

**MAINE PROBATE AND TRUST LAW ADVISORY COMMISSION**  
**Report to Maine Legislature**  
**Joint Standing Committee on Judiciary**  
**Re: LD 123**  
**“An Act To Recodify and Revise the Maine Probate Code”**

Introduction

The Probate and Trust Law Advisory Commission (“PATLAC”) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 123 (P.L. 2017, ch. 402), “An Act to Recodify and Revise the Maine Probate Code.”

LD 123 was enacted in the previous legislative session with an effective date of July 1, 2019. Part G, Sec. G-2 of LD 123 provides as follows:

**Sec. G-2. Legislation.** The joint standing committee of the 129th Legislature having jurisdiction over judiciary matters may report out legislation to the First Regular Session of the 129th Legislature to correct errors and inconsistencies created by recent legislation and this Act and address any additional issues raised in the recodification and revision of the Maine Probate Code.

As contemplated by Part G-2, Sec. G-2, PATLAC has identified the following errors or issues in the recodification and revision of the Maine Probate Code. PATLAC respectfully requests that the 129<sup>th</sup> Legislature make the following changes in LD 123 prior to the July 1, 2019 scheduled effective date.

Recommended Amendments

1. **Amend § 1-108** to include a cross reference to § 3-1201 (Collection of personal property by affidavit). § 3-1201 permits the collection of personal property by affidavit, without the appointment of a personal representative when the “value of the entire estate, wherever located, less liens and encumbrances, does not exceed \$40,000.” The \$40,000 threshold value in § 3-1201 is an increase from the \$20,000 threshold that has existed under the current Title 18-A since 2007. In order to avoid having the statutory threshold value for use of an affidavit to collect personal property become an outdated value, and to keep the threshold economically relevant, it makes sense to link the value to the cost of living adjustments in the same manner as done for the intestate share of a surviving spouse (§ 2-102), the homestead allowance (§ 2-402), exempt property (§ 2-403), and family allowance (§ 2-404). The suggested change to § 1-108(2) is as follows:

## **§ 1-108. Cost-of-living adjustment of certain dollar amounts**

**1. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Consumer Price Index" means the Consumer Price Index, Annual Average, for All Urban Consumers, CPI-U: U.S. City Average, All items, reported by the United States Department of Labor, Bureau of Labor Statistics, or its successor or, if the index is discontinued, an equivalent index reported by a federal authority or, if no such index is reported, "Consumer Price Index" means a comparable index chosen by the Bureau of Labor Statistics.

B. "Reference base index" means the Consumer Price Index for calendar year 2017.

**2. Automatic adjustment of amounts for inflation.** The dollar amounts stated in sections 2-102, 2-402, 2-403, ~~and~~ 2-405 and 3-1201 apply to the estate of a decedent who died in or after 2017, but for the estate of a decedent who died after 2018, these dollar amounts must be increased or decreased if the Consumer Price Index for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. The amount of any increase or decrease is computed by multiplying each dollar amount by the percentage by which the Consumer Price Index for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. If any increase or decrease produced by the computation is not a multiple of \$100, the increase or decrease is rounded down, if an increase, or up, if a decrease, to the next multiple of \$100, but for the purpose of section 2-405, the periodic installment amount is the lump-sum amount divided by 12. If the Consumer Price Index for 2018 is changed by the United States Department of Labor, Bureau of Labor Statistics, the reference base index must be revised using the rebasing factor reported by the Bureau of Labor Statistics or other comparable data if a rebasing factor is not reported.

2. **Amend § 2-807(2)** – Actions for wrongful death, to correct an incorrect cross-reference. As enacted, § 2-807(2) cross-references sections 2-102 and 2-103 of the Maine intestacy statutes. The correct cross-reference should be to the entirety of the Maine intestacy statutes, sections 2-102 through 2-113.

## **§ 2-807. Actions for wrongful death**

**1. Liability notwithstanding death.** Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person or the corporation that would have been liable if death had not ensued is liable for damages as provided in this section, notwithstanding the death of the person injured and although the death was caused under circumstances that amount to a felony.

