LD 123 Proposed Committee Amendment: Specific topics for comments

Please review the Summary of the proposed committee amendment – it provides a fairly detailed description of what the amendment does. (Starts on page 200)

The Judiciary Committee is interested in your comments on all of LD 123 as amended by the proposed committee amendment. The Judiciary Committee is particularly interested in comments on the following:

1. Inheritance changes

Inheritance provisions were revised to be consistent with the Maine Parentage Act

§§2-115 – 2-118 (page 2 of amendment)
§2-705 (pages 3-4 of amendment)
§9-105 (page 147 of amendment) and §9-308, sub-§6 (page 163 of amendment)
Part D (page 200 of amendment)

2. Article 5 changes

Article 5, Parts 1, 3, 4 and 5 are from the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA); Part 2 on minor guardianships is based on the bill (the Uniform Probate Code) and revised by recommendations from PATLAC and FLAC.

"Incapacitated person" is no longer a defined term in Article; the new law will use the terms "individual subject to guardianship," "adult subject to guardianship" and "minor subject to guardianship" as well as "individual subject to conservatorship," adult subject to conservatorship" and "minor subject to conservatorship." To the extent other statutes used "incapacitated person" and referenced Article 5, those have been modified. See Part C.

FLAC recommends including specific legislative findings in Part 2 on minor guardianships. The Subcommittee did not include the language in the proposed committee amendment. See the proposed language in Appendix A.

New §5-103 is retained from current 18-A MRSA §5-404; it was not included in the UGCOPAA.

Note that §5-122, sub-§3 requires that a person that refuses to accept the authority of a guardian or conservator is required to report the refusal and the reason for the refusal to the court.

§5-204 provides for the judicial appointment of a guardian for a minor. Subsection 4 provides for the appointment of a guardian for a minor on an emergency basis, and allows the court to appoint a guardian on an emergency basis without notice if the court finds from affidavit or testimony that the minor will be substantially harmed before a hearing can be held on the petition. As written, the amendment provides for a hearing on the appointment within 14 days but not less than 7 days after issuance of the order, except counsel for a parent may request a sooner hearing. The 14-day deadline is consistent with child protection proceedings. At least one Subcommittee member believes a 21-day deadline is more appropriate for the subject matter and Probate Court practice; 21 days is consistent with protection from abuse hearings when a PFA order is issued without notice.

FLAC recommends including a provision in §5-205 to allow the court to excuse otherwise required notice to a parent when certain requirements are met to show that the parent is unreachable. The concept comes from the UGCOPAA, and FLAC made revisions to address Due Process concerns. The Subcommittee did not include it in the proposed committee amendment. The proposed language is included as Appendix B.

In Part 7, Public Guardian and Conservator, §5-710 provides that the public guardian or conservator is not required to file bonds in individual guardianships or conservatorships, but must provide a surety bond that covers all the persons subject to the public guardian or conservator. In a March 2017 opinion *Claire Dean Perry et al. v. William T. Dean Jr. et al.* 2017 ME 35, the Law Court determined that the provisions of the existing Article V of the Probate Code do not expressly waive sovereign immunity, even though 18-A §5-611 (included in the Committee Amendment as 18-C §5-710) requires the Department of Health and Human Services to post a surety bond. The Court expressed no opinion regarding sovereign immunity in an action brought against the bond pursuant to §8-309 (included in LD 123 as 18-C §8-209).
The Judiciary Committee would like comments on whether, in light of *Perry v. Dean*, the Legislature should retain §5-710 as written, amend §5-710 to make clear the liability or immunity status of the State when acting as the public guardian or public conservator, or delete the section completely and not require a surety bond when the State is acting as the public guardian or public conservator.

Also in Article 5, Part 7, note that §5-703 prohibits the appointment of a coguardian if the public guardian is appointed, and a coconservator may not be appointed if the public conservator is appointed.

Uniform Power of Attorney Act – note new subsection 5 of §5-906 providing a cure for defective notice in a power of attorney after two years.

3. Article 6 – Nonprobate transfers and multiple-party accounts
§6-204 is amended to include a new subsection 3 that is consistent with LD 968, An Act To Help Prevent Financial Elder Abuse, as amended by the Insurance and Financial Services Committee. Subsection 3 directs financial institutions to require the owners of a multiparty account, when opening the account or when converting a single-party account to a multiple-party account, to provide a written answer to the question whether the owner intends for the sum remaining in the account at the owner's death should belong to the other owners of the account.

4. Adoption (Article 9)
The proposed committee amendment revises the law concerning the annulment of an adoption, and limits an annulment to within one year of the adoption decree and the annulment must be based on findings by clear and convincing evidence that the adoption was obtained as a result of fraud, duress or illegal procedure. If the adoptee is a minor, a guardian ad litem must be appointed. §9-315

5. Maine Comments:
Although PATLAC prepared Maine Comments for the original bill (they are included at the end of every Article in LD 123), the Subcommittee and PATLAC agree that, with the changes made in the proposed committee amendment, it would be most useful for PATLAC to take on the task of providing a comprehensive set of Maine Comments for all of Title 18-C. The Maine Comments included in the bill can serve as the base, and PATLAC will update those to reflect changes made in the amendment, case law and any other information that will be helpful to practitioners and other users of the Maine Uniform Probate Code. The proposal is to add language directing PATLAC to report those Maine Comments to the Judiciary Committee by November 1, 2018.

APPENDIX A

(amend the proposed committee amendment – new text in **red and underlined**)

§5-201. Appointment and status of guardian; findings and purposes

1. **Appointment and status.** A person becomes a guardian of a minor by parental appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location of the guardian or minor ward. This section does not apply to permanency guardians appointed in District Court child protective proceedings under Title 22, section 4038-C. If a minor has a permanency guardian, the court may not appoint another guardian without leave of the District Court in which the child protective proceeding is pending.

2. Findings and purposes. The Legislature makes the following findings concerning the appointment of guardians for minors.

A. The Legislature finds that the interests of minor children are usually best promoted in the child's own home. However, when parents are temporarily unable to care for their children, guardianship provides a process through which family members or other parties can be appointed by a court to provide care for children.

B. The Legislature finds that parents have a fundamental liberty interest in the care, custody and control of their children, and the State has an interest in preserving and promoting the welfare of children. The State may interfere with parents' fundamental constitutional rights only where there is an urgent reason or there are exceptional circumstances affecting the child that justify the intrusion.

C. The Legislature finds that decisions about raising a child made by a person other than the child's parent should be based on the informed consent of the parties unless there has been a finding of parental unfitness by clear and convincing evidence.

D. The Legislature finds that a parent's fundamental liberty interest in parenting the parent's child may not be infringed simply by proof that another person might provide a "better" living arrangement for the child.

E. The Legislature finds that safe and consistent contact between parents and children during a guardianship can preserve the parent-child relationship and facilitate possible reunification.

F. The Legislature finds that it is in the interest of all parties, including the children, that parents and proposed guardians have a shared understanding of the rights and responsibilities of the parties during the guardianship and the circumstances under which the parents resume care for their children.

APPENDIX B

(amend the proposed committee amendment – new text in **red and underlined**)

§5-205. Judicial appointment of guardian; procedure

(insert new subsection 2 and renumber the subsequent subsections)

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, paragraph 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.

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