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Maine Family Law Advisory Commission

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

January, 1997

JAN 2 8 1999

STATE OF MAINE

DISTRICT COURT
DISTRICT TEN

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O Box 776
York, ME 03909-0776
207-363-1230

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March 13, 1997

Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

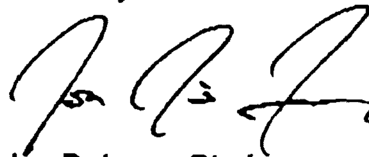
Re: **Maine Family Law Advisory Commission**

Dear Senator Longley and Representative Thompson:

I enclose the report of the Maine Family Law Advisory Commission regarding "An Act to Create a Family Division Within Maine's District Court", L.D. 1213. The Commission will next meet on March 18, 1997, at which time it will review the remaining legislation which has been referred to the Commission.

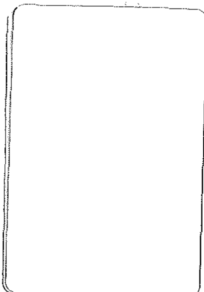
Please let me know if the Commission can be of any additional assistance.

Sincerely,



Jon D. Levy, Chairperson
Maine Family Law Advisory Commission

cc: Hon. Angus S. King, Governor
Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court
Hon. Roland Cole, Chief Justice, Maine Superior Court
Hon. S. Kirk Studstrup, Chief Judge, Maine District Court



AUG 6 1998

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

MARCH 13, 1997

The Maine Family Law Advisory Commission hereby reports its recommendations regarding **"An Act to Create a Family Division Within Maine's District Court", L.D. 1213.**

Introduction

Jurisdiction over Maine's various family related legal proceedings currently resides primarily in the Maine District Court.[1] One can already fairly characterize the District Court as Maine's Family Court. The District Court is, however, currently limited in the degree to which it can organize its docket in a manner which is responsive to the specific needs of family law cases due to limitations in the number of Judges, staff and facilities. If enacted, **"An Act to Create a Family Division Within Maine's District Court"** (hereinafter referred to as the "Act") would represent an important step towards the development of an integrated family court process in Maine.

The Act provides for the creation of a family division within the District Court, the employment of eight "Family Case Management Officers" (hereinafter "FCMOs") and additional staff to assist Maine's judges in the determination of family law disputes. It authorizes the Supreme Judicial Court to promulgate administrative orders and court rules which would give shape to the operation of the family division. The objectives of the Act include fostering "education for the parties, case management and referral services, and mediation and other alternate dispute resolution techniques."

The Commission's members met on March 7, 1997, and undertook a careful analysis of the Act. **By a vote of 8 in favor and 1 opposed, the Commission recommends the enactment of L.D. 1213, subject to the 9 specific**

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[1] The primary exception is actions for divorce over which the Superior Court and the District Court share original jurisdiction.

recommendations which follow.

Taken as a whole, the Commission's recommendations seek to more clearly define the educational,[2] case management[3] and adjudicatory functions of the FCMOs.[4] The Commission's members strongly support the education and case management functions and make certain recommendations intended to emphasize these functions. Deliberate case management of family law matters is valuable because family disputes are explosive by nature and the longer a case remains pending without intervention the greater the opportunity for conflict and tumult in the lives of families. Case management will also serve to encourage parties to pursue various forms of alternative dispute resolution in addition to mediation.

The recommendations also reflect the Commission's belief that the details of "case management", "case management orders" and numerous other issues associated with the establishment of the Family Division should be left to the Maine Supreme Judicial Court for development through its authority to issue rules and administrative orders, with input provided by an advisory committee appointed by the Chief Justice.[5]

The recommendations also propose narrowing the scope of the adjudicatory authority of the FCMOs in two areas - (1) contested interim orders of parental rights and responsibilities (other than child support)[6] and (2) contested final child support orders.[7] The recommendations propose expanding the authority of the FCMOs in two areas - (1) final orders on all issues when a party is in default and fails to appear for final hearing,[8] and (2) final orders on all issues when both parties consent to refer the

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[2] See Recommendation 2.

[3] See Recommendation 3.

[4] See Recommendations 5, 6, 7, 8 and 9.

[5] See Recommendation 1.

[6] See Recommendation 5.

[7] See Recommendation 7.

