MEMORANDUM

To: Maine Legislature Joint Standing Committee on Judiciary

From: Maine Family Law Advisory Commission

Date: January 22, 2019

Re: Proposal for project to study certain adoption and guardianship questions under the Maine Uniform Probate Code

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The 128th Legislature enacted Public Law 2017, Chapter 402 "An Act to Revise and Recodify the Maine Probate Code," which includes several revisions to the minor guardianship provisions (Maine Uniform Probate Code (MUPC) Article 5, Part 2) and the Maine Adoption Act (MUPC Article 9) based on recommendations made by the Maine Family Law Advisory Commission (FLAC). The MUPC has an effective date of July 1, 2019. FLAC anticipates that an "errors and omissions" bill regarding the new MUPC will come before the 129th Maine Legislature's First Regular Session.

FLAC requests that the Legislature include language in that bill directing FLAC to study and provide recommendations on three questions concerning minor guardianship and adoption. Two of the questions concern the Adoption Act as it applies in two contexts: private termination of parental rights and competing adoption petitions. Such matters have been the subject of recent Maine Supreme Judicial Court opinions, and FLAC would like the opportunity to develop specific recommendations for consideration by the Legislature in the Second Regular Session to address concerns raised in recent cases.

In addition, FLAC would also like to study a difficult question that Maine Probate and District Courts occasionally face which is whether and how to award, in conjunction with terminating a guardianship of minor, specific rights of contact between the minor and the former guardian where there is a particularly strong relationship between the two and where, absent such rights of contact, there is a likelihood that there would be a cessation of contact that would pose a risk of harm to the minor.

This memo provides background on those three issues and the reasons FLAC would like the opportunity to study them and to develop recommendations to amend the Maine Uniform Probate Code.

Termination of Parental Rights in Adoption Proceedings

The Maine Adoption Act permits an adoption petitioner to file a petition to terminate the parental rights (TPR) of the child's parent if that parent does not consent to the adoption or join the petition. 18-A M.R.S.A. § 9-204.[1] These TPR petitions generally arise in one of the following contexts: a putative

[1] The Adoption Act provision currently provides, in part:

§9-204. Termination of parental rights

(a). A petition for termination of parental rights may be brought in Probate Court in which an adoption petition is properly filed as part of that adoption petition except when the District Court has exclusive jurisdiction over the child pursuant to Title 4, section 152, subsection 5-A.

father is initially identified during the adoption proceedings; a child's guardian wishes to adopt the child; or a child's parent co-petitions for adoption with a new spouse or partner (commonly referred to as "step-parent" adoptions).

FLAC examined this provision as part of its 2016 study of the parental rights and responsibilities provisions pursuant to Resolve 2015, c. 73, section 3. As part of its study, FLAC sought input from a range of stakeholders, many of whom raised concerns about the private TPR provisions of the Adoption Act. Some stakeholders questioned whether it was appropriate to employ the child protection TPR standard, 22 M.R.S. § 4005, in a private adoption proceeding with no state involvement. When a court determines whether to TPR a parent in a child protection case, there has already been a jeopardy finding, reunification efforts, and a cease reunification determination, all of which are TPR prerequisites in such actions. 22 M.R.S. §§ 4035, 4041(1-A), (2). Also, child protection proceedings often last longer than a year, and the resulting lengthy and detailed record can assist the court in its TPR determination. Private TPR determinations, by contrast, are made in a procedural context that lacks these preliminary steps and findings.

FLAC recommended—and the 128th Legislature adopted in Chapter 402—that the new MUPC revise the standard for termination of parental rights. Specifically, while current section 9-204(b) includes only a cross-reference to the child protection statute in Title 22, the MUPC (Title 18-C) section 9-204(3) spells out the TPR standard to be used by the court. The MUPC TPR standard is consistent with the Title 22 standard, except that it does not include the language set forth at 22 M.R.S.A. § 4055(1)(B)(2)(c) regarding the parent's failure to make a good faith effort to follow a reunification plan. It is unlikely that any such plan was ordered in the context of the adoption proceeding. A court cannot, as a practical matter, order reunification as a prerequisite (even if the statute required it) because the Department of Health and Human Services is not a party and the petitioners are likely not in a position to provide services to the parent.

