

MEMORANDUM

To: Senator Lisa Keim, Senate Co-Chair, and Representative Mathew Moonen, House Co-Chair, Joint Standing Committee on Judiciary

From: Maine Family Law Advisory Commission

Date: January 2, 2018

Re: Supplement to January 15, 2017, Report Regarding Adoption and Guardianship Provisions in the Maine Probate Code

This memorandum supplements the Maine Family Law Advisory Commission's (FLAC) January 15, 2017, Report and Recommendations submitted to the Joint Standing Committee on Judiciary, pursuant to Resolve 2016, c. 73, section 3 of the 127th Legislature. The Resolve directed FLAC to "oversee a comprehensive review of the laws and procedures concerning minor guardianship and adoption and other provisions implicating parental rights throughout the [Maine] Probate Code, including, but not limited to, an evaluation of the extent to which such laws, procedures and provisions are consistent with family law policy as set forth elsewhere in the Maine Revised Statutes." In its Report, FLAC offered several recommendations for modifications to the minor guardianship and adoption provisions in the proposed recodification and revision of the Maine Probate Code in LD 123, "An Act to Recodify and Revise the Maine Probate Code." In this Supplement, FLAC provides a few minor changes to those recommendations.

Guardianship Recommendations

LD 123 was carried over from the First Session of the 128th Legislature in part to provide the Probate and Trust Law Advisory Commission (PATLAC) and FLAC an opportunity to review the Uniform Law Commission's (ULC) newly-approved Uniform Guardianship Conservatorship and Other Protective Arrangements Act (UGCOPAA) and to determine if Maine should adopt some or all of the language included in that new uniform act.

FLAC has examined the substantive differences between the minor guardianship provisions in the UGCOPAA and FLAC's January 15, 2017, recommendations. FLAC also considered the ULC Drafting Committee's comments and minutes regarding those provisions. After discussing this information at meetings throughout the fall, FLAC has decided not to make revisions to its prior recommendations for the minor guardianship provisions, with two exceptions noted below. The UGCOPAA's minor guardianship provisions (listed as Sections 201 through 211) will undoubtedly represent innovative and important reforms for many of the states that adopt them. However, FLAC notes that the provisions depart in significant respects from existing Maine law and practice. In addition, the UGCOPAA does not reflect many of the important reforms outlined in FLAC's January 15, 2017, Report and Recommendations, which were based on the findings from its comprehensive review of Maine minor guardianship laws and practice, including valuable contributions from dozens of Maine stakeholders. For these reasons, FLAC believes that its recommendations continue to reflect how the Maine Uniform Probate Code's (MUPC) minor guardianship laws can best serve Maine children, families, and courts.

Although FLAC is not recommending adoption of the UGCOPAA's minor guardianship provisions, it has reviewed and agrees with the proposed changes to the LD 123 Article V, Part 1 "General Provisions," applicable to all guardianships, that PATLAC will be presenting to the Judiciary Committee as part of a proposed Committee Amendment incorporating the other parts of the UGCOPAA. FLAC notes that two of the proposed General Provisions—sections 5-120 and 5-121, which address compensation and liability of guardians of a minor—will eliminate the need for section 5-209 in LD 123's minor guardianship provision, because the substance of that provision will be included in the revised General Provisions. The removal of section 5-209 will require the renumbering of the sections in Article V, Part 2 that follow.

In addition, during its review of the UGCOPAA, FLAC noted that the ULC has included language in the new uniform act permitting a court to waive the requirement of notice to a parent when the parent cannot be located after a diligent search or the parent has expressed a clear intention to waive such notice. FLAC concludes that such a provision would be useful and appropriate to include in Maine's MUPC, but the UGCOPAA language would need to be revised significantly to reflect Maine practice. Accordingly, FLAC recommends the following change to its prior recommendation for section 5-205. The text in black is the current LD 123, with FLAC's January 15, 2017, recommendations in red, and the proposed new language in blue:

§5-205. Judicial appointment of guardian; procedure

1. Petition; notice of hearing. After a petition for appointment of a guardian is filed, the court shall schedule a hearing, and the petitioner shall give notice of the time and place of the hearing, together with a copy of the petition, to:

A. The minor, who may appear through counsel, if the minor has attained 14 years of age and is not the petitioner;

B. Any person alleged to have had the primary care and custody of the minor during the 60 days before the filing of the petition;

C. Each living parent of the minor or, if there is none, the adult nearest in kinship that can be found;

D. Any person nominated as guardian by the minor if the minor has attained 14 years of age;

E. Any appointee of a parent whose appointment has not been prevented or terminated under section 5-203; and

F. Any guardian or conservator currently acting for the minor in this State or elsewhere.

If the court finds that receiving information from the Department of Health and Human Services may be necessary for a determination of whether to appoint a guardian for a minor, it may order a Department of Health and Human Services child protection worker to attend the hearing and to provide information relevant to the proceeding. When receiving any information that is confidential pursuant to Title 22, section 4008, the court shall close the proceeding and take other measures necessary to preserve the confidentiality of the information received.

