LD 1440

MAINE PROBATE AND TRUST LAW ADVISORY COMMISSION
Proposed Amendments to Title 4 and Title 18-C - Maine Uniform Probate Code
Joint Standing Committee on Judiciary

Introduction

The Probate and Trust Law Advisory Commission ("PATLAC") hereby submits the following proposed amendments to Title 4 and Title 18-C – the Maine Uniform Probate Code.

Recommended Amendments

1. **Amend Title 18-C, § 2-201(3)** to clarify that a marriage, for purposes of the elective share rights of a surviving spouse, includes a registered domestic partnership and a legal union that was validly formed in any state or jurisdiction and that provides substantially the same rights, benefits and responsibilities as a marriage.

   § 2-201(3) currently states:

   > **3. Marriage.** "Marriage," as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.

   Maine's elective share statute in Part 2 of Article 2 of the Maine Probate Code, provides a surviving spouse with the right to take an elective-share amount equal to 50% of the value of the marital-property portion of the augmented estate (see § 2-202(1)). The value of the marital-property portion of the augmented estate is a graduated percentage of the augmented estate based on the number of years the decedent and the surviving spouse were "married" to each other. The marital-property portion of the augmented estate is 3% for a marriage of less than one year and increases incrementally each year, reaching 100% for a marriage of 15 years or more. The value of the augmented estate is based on various factors, including the value of certain property transferred by the decedent during the "marriage" (see § 2-205(2) and (3)). Maine's elective share statute, which is modeled after the elective share provisions of the Uniform Probate Code, in its references to the "marriage" of the decedent and the surviving spouse, does not comport with Maine's non-uniform definition of "spouse" in § 1-201(54) that expands the definition of "spouse" beyond individuals who are "lawfully married."

   The Maine Probate Code's definition of "spouse" under § 1-201(54):

   > **54. Spouse.** "Spouse" means an individual who is lawfully married and includes registered domestic partners and individuals who are in a legal union that was validly formed in any state or jurisdiction and that provides substantially the same rights, benefits and responsibilities as a marriage.

Because the definition of "marriage" under § 2-201(3) is more restrictive than the definition of "spouse" under § 1-201(54), "marriage" references in Maine's elective share statute, including the determination of the marital-property portion of the augmented estate, which determination is based on the number of years the decedent and the surviving spouse were "married" to each other, create an ambiguity as to whether elective share rights in Maine are intended to apply to individuals who are registered domestic partners and individuals who are in a legal union that was validly formed in any state or jurisdiction and that provides substantially the same rights, benefits and responsibilities as a marriage.

To make elective share rights consistent with the Maine Probate Code's expansive definition of "spouse" under § 1-201(54), PATLAC recommends that § 2-201(3) be revised to read as follows:

> **3. Marriage.** "Marriage" or "married" as used in this Part ~~as it relates to a transfer by the decedent during marriage~~, means any marriage of the decedent to the decedent's surviving spouse, and includes a registered domestic partnership and a legal union that was validly formed in any state or jurisdiction and that provides substantially the same rights, benefits and responsibilities as a marriage.

2. **Amend Title 18-C, § 3-108(D)** to clarify that the homestead allowance (§ 2-402), exempt property (§ 2-403), and the family allowance (§ 2-404) are not to be paid by a personal representative appointed under § 3-108(D). As currently enacted, § 3-108(D) states that "claims other than expenses of administration may not be presented against the estate." The homestead allowance, exempt property, and the family allowance are all referred to under Part 4 of Article 2 as "rights" and as payments to which a surviving spouse or minor dependent children are "entitled." As such, the homestead allowance, exempt property, and the family allowance are not properly classified as claims. As a result, there is ambiguity as to whether a personal representative appointed under § 3-108(D) has an obligation to pay the homestead allowance, exempt property, and the family allowance. Because a personal representative appointed under § 3-108(D) "has no right to possess estate assets . . . beyond that necessary to confirm title in the successors to the estate," § 3-108(D) should be amended to make it clear that the homestead allowance, exempt property, and the family allowance are not intended to be, should not be, paid by a personal representative appointed under § 3-108(D).

PATLAC recommends that § 3-108(D be revised to read as follows:

> D. Regardless of whether the decedent dies before, on or after the effective date of this Code, an informal testacy or appointment proceeding 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 the personal representative shall not pay the homestead allowance, exempt property, or the family allowance;

3. **Amend Title 18-C, § 3-203(1)** to remove a surviving domestic partner of the decedent from the list of persons with priority for appointment as personal representative.