The MUPC provision directs the court instead to consider "the extent to which the parent had opportunities to rehabilitate and to reunify with the child, including actions by the child's other parent to foster or to interfere with a relationship between the parent and child or services provided by public or non-profit agencies." 18-C M.R.S.A. §9-204(3)(B). This language permits a more appropriate and context-specific finding regarding the parent's opportunities and efforts to reunify with the child.

This change to the TPR standard, however, does not fully address the concerns about private TPR. It is challenging for a court to apply concepts such as "rehabilitate and reunify" in the absence of prior proceedings in which a parent had an opportunity and the services needed to do so. Stakeholders noted that it is particularly difficult to apply the TPR standard to a parent who has never been actively involved in the child's life but who now states they want to have a parental role. In some cases, the notification of the adoption proceeding and TPR may be the first time the father has learned of the current location or even the existence of a child.

(b). Except as otherwise provided by this section, a termination of parental rights petition is subject to the provisions of Title 22, chapter 1071, subchapter VI.

(c).The court may appoint a guardian ad litem for the child. The appointment must be made as soon as possible after the petition for termination of parental rights is initiated….

As some stakeholders observed, the objecting parent in most private TPR cases is not asking the court to remove the child from the petitioners' care or to deny the adoption petition; rather, they simply do not want their own connection to the child to be severed completely and permanently. Because of the "winner take all" orientation of the Adoption Act, however, the only way to prevent TPR is to object to the adoption itself.

The Maine Supreme Judicial Court has echoed many of the stakeholders' concerns about the private TPR process in a series of appellate opinions. Most recently, in the unanimous *per curiam* opinion in *Adoption of Isabelle T.*, 2017 ME 220, a step-parent adoption case in which the child's mother and step-father successfully petitioned to terminate the parental rights of the father, the Court noted the following:

> There is no state assertion of parental unfitness in private termination/adoption proceedings, and the Adoption Act provides fewer protections for parents than those provided in Title 22 child protection proceedings. Individuals facing the loss of their rights in Title 22 termination of parental rights proceedings are nearly always provided opportunities for rehabilitation and reunification before a court even considers the termination of their parental rights.
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> The Adoption Act, on the other hand, does not require—or even authorize—the court to consider rehabilitation or reunification efforts prior to terminating parental rights. A termination action litigated as part of a "private adoption," where the adoption petitioner—often one parent—seeks to terminate the parental rights of a nonconsenting parent to facilitate an adoption, requires only that the petitioner prove that the grounds for termination have been met in order for the court to permanently terminate that parent's legal rights to his or her child.
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> In a Title 22 child protection proceeding, the question of termination is addressed only after a court has decided that the parent's unfitness is so dire that the children must be removed from his or her care. And, even in those circumstances, the parent is nonetheless usually offered multiple opportunities to better his or her parenting abilities and reunify with the children through court-ordered and state-provided services.
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> Thus, application of the Adoption Act, as written, poses a substantial risk to fundamental parental rights that the court must respect by rigorous application of quality of evidence standards and procedural protections as we have articulated in opinions such as *Guardianship of Chamberlain*, 2015 ME 76, 118 A.3d 229.

Id. at ¶¶ 11-14 (internal citations omitted). The Law Court vacated the TPR of the father in that case because he "has had no opportunity to receive rehabilitative services, and … he has been prohibited from having contact with his children." *Id.* at ¶ 35. It also observed:

> In the private adoption setting, the permanency concerns that are typically present in state-initiated termination proceedings are not at issue. Here, the children are in a permanent living situation with their mother and stepfather, which, as all the parties testified, is not going to change regardless of the outcome of the termination and adoption processes.

Id. at ¶ 26.

A pending appeal in a pair of private adoption cases arising from Cumberland County Probate Court may provide another opportunity for the Law Court to address private TPR. On August 6, 2018, the Law Court called for amicus briefs to address the question of whether courts must or should follow certain procedures in private TPR cases and take measures such as making rehabilitation and reunification services available for the parent whose rights are at issue. The Court heard oral arguments in the cases on October 11, and an opinion could be issued at any time.

Thus, real questions exist about whether private TPR should remain in the Maine Adoption Act and, if so, whether current law sufficiently protects parents' rights and children's interests. The Law Court may rule in the pending appeals about the constitutional implications of the practice, but it will be for the Legislature to decide if it is good family law policy.

