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No. 145

H.P. 101

House of Representatives, January 21, 2021

An Act To Amend the Maine Uniform Probate Code

(EMERGENCY)

Reported by Representative HARNETT of Gardiner for the Probate and Trust Law Advisory Commission pursuant to the Maine Revised Statutes, Title 18-C, section 1-803, subsection 2.

Received by the Clerk of the House on January 19, 2021. Referred to the Committee on Judiciary pursuant to Joint Rule 308.2 and ordered printed.

ROBERT B. HUNT Clerk

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Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Maine Uniform Probate Code took effect September 1, 2019, but the new confidentiality of records provisions applicable to adult guardianships and conservatorships were delayed until January 1, 2021 to allow the development and adoption of rules governing those records by the Supreme Judicial Court; and

Whereas, the rules governing confidentiality of Probate Court records have not yet been adopted; and

Whereas, the effective date of the statutory provisions should be delayed until the rules are adopted and any appropriate statutory amendments can be made; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

- **Sec. 1. 18-C MRSA §3-108, sub-§1, ¶D,** as amended by PL 2019, c. 417, Pt. A, §4, is further amended to read:
 - D. An Regardless of whether the decedent dies before, on or after the effective date of this Code, an informal appointment or a formal testacy or appointment proceeding may be commenced more than 3 years after the decedent's death if no proceeding concerning the succession or estate administration has occurred within the 3-year period after the decedent's death, but the personal representative has no right to possess estate assets as provided in section 3-709 beyond that necessary to confirm title in the successors to the estate, and claims other than expenses of administration may not be presented against the estate;
- **Sec. 2. 18-C MRSA §5-308, sub-§4,** as enacted by PL 2019, c. 417, Pt. A, §30, is amended to read:
 - **4. Effective date.** This section takes effect January 1, 2021 2023.
- **Sec. 3. 18-C MRSA §5-409, sub-§4,** as enacted by PL 2019, c. 417, Pt. A, §62, is amended to read:
 - **4. Effective date.** This section takes effect January 1, 2021 2023.
- **Sec. 4. 18-C MRSA §5-423, sub-§2, ¶E,** as amended by PL 2019, c. 417, Pt. A, §80, is further amended to read:
 - E. An annual credit report of the individual subject to conservatorship and, to To the extent feasible, a copy of the most recent reasonably available financial statements evidencing the status of bank accounts, investment accounts and mortgages or other debts of the individual subject to conservatorship, with all but the last 4 digits of the account numbers and the individual's social security number redacted, and, if ordered by the court, a credit report of the individual subject to guardianship;
 - **Sec. 5. 18-C MRSA §5-431, sub-§8,** as enacted by PL 2017, c. 402, Pt. A, §2 and affected by PL 2019, c. 417, Pt. B, §14, is amended to read:

- **8. Safeguard rights of individual.** Unless the court otherwise orders for good cause, before terminating <u>or modifying</u> a conservatorship, the court shall follow the same procedures to safeguard the rights of the individual subject to conservatorship that apply to a petition for conservatorship.
- **Sec. 6. 18-C MRSA §8-301, sub-§2, ¶A-1,** as amended by PL 2019, c. 598, §8, is further amended to read:
 - A-1. The intestate succession provisions of Article 2, Part 1, Subpart 1, the elective share provisions of Article 2, Part 2 and, the exempt property and allowances provisions of Article 2, Part 4 and the wrongful death provisions of section 2-807 apply to the estates of decedents who die on or after the effective date;
- **Sec. 7. Retroactivity.** Those sections of this Act that amend the Maine Revised Statutes, Title 18-C, section 5-308, subsection 4 and section 5-409, subsection 4 apply retroactively to January 1, 2021.
- **Emergency clause.** In view of the emergency cited in the preamble, this legislation takes effect when approved.

16 SUMMARY

This bill contains recommendations of the Probate and Trust Law Advisory Commission pursuant to the Maine Revised Statutes, Title 18-C, section 1-803, subsection 2.

1. This bill amends Title 18-C, section 3-108 to resolve an ambiguity as to whether the provision applies to decedents who died prior to the effective date of Title 18-C.

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.

- 2. 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.
- 3. This 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.
- 4. This 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.

5. This 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 2 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.