[8] See Recommendation 6.

dispute to the FCMO for final determination.[9] The Commission also recommends the delineation of parties' rights to seek review of the adjudicatory decisions of the FCMOs.[10]

Recommendation 1

The first paragraph of section 183 should be amended by the addition of the following sentence: "***The Chief Justice of the Supreme Judicial Court shall appoint a committee of Judges, Attorneys and Public Members to advise the Supreme Judicial Court in the implementation of the Family Division.***"

[Commission vote: 8 in favor, 1 opposed]

Comment: The Commissioner who voted in opposition to this recommendation believes that the recommendation should identify the Maine Family Law Advisory Commission as the advisory committee.

Recommendation 2

Add the following new subparagraph (D) to section 181(1) and redesignate the existing subparagraphs accordingly:

"D. Family case management officers shall be responsible for implementing the educational programs of the Family Division."

[Commission vote: 9 in favor, 0 opposed]

Recommendation 3

Add the following new subparagraph (1) to existing section 183(1)(D), and redesignate the existing subsections accordingly:

"(E)(1) Case management orders in actions involving divorce, legal separation, paternity or parental rights, and post-judgment proceedings arising out of these actions including, but not limited to, motions to modify and motions to enforce or motions for contempt."

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[9] See Recommendation 7.

[10] See Recommendation 9.

[Commission vote: 9 in favor, 0 opposed]

Comment: The Commission strongly supports the utilization of FCMOs to provide early intervention to actively manage family law matters in order to reduce conflict and facilitate prompt dispositions. Early case management will help to move cases through the system, and foster the prompt enforcement of existing court orders.

Recommendation 4

Subsection 183(1)(D)(1) which grants to the FCMOs the authority to enter interim child support orders should not be modified. In accordance with the preceding recommendation, subsection 183(1)(D)(1) should be redesignated as subsection 183(1)(E)(2).

[Commission vote: 7 in favor, 2 opposed]

Comment: The prompt determination of child support obligations is an important goal of the Act. Recommendation 9 establishes that if a party is dissatisfied with an FCMO's interim child support order, that party has the right to have it reconsidered by a Judge at the time of a final contested hearing who could then redetermine interim child support and grant relief retroactive to the date of the FCMO's order. Two members of the Commission oppose extending this adjudicatory authority to the FCMOs because of the potential role conflict it creates since the FCMO must simultaneously act as educator, case manager and adjudicator.

Recommendation 5

Subsection 183(1)(D)(2) should be amended as follows:

> *(E)(3)* Interim orders in actions involving divorce, legal separation, paternity or parental rights, including interim orders in post-judgment proceedings arisings out of these actions, ***except that a contested motion concerning interim parental rights and responsibilities, excluding interim child support orders, shall only be determined by the family case management officer if both parties consent to refer the issue or issues in dispute to the family case management officer for determination.***

[Commission vote: 7 in favor, 2 opposed]

Comment: In consideration of the tremendous personal, social and legal importance attached to interim decisions regarding the custody and care of minor children, it is the Commission's view that contested issues concerning parental rights and responsibilities other than child support should be reserved for Judges unless both parties agree to have the issues determined by an FCMO. This policy should be

reconsidered after the Family Division has been implemented and the Division's experience provides a basis to assess the advisability of granting unconditional authority to the FCMOs to make such decisions. Of the two Commissioners who oppose this recommendation, one believes that the use of FCMOs to determine contested interim parental rights and responsibilities without the consent of the parties should be authorized so that it can be tested on a pilot project basis. The second Commissioner believes that absent the consent of the parties, the FCMOs should only have adjudicatory authority over interim child support.

Recommendation 6

Subsection 183 (1)(D)(3) should be amended as follows:

> ***(E)(4)*** Final orders in any of the matters included in subparagraphs ***(2) or (3)*** when the proceeding is uncontested ***or when entry of default has been entered against a party and that party fails to appear at the final hearing. Family case management officers have the same discretion as a Judge to disapprove an agreement of the parties if it is determined to be contrary to law."***

[Commission vote: 9 in favor, 0 opposed]

Comment: The amendment authorizes the FCMOs to determine cases in which a party is in default. It also authorizes the FCMOs to reject agreements of the parties, regardless of consent, in the interests of justice. In some cases agreements of the parties may be contrary to law. For example, an agreement to pay no child support or an agreement which awards all marital property to one party should be carefully scrutinized to assure that there is legitimate basis for what appears to be an inequitable result.

