

OFFICE OF POLICY AND LEGAL ANALYSIS
Bill Analysis

To: Joint Standing Committee on Judiciary

From: Peggy Reinsch, Legislative Analyst

LD 145 An Act to Amend the Maine Uniform Probate Code

Public Hearing Date: February 11, 2021

SUMMARY

LD 145 contains several amendments to the Maine Uniform Probate Code recommended by the Probate and Trust Law Advisory Commission (PATLAC)

PATLAC provided a proposed committee amendment to amend 18-C MRSA §5-511, sub-§4 to make the same delayed effective date change as included in Sections 2 and 3 of the bill.

TESTIMONY

Proponents

- Representative Harnett, presenter
- David Backer, Chair, Probate and Trust Law Advisory Commission (PATLAC) – PROPOSED COMMITTEE AMENDMENT
- Leo Delicata, Legal Services for the Elderly (written testimony only)
- Kathleen Ayers, Register, Kennebec County and Maine Association of Registers of Probate (written testimony only)
- Judge Lyman Holmes, Probate Judge, Washington County (written testimony only)
 - Original Maine Probate Code was enacted in 1979 with an effective date of 1981. PATLAC spent 6-7 years working with new Uniform Probate Code and presented the 802-page document to the Legislature; took effect September 1, 2019 as Title 18-C
 - Title 18-C is working really well, but just a few things to tweak and update
 - Section 1 – not frequently that a will or estate is not probated within 3 years, but it does happen
 - Confidentiality provisions in Sections 2 and 3 and the proposed amendment – thought that January 1, 2021 would provide sufficient time for the Supreme Judicial Court to adopt rules, and could then amend the law to refer to the rules – but rules for Probate Court records not yet adopted
 - Confidentiality provisions took effect January 1, 2021 and have caused problems – what is available on MaineProbate.net operated by the Probate Courts
 - Before 18-C, there were no confidentiality rules
 - Our intent is that the provisions never become effective, but that will be amended to refer to rules
 - Section 4 – removes the requirement that conservator include a credit report in every annual report to the Probate Court – credit report companies not providing to conservators in time or at all, so delays annual report. Allow court to order credit report be included

- Section 5 amends §5-431 "Termination or modification of conservatorship" – subsection 8 refers just to termination. Uniform Act left out "modification" – this adds in
- Section 6 amends the application dates section of 18-C and specifically references which law applies in wrongful death actions. It specifies that the law in effect at the time of the death of the decedent applies (18-A or 18-C).
- Rare issue but can happen
- Concerned that 18-C §3-108, sub-§1, ¶D has no overall statute of limitations – there is no "ultimate time limit"; without a statute of limitations it could result in an abuse and unintended consequences

Opponents

- None

Neither for nor against

- None

SPECIFIC INFORMATION

The Maine Uniform Probate Code, Title 18-C took effect September 1, 2019, replacing the former Probate Code, Title 18-A (which was enacted in 1979, taking effect in 1981). This bill makes corrections and adjustments to 18-C.

- **Section 1 of the bill** amends section 3-108, subsection 1, paragraph D to make clear it applies regardless of the date of the decedent's death.

Section 3-108, subsection 1, paragraph D allows the probate of a will of a decedent more than 3 years after death in a formal proceeding, but as a result of the limitations imposed by section 8-301, subsection 2, paragraph A, the probate is permitted only for a decedent who died after the September 1, 2019 effective date of Title 18-C. Section 3-108, subsection 1, paragraph D appears to allow an appointment of a personal representative, in an informal or formal proceeding, more than 3 years after death regardless of whether the date of death was before, on, or after the September 1, 2019 effective date of Title 18-C.

As a result, if a decedent died more than 3 years prior to the September 1, 2019 effective date, with a purported will, it would not be possible to probate the will under current law because of the limitation imposed by section 8-301, subsection 2, paragraph A. However, it appears that the decedent's heirs could, under section 3-108, subsection 1, paragraph D, still obtain an informal or formal appointment of a personal representative because the appointment is permitted regardless of the date of death. The heirs would submit an informal application or a formal petition for appointment of a personal representative, indicate that they are aware of an unrevoked testamentary instrument and explain that it is not being probated because it cannot be probated due to section 8-301, subsection 2, paragraph A. There is ambiguity, however, as to whether the limitations of section 8-301, subsection 2, paragraph A prevent the appointment of a personal representative more than 3 years after the date of death.

The interplay between section 3-108, subsection 1, paragraph D and section 8-301, subsection 2, paragraph A appears to create unintended inconsistencies in outcomes regarding the appointment of a personal representative and the probate of a will that can be cured by making it clear that section 3-108, subsection 1, paragraph D applies regardless of the date of the decedent's death.