Competing Adoption Petitions

Maine's Adoption Act is silent on how a court should address competing petitions for adoption. Such petitions arise most commonly out of a Title 22 child protection matter brought by the Department of Health and Human Services in which both parents' rights were terminated and the permanency plan approved by the District Court for the child is adoption. The approved plan may make reference to a prospective adoption petitioner, who is usually the person with whom the child has been placed such as a foster parent or kinship caregiver, but it does not determine as a matter of law who should adopt the child.

Rather, the determination of who may adopt the child is made in a separate proceeding pursuant to the Maine Adoption Act. The person identified in the permanency plan must file a petition to adopt pursuant to 18-A/C M.R.S.A. § 9-301. If someone else wishes to adopt the child–such as a family member not named in the permanency plan–they may also file a petition to adopt. The Adoption Act sets no standing requirement for filing a petition to adopt and there is no limitation on how many petitioners may pursue adoption of the same child.

Until the enactment of the so-called Home Court Act, P.L. 2015, c. 460, which gives the District Court exclusive jurisdiction over adoptions if there is a pending matter involved the child (such as a child protection matter), the adoption proceeding also had to take place in a different court. This set up problematic scenarios such as where the child was the subject of proceedings in multiple courts: the District Court, in which the child protection matter was pending, as well as two different probate courts in which each of the competing petitions had been filed.

Now with the District Court having jurisdiction over both the child protection and adoption matters, there may be multiple petitions in one consolidated proceeding before the District Court. For example, in the recent case *Adoption of Parker J.*, 2018 ME 63, there was a single consolidated trial involving three competing petitioners: the maternal grandmother (who had served as the foster care placement), the paternal grandmother, and the maternal grandfather and his spouse.

The Adoption Act provides no guidance to a court on how to decide which petition to grant. Unlike the parental rights and responsibilities provisions in Title 19-A, the Adoption Act is framed in an "up or down" approach: either the petition meets the statutory requirements and therefore may be granted or it does not. 18-A M.R.S.A. § 9-308(a). The statutory language assumes that there is a single petition to

consider at one time, and it sets forth the requirements for *whether* to grant that petition, not how to decide *among* competing petitions, especially if all of them meet the basic qualifications to adopt, as in *Parker J*.

These cases are highly contentious and emotional, in part because of the impact of the court's decision to grant or deny a petition to adopt–the "winner take all" result noted above. The successful petitioner will have full parental rights to the child, including the decision whether to allow any post-adoption contact with the child's existing relatives or caregivers. And the unsuccessful petitioner has no right to contact with the child or to seek the same in a court proceeding. Courts and mediators have few middle-ground options to offer the parties in these cases.

A related potential source of conflict in an adoption proceeding concerns the role of the Department of Health and Human Services if the child is in DHHS custody at the time the adoption petition is filed, which is usually the case if a petition is filed in the context of a child protection proceeding. The Adoption Act at 18-A M.R.S.A. § 9-302(a)(3) provides that an adoption of a child in agency custody may be granted only if the agency, such as DHHS, consents to the adoption, or, if the agency does not consent, only if the court finds by a preponderance of the evidence that the "agency acted unreasonably" in withholding its consent. That provision includes four factors the court must consider when determining whether the consent was unreasonably withheld.

The implications of this language were addressed in Law Court opinions for the first time in *Adoption of Parker J.* and another 2018 case, *Adoption of Paisley*, ME 2018 19. Both appeals were from District Court decisions to grant an adoption, without the consent of the Department, to a petitioner who had filed a petition competing with that of the person who did have the Department's consent to adopt. In *Paisley*, the child's siblings' relatives sought to adopt the child with the consent of the Department, and the court granted the adoption instead to the child's foster parents. The other case was *Parker J.*, where the court granted the petition of the paternal grandmother rather than the maternal grandmother, who had the Department's consent. In *Paisley*, the Court affirmed the District Court's determination that the Department unreasonably withheld consent to the foster family. In *Parker J.*, the Court vacated the adoption decree due to a procedural error, and it did not address the question of the Department's consent at all. However, Justice Jabar, in a concurrence, described what he characterized as a "shortcoming" in § 9-302(a)(3) in that it "fails to adequately address the Department's obligation in cases where more than one suitable party petitions to adopt a child placed in the Department's custody." *Parker J.*, 2018 ME 63, ¶ 31 (J. Jabar, concurring).

