MEMORANDUM

To: Maine Legislature Joint Committee on Judiciary

From: Maine Family Law Advisory Commission

Date: January 22, 2019

Re: Proposed revision to MUPC § 5-210(7) for Errors and Inconsistencies Legislation

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The Maine Family Law Advisory Commission (FLAC) has identified an inconsistency and potential constitutional infirmity in the minor guardianship termination provision in the Maine Uniform Probate Code (MUPC), 18-C M.R.S.A. § 2-510(7). This memo describes the problem and a proposed revision to the language. Such revision could be included in the MUPC "errors and inconsistencies" bill that will be considered by the Judiciary Committee in the First Session of the 129th Legislature, which would put the amendment on track for enactment prior to the July 1, 2019, MUPC effective date.

In 2005, the Maine Legislature amended the minor guardianship termination provision in 18-A M.R.S.A. § 5-212(d) to place on the "petitioner" (meaning the person who filed the petition to terminate) the burden of proof by a preponderance of the evidence on the issue of whether the termination of the guardianship is in the minor's best interest. The Law Court held in *Guardianship of David C.*, 2010 ME 136, ¶ 7, that, notwithstanding the burden assigned to the petitioner under the statute, when a *parent* petitions to terminate a guardianship:

> [t]he party opposing the termination of the guardianship bears the burden of proving, by a preponderance of the evidence, that the parent seeking to terminate the guardianship is currently unfit to regain custody of the child. If the party opposing termination of the guardianship fails to meet its burden of proof on this issue, the guardianship must terminate for failure to prove an essential element to maintain the guardianship. This rule applies whether the guardianship was initially established with the parents' consent…or otherwise.

This clarification by the Law Court reflects the constitutional implications of continuing a guardianship over a parent's objection. *Id*. ¶ 6 ("Because a parent has a fundamental right to parent his or her child, the burden of proving parental unfitness is generally on the non-parent party who is attempting to limit the parent's right.") (citing *Guardianship of Jeremiah T*., 2009 ME 74, ¶ 28).

The original text of LD 123 ("An Act to Revise and Recodify the Maine Probate Code") proposed by the Probate and Trust Law Advisory Commission included language consistent with this holding in *David C.* FLAC recommended additional substantive and organizational changes to the minor guardian termination provision that were included in the final version of LD 123 (P.L. 2017, ch. 402). As enacted, MUPC §§ 5-210(6) and (7) address the standards and burdens of proof applicable to contested petitions to terminate a guardianship. Under subsection (6), except upon a petition to terminate the guardianship filed by the parent, the court may not terminate the guardianship without the consent of the guardian unless the court finds by a

preponderance of the evidence that the termination is in the best interest of the minor. Subsection (7) provides that if a parent petitions for the termination of the guardianship, the party opposing the termination (usually the guardian) bears the burden of proving by a preponderance of the evidence that the parent seeking to terminate the guardianship is currently unfit to regain custody of the minor. The court must determine unfitness by applying the standard in section 5-204(2)(C) for appointing a guardian over a parent's objection by finding unfitness. If the party fails to prove that the parent is unfit, the court must terminate the guardianship and make any further order that may be appropriate. The full text of that section is as follows:

> **7. Parent's petition to terminate guardianship; burden of proof.** A parent may bring a petition to terminate the guardianship of a minor. A parent's notification to the court of the revocation of prior consent for a guardianship must be considered a petition to terminate the guardianship. *Before the court may apply the termination requirements in subsection 6, a party opposing a parent's petition to terminate a guardianship bears the burden of proving by a preponderance of the evidence that the parent seeking to terminate the guardianship is currently unfit to regain custody of the minor, in accordance with the standard set forth in section 5-204, subsection 2, paragraph C.* If the party opposing termination of the guardianship fails to meet its burden of proof on the question of the parent's fitness to regain custody, the court shall terminate the guardianship and make any further order that may be appropriate. In a contested action, the court may appoint counsel for the minor or for any indigent guardian or parent. In ruling on a petition to terminate a guardianship, the court may modify the terms of the guardianship or order transitional arrangements pursuant to section 5-211.

The standard in § 5-204(2)(C) cross-referenced in the sentence highlighted in italicized text above is the following:

> 2. Appointment. The court may appoint a guardian for a minor if the court finds the appointment is in the best interest of the minor, finds the proposed guardian is suitable and finds:…
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> C. By clear and convincing evidence that the parents are unwilling or unable to exercise their parental rights, including but not limited to:
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> (1) The parent is currently unwilling or unable to meet the minor's needs and that will have a substantial adverse effect on the minor's well-being if the minor lives with the parent; or
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> (2) The parent has failed, without good cause, to maintain a parental relationship with the minor, including but not limited to failing to maintain regular contact with the minor for a length of time that evidences an intent to abandon the minor.