2. Notice to parent excused. The Court may, on motion of the petitioner, excuse the petitioner from the requirement of providing notice to a parent of a minor under subsection (1)(C) or under court rules for service of process if the Court finds that the petitioner is unable to give notice to the parent or the parent has waived the right to notice under this section. The Court may make such finding based on sworn affidavits submitted by the petitioner that demonstrate either:

A. The parent could not be located after due diligence and that there are no reasonable means available to the petitioner to provide actual notice to the parent; or

B. The parent's actions reflect a clear intention to waive their right to notice of these proceedings.

The Court may require the petitioner to appear and provide evidence in a testimonial hearing prior to ruling on a motion to excuse notice. "Reasonable means" are those that do not involve significant difficulty or expense.

23. Appointment; other disposition. The court, after the hearing scheduled pursuant to subsection 1, shall make the appointment of a guardian if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of section 5-204, subsection 2 have been met and the best interest of the minor will be served by the appointment. In other cases, the court may dismiss the proceeding or make any other disposition of the matter that will serve the best interest of the minor.

34. Court-appointed attorney. If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, the court may appoint an attorney to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age.

Adoption Recommendations

PATLAC and FLAC recently identified a conflict between the post-adoption inheritance rights described in the intestacy inheritance provisions in LD 123 (18-C M.R.S. § 2-119(6)) and those in a new provision to the Adoption Act recommended by FLAC (18-C M.R.S. § 9-308(6)) to clarify the effects of adoption on the legal relationship between a child and their former parents. PATLAC and FLAC agree that: (1) the Adoption Act should include a provision confirming the broad effects of the adoption on the adoptee's legal relationship with their former parent; (2) the MUPC should have consistent provisions regarding the impact of adoption on inheritance rights; and (3) the language in LD 123's § 2-119(6) that provides authority to an adoption judge to preserve an adoptee's inheritance rights in the adoption decree (and that otherwise, such rights do not continue post-adoption) is sound policy.

Therefore, to ensure consistency between the post-adoption inheritance provisions in the MPUC, FLAC recommends revising its previously proposed language for 18-C M.R.S. § 9-308(6)(A) as follows:

6. Effect of adoption. An order granting the adoption has the following effect:
A. An order granting the adoption of the child by the petitioner divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, ~~except the inheritance rights between the child and the parent.~~ an adoptee inherits from the adoptee's former parents if so provided in the adoption decree....

PATLAC and FLAC have also noted that the language addressing post-adoption inheritance rights of an adoptee in the proposed MPUC is inconsistent with existing provisions regarding inheritance rights after adoption from permanency guardianship and termination of parental rights in Maine's child protection statute. Specifically, Title 22 child protection provisions preserve inheritance rights after the termination of parental rights (22 M.R.S.A. § 4056) and adoption from a permanency guardianship (22 M.R.S.A. § 4038-E), while the proposed intestacy provisions in LD 123 Article 2 (18-C M.R.S. § 2-119(6)), which is cross-referenced in the "Rights of Adopted Persons" provision in 18-C M.R.S. § 9-105, provides that an adoptee inherits from the adoptee's former parents only "if so provided in the adoption decree." Accordingly, FLAC recommends—and PATLAC has informed us that it agrees—that these two provisions in Title 22 be amended to ensure consistency across all Maine statutes that address inheritance rights after adoption or other terminations of parental rights. Such amendments would be as follows.

22 M.R.S. § 4038-E(11)(A): An order granting the adoption of the child by the permanency guardian divests the consenting parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, ~~except the inheritance rights between the child and the parent~~ except an adoptee inherits from the adoptee's former parents if so provided in the adoption decree.

22 M.R.S. § 4056(1): An order terminating parental rights divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, ~~except the inheritance rights between the child and parent~~ except the child inherits from the child's former parents if so provided in the order.

Thank you for considering this Supplement to our January 15, 2017, Report and Recommendations. FLAC would be glad to provide its assistance the Committee with the review of LD 123 and FLAC's recommendations in the coming weeks.

Respectfully submitted:
Maine Family Law Advisory Commission

Hon. Bruce Jordan, District Court Judge (Chair)
Hon. Wayne Douglas, Superior Court Justice
Hon. Steven Chandler, Family Law Magistrate
Hon. Jarrod S. Crockett, Oxford County Probate Judge
Franklin L. Brooks, Ph.D., LCSW
Nicolle Carbone, Esq., MFT, Kids First Center
Edward S. David, Esq.
Diane E. Kenty, Esq., Maine Judicial Branch, CADRES
Margaret C. Lavoie, Esq.
Melissa Martin, Esq., Pine Tree Legal Assistance
Kevin Wells, Esq., Maine Dept. of Health and Human Services