Thus, there are two aspects of the Adoption Act that could provide more guidance to the Court in competing adoption matters. First, it may be beneficial to provide a court with specific standards and procedures to follow when a court must decide between multiple petitions, all of whom meet the basic qualifications for adoption. Relatedly, the Legislature may want to consider providing courts other tools to enable courts to minimize the extreme results in such cases and to facilitate mediated agreements, such as permitting post-adoption contact by relative caregivers. The second issue is whether to clarify the Adoption Act's provision regarding the Department's consent, or lack thereof, in the context of a proceeding with multiple petitions.

<u>Post-Termination Rights of Contact between a Former Guardian and Minor</u>

FLAC also has an interest in reviewing the question of what options are or should be available under Maine Law to confer authority to a District Court or Probate Court to order rights of contact between a former guardian of a minor and the minor when terminating the guardianship, such as when a parent resumes custody of the minor.

Under the MUPC, a guardianship order continues indefinitely, unless it is specifically time-limited, until one of the following events happens: "the minor's death, adoption, emancipation, marriage or attainment of majority,... the death, resignation or removal of the guardian or conservator[,] or upon termination of the guardianship or conservatorship." 18-C M.R.S.A. § 5-210(2), (3). A court may terminate the guardianship based on a petition. 18-C M.R.S.A. § 5-210(6), (7).

When the circumstances giving rise to the initial appointment of a guardian—such as a parent's illness, absence, incarceration, or housing instability—changes, a parent may seek to resume care and custody of the child. Most guardianships and created with the consent of the parent, and in many if not most instances, the parent and guardian (most often a child's close relative) can also agree when the child may be returned to the parent's care. It is unusual in such cases for the parties to return to court to ask the court to terminate the order; most likely, they will simply disregard the guardianship order. In those situations, the minor continues to have contact with the guardian after returning to the parent's home.

A far more difficult situation arises when the parent and guardian cannot agree whether the child should return to the parent's care. In such instances, a parent must file a petition to terminate the guardianship over the objection of the guardian. 18-C M.R.S.A. § 5-210(7). In ruling on the petition, the court does not compare the two competing parties and decide which should have custody of the child based on the child's best interest, as would be the case if the dispute were between two parents. *See* 19-A M.R.S.A. § 1653(3). This is because the parent and guardian are not on equal footing due to the parent's fundamental constitutional right to parent their child. The Law Court held in *Guardianship of David C.*, 2010 ME 136, ¶ 7, that, in light of the constitutional rights at stake, when a parent petitions to terminate a guardianship, the guardian opposing the termination must prove:

> 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 holding reflects the constitutional implications of continuing a guardianship over a parent's objection. *Id*. ¶ 6. The MUPC incorporates *David C.*'s holding: section 5-210 (7) provides that if a parent petitions for the termination of the guardianship and the guardian does not prove that the parent is currently unfit and the need for a guardianship continues, the court must terminate the guardianship.

In a high-conflict termination case where a parent is fit and able to resume care of the child, that parent may also indicate that they do not wish there to be contact between the former guardian and the child once the guardianship ends. If the guardianship appointment was in place for an extended period of time, there may be a risk that the child may suffer harm or trauma if their contact with a former guardian and caretaker is severed abruptly and entirely.

There are some tools available under the MUPC that enable courts to structure a guardianship termination to minimize any adverse impact on the child. Section 5-210(7) permits a court to make "any further order that may be appropriate." More specifically, section § 5-211 permits a court to order transitional arrangements, such as "rights of contact, housing, counseling or rehabilitation," if the court determines that such arrangements "will assist the minor with a transition of custody and are in the best interest of the minor." This provision carries forward the current law, with an additional sentence allowing a court to consider the child's "relationship with the guardian and need for stability" when evaluating a child's best interest in the context of ordering transitional arrangements for minors.