The § 5-204(2)(C) standard highlighted above requires proof by clear and convincing evidence. Therefore, the cross-reference to the definition of unfitness creates an internal inconsistency in Article 5, Part 2 in terms of the evidentiary standard to be applied by the court in determining unfitness in a contested termination petition brought by a parent.

Moreover, while LD 123 was pending in the Legislature, the Law Court issued its opinion in *Guardianship of Alisha K. Golodner*, 2017 ME 54, which included the following *dictum* casting

doubt on the constitutionality of using a preponderance of the evidence standard to assess fitness in a contested guardianship termination matter:

> Although the Legislature has established the standard of a preponderance of the evidence for addressing the best interest of the child in a proceeding to terminate a guardianship, neither we nor the Legislature has made clear what specific standard of proof the existing guardian must meet in proving the petitioning parent's unfitness in order for the guardianship to continue.[5] Nor has the Legislature defined "fitness" for purposes of termination-of-guardianship cases. The law in these areas is unsettled and evolving. *See Guardianship of Reena D.*, 35 A.3d 509, 514-15 (N.H. 2011) (collecting cases and holding that where a guardianship was established by consent, for the court to order continuation of the guardianship over the petitioning parent's objection, the guardian must prove, by clear and convincing evidence, that the guardianship is "necessary to provide for the essential physical and safety needs of the minor" and that terminating it would "adversely affect the child's psychological well-being" (quotation marks omitted)); *see also Tourison v. Pepper*, 51 A.3d 470, 473-74 (Del. 2012) (holding that on a parent's petition, the guardianship must terminate unless the guardian proves, by clear and convincing evidence, that terminating the guardianship would result in physical or emotional harm to the child); *Boddie v. Daniels*, 702 S.E.2d 172, 174-75 (Ga. 2010) (same); *In re Guardianship of D.J.*, 682 N.W.2d 238, 243-46 (Neb. 2004) (holding that the guardianship must terminate unless the guardian proves, by clear and convincing evidence, that the petitioning parent is either unfit or has forfeited the right to custody).
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> We need not decide the applicable burden in this case because the court in fact applied the more stringent standard of proof—namely, clear and convincing evidence, which is more favorable to [the parent]—and the court's findings are supported by the evidence even under that standard of proof….
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> [5] We referred to a preponderance-of-the-evidence standard in *Guardianship of David C.* and cases that followed. *See Guardianship of David C.*, 2010 ME 136, ¶ 7, 10 A.3d 684; *see also Guardianship of Chamberlain*, 2015 ME 76, ¶ 28, 118 A.3d 229; *Guardianship of Stevens*, 2014 ME 25, ¶ 14, 86 A.3d 1197. In *Guardianship of David C.*, however, we were concerned primarily with the allocation of the burden to prove unfitness as opposed to the standard of proof. 2010 ME 136, ¶¶ 4, 7, 10 A.3d 684.

Guardianship of Alisha K. Golodner, 2017 ME 54, ¶¶12-13 n.5.

FLAC's research findings on how other states address the burdens and standards in contested guardianship termination cases are consistent with the Law Court's characterization of the law as "unsettled and evolving." Most opinions addressing the question of the allocation of burdens note the constitutional rights at stake and hold that it the guardian's burden to prove unfitness or other potential harm to the child in a contested guardian termination matter, particularly if the parents had originally consented to the guardianship (which is the scenario in the majority of guardianships). As most states require unfitness findings for the appointment of a guardian to be based on clear and convincing evidence, they require the same evidentiary standard in a

contested termination case. However, one state, New Hampshire, has held that where there was an adjudication of unfitness at the appointment stage, the parent is no longer entitled to the presumption of fitness, and the burden-shifting and higher standard of proof is not *constitutionally* required. *In re Guardianship of Raven G.*, 66 A.3d 1245, 1248-49 (N.H. 2013).

To eliminate the internal inconsistency and any potential constitutional infirmity, FLAC recommends that the standard for finding unfitness in MUPC § 5-210(7) be revised from "a preponderance of the evidence" to "clear and convincing evidence" as follows:

> **7. Parent's petition to terminate guardianship; burden of proof.** A parent may bring a petition to terminate the guardianship of a minor. A parent's notification to the court of the revocation of prior consent for a guardianship must be considered a petition to terminate the guardianship. Before the court may apply the termination requirements in subsection 6, a party opposing a parent's petition to terminate a guardianship bears the burden of proving by ~~a preponderance of the evidence~~ clear and convincing evidence that the parent seeking to terminate the guardianship is currently unfit to regain custody of the minor, in accordance with the standard set forth in section 5-204, subsection 2, paragraph C. If the party opposing termination of the guardianship fails to meet its burden of proof on the question of the parent's fitness to regain custody, the court shall terminate the guardianship and make any further order that may be appropriate. In a contested action, the court may appoint counsel for the minor or for any indigent guardian or parent. In ruling on a petition to terminate a guardianship, the court may modify the terms of the guardianship or order transitional arrangements pursuant to section 5-211.

Thank you for considering this recommendation. Please let us know if we can be of further assistance.