§ 3-203(1) currently states:

> **3-203. Priority among persons seeking appointment as personal representative**
>
> **1. Priority.** Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:
> A. The person with priority as determined by a probated will including a person nominated by a power conferred in a will;
> B. The surviving spouse of the decedent who is a devisee of the decedent;
> C. Other devisees of the decedent;
> D. The surviving spouse of the decedent;
> *E. The surviving domestic partner of the decedent;*
> F. Other heirs of the decedent;
> G. Forty-five days after the death of the decedent, any creditor; and
> H. Six months after the death of the decedent if no testacy proceeding have been held or no personal representative has been appointed, the State Tax Assessor upon application by the State Tax Assessor. (emphasis added)

The term "domestic partner" is defined in Title 1, § 72 (2-C):

> **2-C. Domestic partner.** "Domestic partner" means one of 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare.

The Maine Probate Code's definition of "spouse" under § 1-201(54) includes registered domestic partners:

> **54. Spouse.** "Spouse" means an individual who is lawfully married and includes registered domestic partners and individuals who are in a legal union that was validly formed in any state or jurisdiction and that provides substantially the same rights, benefits and responsibilities as a marriage.

As a result of a registered domestic partner being treated as a spouse under the Maine Probate Code, registered domestic partners have inheritance rights in intestacy under Part 1 of Article 2 (§ 2-101 et seq.). In contrast, unregistered domestic partners have no inheritance rights in intestacy. As a result, providing an unregistered domestic partner with priority over the decedent's heirs for appointment as personal representative creates an opportunity for an individual with no financial interest in the distribution of the estate to have control over the estate's assets. PATLAC recommends that an unregistered domestic partner be removed from the list of persons with priority for appointment as personal representative and that § 3-203(1) be revised as follows:

> **3-203. Priority among persons seeking appointment as personal representative**

1. Priority. Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

A. The person with priority as determined by a probated will including a person nominated by a power conferred in a will;

B. The surviving spouse of the decedent who is a devisee of the decedent;

C. Other devisees of the decedent;

D. The surviving spouse of the decedent;

~~E. The surviving domestic partner of the decedent;~~

E~~F~~. Other heirs of the decedent;

F~~G~~. Forty-five days after the death of the decedent, any creditor; and

G~~H~~. Six months after the death of the decedent if no testacy proceeding have been held or no personal representative has been appointed, the State Tax Assessor upon application by the State Tax Assessor. (emphasis added)

The removal of a surviving domestic partner from the list of persons with priority for appointment as personal representative will also require a counterpart revision of § 3-203(3) as follows:

3. Nomination and renunciation. A person entitled to letters under subsection 1, paragraphs B to E~~F~~ may nominate a qualified person to act as personal representative. Any person may renounce the person's right to nominate or to an appointment by appropriate writing filed with the court. When 2 or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them or in applying for appointment.

4. **Amend Title 18-C, § 5-319** to correct an error by omission in the existing statute. Maine adopted the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, with various modifications, as the current Article 5 of the Maine Probate Code. Article 5 contains provisions for the termination of the guardianship of a minor or the termination of a conservatorship upon the death of the minor or the individual subject to conservatorship.

§5-210. Modification or termination of guardianship; other proceedings after appointment

2. Termination of guardianship. *A guardianship of a minor terminates upon the minor's death*, adoption, emancipation, marriage or attainment of majority or as ordered by the court pursuant to this section.

§5-427. Death of individual subject to conservatorship

4. Distribution; discharge. *On the death of an individual subject to conservatorship, the conservator shall conclude the administration of the conservatorship estate* by distributing property subject to conservatorship to the individual's successors. Not later than 30 days after distribution, the conservator shall file a final report and petition for discharge.

§5-431. Termination or modification of conservatorship

1. Conservatorship for a minor. A conservatorship for a minor terminates on the earlier of:

. . .

D. Death of the minor.

2. Conservatorship for an adult. A conservatorship for an adult terminates on order of the court or when the adult dies.

Article 5 contains no counterpart provision for termination of the guardianship of an adult upon the death of the individual subject to guardianship. Maine's former Title 18-A contained § 5-306, which stated in relevant part, "The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward . . .." The omission of a counterpart provision in Article 5 for termination of the guardianship of an adult was an oversight. In response to an email inquiry from the PATLAC, on October 21, 2024 the chief legal counsel for the Uniform Law Commission indicated the omission of a counterpart provision in the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act for terminating the guardianship of an adult upon the death of the individual subject to guardianship was "an inadvertent oversight."

To remedy the inadvertent omission, PATLAC recommends that a new subsection A1 be added to § 5-319, inserted immediately before the existing subsection 1, and that subsection 1 be revised to read as follows:

§5-319. Termination or modification of guardianship for adult

A1. Termination on Death. The authority and responsibility of a guardian terminates upon the death of the adult subject to guardianship.