Therefore, a court may order rights of contact for a limited period of time to facilitate the minor's return to their parents if doing so is in the child's best interest. The court may appoint a guardian ad litem (GAL) to advise the court on specific transitional arrangements that would be in the child's best interest. 18-C M.R.S.A. § 5-212; *see also Guardianship of Zachariah Stevens*, 2014 ME 25, ¶¶ 4–7 (discussing GAL's recommendations for terminating the guardianship with transitional arrangements in light of young child's connection with his grandparents-guardians, who had cared for him since shortly after his birth). The court may also order the parties to mediate in good faith before a hearing on a petition to terminate, if such services are available at a reasonable fee or no cost. MUPC § 5-205(9). Ideally, the parties, assisted by a GAL, could agree on a transition plan. If they cannot agree, it's likely that any continued custody or rights of contact awarded to a former guardian pursuant to § 5-211 must be time limited rather than indefinite. The Law Court has never addressed the constitutional implications of post-termination contact rights of a former guardian ordered over the objection of parents.

Outside of the MUPC, Maine law includes a few provisions for affording rights of contact to non-parents. Most notably, the Grandparent Visitation Act, 19-A M.R.S.A., ch. 59 (§§ 1801–1806), enables a grandparent with a "sufficient existing relationship" with a grandchild to have rights of contact. Given that many guardians are also grandparents, an extended guardianship could give rise to the conditions conferring standing for a former guardian to petition for such rights under that statute.[2] However, this would require a guardian or former guardian to bring a separate petition, and probate courts do not have jurisdiction to award rights under that statute.

In addition, there is a provision in the parental rights and responsibilities statute at 19-A M.R.S.A. § 1653 that could potentially serve as a basis to award contact to a former guardian. Specifically, § 1653(2)(B) permits a court to "award reasonable rights of contact with a minor child to a 3rd person." However, it's unclear whether that provision could be applied outside of the context in which the court is addressing a family matter between the child's parents. The Law Court addressed this provision at some length in a recent opinion and held:

[2] Under 19-A M.R.S.A. § 1802(2), a "Sufficient existing relationship" is defined as "a relationship involving extraordinary contact between a grandparent and a child, including but not limited to *circumstances in which the grandparent has been a primary caregiver and custodian of the child for a significant period of tim*e." (emphasis added). This high standard reflects the procedural requirements serving as constitutional safeguards that are triggered "when a non-parent third party seeking to interfere with the fundamental right to parent"; a non-parent must affirmatively demonstrate "standing to commence the litigation sufficient to justify the interference that is created just by having to defend against such a petition." *Curtis v. Medeiro*s, 2016 ME 180, ¶ 15 (citing Law Court opinions addressing grandparent visitation and *de facto* parent matters).

> [B]efore a court may grant a third party contact with a child pursuant to 19–A M.R.S. § 1653(2)(B), the third party must file both a motion to intervene in the matter and his or her own motion seeking such contact. The motion for contact must—at a minimum—be accompanied by an affidavit that demonstrates, on a *prima facie* basis, the party's standing to interfere with the fundamental right to parent.

Curtis v. Medeiros, 2016 ME 180, ¶ 18. This suggests that there must be a pending matter in which a non-parent can seek to intervene and also file a motion for contact rights. Therefore, unless the guardianship termination occurs in conjunction with a divorce or parental rights matter, this provision is not likely to authorize a court to award rights of contact to a former guardian over the objection of a parent.

The closest analogy to the guardianship termination context is when a child returns to their parents after a period in foster care. Maine law provides no authority for a court to award rights of contact for former foster parents. However, given that child protection matters are time-limited due to the statutory requirements for achieving permanency, it is less likely that a child will be with foster parents for several years before returning a parent's care.

FLAC would like the opportunity to explore potential ways to expand the tools available to a court terminating a guardianship that will serve a child's interests while also respecting an objecting parent's fundamental constitutional rights. The goal would be to give the court the ability to mitigate or avoid harm or unnecessary trauma to a child who has a strong relationship with the guardian by providing some rights of contact between the former guardian and the child after the guardianship has been terminated so that the relationship can be preserved.

Proposal from FLAC

FLAC proposes to examine the three issues outlined above over the coming months. As part of this study, FLAC will review approaches taken by other states regarding these difficult, contested adoption and guardianship termination questions. FLAC will also seek input and ideas from stakeholders, including the Department of Health and Human Services and the Office of the Attorney General, as well as legal practitioners, mediators, and guardians *ad litem*.

FLAC will then prepare a report to be submitted to this Committee by December 1, 2019, which will include specific recommendations for amendments to the Maine Uniform Probate Code or other family law statues to be considered during the Second Regular Session.