. This is a policy question for the Legislature. Even if the Legislature were to waive sovereign immunity, a bond would serve no purpose, for the reasons discussed above. I trust this information is helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Aaron M. Frey". The signature is written in black ink on a white background.

Aaron M. Frey
Attorney General