**2. Wrongful death action; damages; limitations.** Every wrongful death action must be brought by and in the name of the personal representative or special administrator of the

deceased person, and is distributable, after payment for funeral expenses and the costs of recovery including attorney's fees, directly to the decedent's heirs without becoming part of the probate estate, except as may be specifically provided in this subsection. The amount recovered in every wrongful death action, except as specifically provided in this subsection, is for the exclusive benefit of the deceased's heirs to be distributed to the individuals and in the proportions as provided under the Maine laws of intestacy, in sections 2-102 through 2-113 and 2-103. The jury may give damages as it determines a fair and just compensation with reference to the pecuniary injuries resulting from the death. Damages are payable to the estate of the deceased person only if the jury specifically makes an award payable to the estate for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses or, in the case of a settlement, the settlement documents specifically provide for such an allocation to the estate for the same. In addition, the jury may give damages not exceeding \$500,000 for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress arising from the same facts as those constituting the underlying claim, to the persons for whose benefit the action is brought. The jury may also give punitive damages not exceeding \$250,000. An action under this section must be commenced within 2 years after the decedent's death, except that if the decedent's death is caused by a homicide, the action may be commenced within 6 years of the date the personal representative or special administrator of the decedent discovers that there is a just cause of action against the person who caused the homicide. If a claim under this section is settled without an action having been commenced, the amount paid in settlement must be distributed as provided in this subsection. A settlement on behalf of minor children is not valid unless approved by the court, as provided in Title 14, section 1605.

**3. Damages for conscious suffering.** Whenever death ensues following a period of conscious suffering, as a result of personal injuries due to the wrongful act, neglect or default of any person, the person who caused the personal injuries resulting in such conscious suffering and death is, in addition to the action at common law and damages recoverable therein, liable in damages in a separate count in the same action for such death, brought, commenced and determined and subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in subsection 2, separately found, but in such cases there is only one recovery for the same injury.

**4. Maine Tort Claims Act.** Any action under this section brought against a governmental entity under Title 14, sections 8101 to 8118 is limited as provided in those sections.

3. **Amend § 3-108** – time limits for probate, testacy, and appointment proceedings, by adding former Title 18-A, § 3-108(4) as a new paragraph D, and re-lettering the existing paragraphs D and E, as E and F respectfully. § 3-108(4) of Title 18-A is not a provision of the Uniform Probate Code but was added to the Maine Probate Code to address the situation where the defendant in a personal injury case dies after the accident (from unrelated causes), but the plaintiff does not learn of the death until after the 3 year “ultimate time limit” for commencing proceedings to appoint a personal representative. The provision was added to the Maine Probate Code to preserve the plaintiff’s right to recover from the deceased’s insurer. The omission of paragraph 4 of Title 18-A’s § 3-108 was inadvertent - - the intent was to have it carry forward as part of Title 18-C.

## **§ 3-108. Probate, testacy and appointment proceedings; ultimate time limit**

**1. Limitations period; exceptions.** An informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may not be commenced more than 3 years after the decedent's death, except:

A. If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;

B. Appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed at any time within 3 years after the conservator becomes able to establish the death of the protected person;

C. A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of 12 months from the informal probate or 3 years from the decedent's death;

D. Appropriate probate, appointment or testacy proceedings may be commenced in relation to a claim for personal injury made against the decedent by a person without actual notice of the death of the decedent at any time within 6 years after the cause of action accrues. If the proceedings are commenced more than 3 years after the decedent's death, any recovery is limited to applicable insurance;

~~E~~. 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; and

~~F~~. A formal testacy proceeding may be commenced at any time after 3 years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from a person other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.

**2. Limitations period inapplicable.** The limitations under subsection 1 do not apply to proceedings to construe probated wills or determine heirs of an intestate.

**3. Special provision regarding date of death.** In cases under subsection 1, paragraph A or B, the date on which a testacy or appointment proceeding is properly commenced is deemed to be the date of the decedent's death for purposes of other limitations provisions of this Code that relate to the date of death.

#### Conclusion

The Probate and Trust Law Advisory Commission therefore recommends the amendment of Title 18-C as noted above, with the amendments to take effect contemporaneous with Title 18-C's scheduled July 1, 2019 effective date.

Dated: February 22, 2019

Respectfully submitted,

Probate and Trust Law Advisory Commission

Judge William Avantaggio, Lincoln County Probate Court  
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Barbara Carlin, Esq.  
Cody Hopkins, AAG  
Jeffrey W. Jones, Esq.  
Justin LeBlanc, Esq., Vice-Chair  
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Judge Robert Washburn, Somerset County Probate Court