1. Petition for termination or modification. Except as provided in subsection A1, ~~A~~an adult subject to guardianship, the guardian for the adult or a person interested in the welfare of the adult may petition for:

5. **Amend Title 18-C, § 9-202(8) and (9)** to provide a procedure for a parent who resides (temporarily or permanently) outside the State of Maine to provide a surrender and release or a consent that complies with Maine law when the law of the state where the parent resides does not have a procedure that complies with current Maine statutory requirements. Currently, § 9-202(8) requires a parent who is outside the State of Maine to provide a surrender and release or a consent by appearing before a court of comparable jurisdiction in the state where the parent resides. However, some states do not require that a surrender and release or a consent be signed after appearing before a court. Rather, some states merely require that the surrender and release or consent be signed before a notary. A parent, who resides in a state that does not have a court procedure for advising the parent of the consequences of the surrender and release or consent, faces an impediment that current Maine law does not accommodate.

   To provide a procedural remedy for a parent who resides in a state without a court procedure for advising the parent of the consequences of the surrender and release or consent, PATLAC recommends that § 9-202(8) be amended and that new § 9-202(9) be added as follows:

8. Surrender and release or consent by court of comparable jurisdiction from another state. The court shall accept a surrender and release or a consent by a court of comparable jurisdiction in another state if the court receives an affidavit from a member of that state's bar or a certificate from that court of comparable jurisdiction stating that:

A. The party executing the surrender and release or the consent followed the procedure required to make a surrender and release or a consent valid in the state in which it was executed; and

B. The court of comparable jurisdiction advised the person executing the surrender and release or the consent of the consequences of the surrender and release or the consent under the laws of the state in which the surrender and release or the consent was executed.

The court shall accept a waiver of notice by a putative parent that meets the requirements of section 9-201, subsection 3.

9. Surrender and release or consent from another state without court of comparable jurisdiction. If a parent of a child resides in another state whose law does not provide for a court of comparable jurisdiction to advise the parent of the consequences of the surrender and release or the consent, then the surrender and release or the consent shall be approved pursuant to Sections 1 and 2 either in person, or after a motion, the court may approve a remote appearance by video conference.

6. **Amend Title 4, § 202** for consistency with 18-C, § 9-202(8) and the proposed new § 9-202(9).

Title 4, § 2-202 currently states:

§202. Oaths and acknowledgments

All oaths required to be taken by personal representatives, trustees, guardians, conservators, or of any other persons in relation to any proceeding in the probate court, or to perpetuate the evidence of the publication of any order of notice, may be administered by the judge or register of probate or any notary public. A certificate thereof, when taken out of court, shall be returned into the registry of probate and there filed. *When any person of whom such oath is required, including any parent acknowledging consent to an adoption, resides temporarily or permanently without the State, the oath or acknowledgment may be taken before and be certified by a notary public without the State, a commissioner for the State of Maine or a United States Consul.* (emphasis added)

Title 4, § 2-202 was adopted in 1979 and amended in 1981. The failure to revise the italicized language above when Title 18-C was enacted was likely an oversight because Title 4 was not

a focus when Title 18-C was being reviewed. To create consistency between Title 4, § 2-202 and Title 18-C, § 9-202, PATLAC recommends that Title 4, § 2-202 be amended as follows:

§202. Oaths and acknowledgments

All oaths required to be taken by personal representatives, trustees, guardians, conservators, or of any other persons in relation to any proceeding in the probate court, or to perpetuate the evidence of the publication of any order of notice, may be administered by the judge or register of probate or any notary public. A certificate thereof, when taken out of court, shall be returned into the registry of probate and there filed. When any person of whom such oath is required, ~~including~~excluding any parent executing a surrender and release or a consent under 18-C M.R.S. section 9-202~~acknowledging consent to an adoption~~, resides temporarily or permanently without the State, the oath or acknowledgment may be taken before and be certified by a notary public without the State, a commissioner for the State of Maine or a United States Consul.

Conclusion

The Probate and Trust Law Advisory Commission therefore recommends the amendment of Title 4 and Title18-C as noted above.

Dated: December 3, 2024

Respectfully submitted,

Probate and Trust Law Advisory Commission

- Justice Jennifer Archer, Maine Superior Court
- Judge William Avantaggio, Lincoln County Probate Court
- David J. Backer, Esq., Chair
- Barbara Carlin, Esq.
- Cody Hopkins, AAG
- Jeffrey W. Jones, Esq.
- Justin LeBlanc, Esq., Vice-Chair
- Marianna Putnam Liddell, Esq.
- Patricia A. Nelson-Reade, Esq.
- Judge Robert Washburn, Somerset County Probate Court