- **Sections 2 and 3 of the bill, and the PATLAC proposed committee amendment, amend the effective date of new confidentiality provisions applicable to records of adult guardianships, conservatorships and other protective proceedings.** This bill amends section 5-308, subsection 4 and section 5-409, subsection 4 to delay the effective date of the confidentiality of records provisions governing guardianships of adults and governing conservatorships. When Title 18-C was enacted, with a September 1, 2019 effective date, the provisions of section 5-308 and section 5-409 had a delayed effective date of January 1, 2021. The purpose of the delayed effective date was to give the Supreme Judicial Court time to address confidentiality of court records in the state courts and perhaps in the Probate Courts, and then give the commission an opportunity to propose amendments to sections 5-308 and 5-409 to ensure consistency with confidentiality of records provisions adopted by the Supreme Judicial Court. With an effective date of August 21, 2020, the Supreme Judicial Court adopted the Maine Rules of Electronic Court Systems, which contains extensive provisions governing the confidentiality of records filed with the Supreme Judicial Court, the Superior Court and the District Court. The Supreme Judicial Court has not yet had an opportunity to consider rules governing confidentiality of records filed with the Probate Courts. This bill further delays the effective date of sections 5-308 and 5-409 to January 1, 2023 to provide additional time for the Supreme Judicial Court, in conjunction with the commission and the Advisory Committee on Probate Rules, to complete its review and approval of rules governing confidentiality of records in the Probate Courts. Because this bill will not take effect before January 1, 2021, these changes are made retroactive to January 1, 2021.

The proposed committee amendment makes the same change to §5-511, sub-§4 which governs the confidentiality of records governing a proceeding for or the existence of one or more protective arrangements instead of a guardianship or conservatorship.

- **Section 4 of the bill amends section 5-423, subsection 2, paragraph E to remove the mandatory credit report for the individual subject to conservatorship from the conservator's annual report and accounting and make the credit report a requirement only if ordered by the court.** The reason for the amendment is because it is difficult, and sometimes impossible, for the conservator to obtain a credit report for the individual subject to conservatorship and the credit report requirement is interfering with the timely submission of conservators' annual reports and accountings. The statutory requirement of submission of copies of recent financial statements along with the detailed accounting schedules provide sufficient court monitoring of conservators for most situations and the Probate Court will have flexibility to order a credit report if the court deems the credit report an appropriate element of the conservator's report and accounting.
- **Section 5 of the bill amends section 5-431, subsection 8 to clarify that the subsection applies to both the termination and modification of a conservatorship.** The headnote for section 5 431 is "Termination or modification of conservatorship," but subsection 8 refers only to the termination of a conservatorship, with no reference to modification. Section 5-319, subsection 6, which is the counterpart provision that applies to adult guardianships, includes both terminations and modifications of adult guardianships. The uniform act, on which section 5-431, subsection 8 is based, mentions only termination and not modification; however, the uniform comment to the corresponding paragraph of the uniform act describes both terminating and modifying conservatorships. It appears that reference to modification of a conservatorship was inadvertently omitted from section 5 431, subsection 8 and that the drafting error originated in the uniform act. To correct the apparent inadvertent omission, this bill amends subsection 8 to cover modifications of adult guardianships as well as terminations.

- **Section 6 of the bill** amends section 8-301, subsection 2, paragraph A-1 to add a reference to the wrongful death provisions of section 2-807 of Title 18-C to avoid ambiguity as to whether the intestacy provisions of former Title 18-A or the intestacy provisions of Title 18-C govern the distribution of a recovery of a wrongful death claim. The first two sentences of section 2-807, subsection 2 require the distribution of a recovery of a wrongful death claim to be paid to the decedent's heirs without becoming part of the decedent's probate estate.

The intestate succession provisions of Title 18-C are materially different, in a number of respects, from the intestate succession provisions of former Title 18-A. Although section 8-301, subsection 2, paragraph A-1 already states that the intestate succession provisions of Article 2, Part 1, Subpart 1 apply to the estates of decedents who die on or after the effective date, there remains ambiguity as to whether actions for wrongful death brought after the effective date, for deaths occurring before the effective date, are governed by the provisions of former Title 18-A or by the provisions of Title 18-C. The amendment resolves any ambiguity by making it clear that the date of death of the decedent will control which provisions apply.

- **Section 7 of the bill** makes the sections of the bill concerning the effective date of the confidentiality provisions apply retroactively to January 1, 2021. This is the date that those sections were to become effective, so making the changes apply retroactively closes the gap of what applies.

There is a presumption that all enactments apply prospectively, but the Legislature is permitted to make provisions apply retroactively as long as the intent is clear and the application will not affect any rights vested before the retroactive enactment.

** If the proposed amendment is adopted, make sure Section 7 is amended to make that change retroactive as well.

INFORMATION REQUESTED

Kathleen Ayers (Register of Probate in Kennebec County) and David Backer (PATLAC) have been invited to the work session.

- What information is available on MaineProbate.net?
- What information is available with an in-person visit a Probate Court in person?
- Has the effective date of January 1, 2021 caused problems?

FISCAL IMPACT:

Not yet determined as of February 22, 2021.