Recommendation 7

Subsection 183(1)(D)(4) should be amended a follows:

> ***(E)(5)*** Final orders in a contested proceeding, ***so long as both parties consent to refer the issue or issues to the family case management officer for determination."***

[Commission vote: 5 in favor, 2 opposed, 2 abstain]

Comment: The use of FCMOs to decide contested final orders without the consent of the parties should be reconsidered after the Family Division has been implemented and the Division's experience provides a basis to assess the advisability of unconditionally using FCMOs to make such decisions. The recommendation also proposes, however, expanding the authority of the FCMOs to issue contested final orders on all issues, rather than just child support as proposed in the Act.

Recommendation 8

Subsection 183(1)(D)(5) should be amended as follows:

> ***(E)(6)*** Other actions ***involving family law matters*** assigned by the Chief Judge of the District Court.

[Commission vote: 8 in favor, 1 opposed]

Comment: The Commission believes that the Chief Judge should have the discretion contemplated by this subsection, but that it should be expressly tied to "family law matters." The one Commissioner in opposition opposes the inclusion of (E)(6) in the Act based upon the view that any redefinition of the FCMOs' authority should be subject to a full public debate.

Recommendation 9

Subsection 183(1)(E) should be revised as follows:

> ***F. The case management orders of the family case management officers are effective immediately, and are subject to review by a Judge as a referee's report. Interim orders in any of the matters included in subparagraphs (E)(2) and (E)(3) are effective immediately, and are subject to de novo review before a Judge at the final hearing. Final orders in any of the matters included in subparagraphs (E)(4) and (E)(5) are subject to appellate review in the same manner as any final order of the District Court. The family case management officer shall inform the parties of the rights of review established herein.***

[Commission vote: 8 in favor, 1 opposed]

Comment: This proposed revision is not intended to limit the authority of the FCMOs to reconsider or amend a case management order during the pendency of the case. The rationale for making the de novo judicial review available "at the final hearing" is to assure that parties do not get embroiled in the relitigation of interim matters since an immediate right of de novo review would encourage a dissatisfied party to immediately seek a de novo hearing before a Judge. Preserving a right of de novo review simultaneous with the final hearing assures that there will be an opportunity for review if desired by an aggrieved party, but at a single hearing at which all outstanding issues can be determined. The Commissioner who opposes this recommendation believes that a party aggrieved by a FCMO's decision should have an immediate right of de novo review.

Date: March _13_, 1997

Respectfully submitted:

MAINE FAMILY LAW ADVISORY COMMISSION

Hon. Jon D. Levy, Chairperson
Kristin A. Gustafson, Esq., Vice Chairperson
Michael J. Levey, Esq., Treasurer
Hon. Francis C. Marsano
Hon. Carol R. Emery
Naira B. Soifer, Esq.
Thomas J. Mato, Esq.
Bruce B. Kerr, Ph.D.
Kathleen E. Sullivan, M.S.W.

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Recommendation 4: Maine's parental rights and responsibilities statute should be revised so as to clarify the meaning of shared parental rights and responsibilities, and to require that the definition of shared parental rights and responsibilities be stated in court orders awarding shared parental rights and responsibilities. 12

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IV. APPENDIX

A. Proposed Rule 66 of the Maine Rules of Civil Procedure.

REPORT OF THE
MAINE FAMILY LAW ADVISORY COMMISSION

I. INTRODUCTION

The Maine Family Law Advisory Commission was established by the Maine Legislature in 1996 with the enactment of P.L. 1996, c. 694, Part B (codified at 19 M.R.S.A. Section 2001, et. seq., 19-A M.R.S.A Section 351, et. seq.). The Commission consists of nine members, all appointed by the Chief Justice of the Maine Supreme Judicial Court. The Commission was created "for the purpose of conducting a continuing study of the family laws of this State."[1]

By an Order dated July 10, 1996, Chief Justice Daniel E. Wathen appointed the following individuals to serve as Commissioners:

Hon. Francis C. Marsano, Maine Superior Court
Hon. Jon D. Levy, Maine District Court
Hon. Carol R. Emery, Maine Probate Court
Kristin A. Gustafson, Esq., Maine State Bar Association
Michael J. Levey, Esq., Maine State Bar Association
Naira B. Soifer, Esq., Legal Services Organizations
Thomas J. Mato, Esq., Maine Department of Human Services
Bruce Kerr, Ph.D., public member
Kathleen E. Sullivan, L.C.S.W., public member

The Commission's organizational meeting was held on September 6, 1996, at which time the Commission elected the following officers:

Hon. Jon D. Levy, Chairperson
Kristin A. Gustafson, Esq., Vice Chairperson
Michael J. Levey, Esq., Treasurer

The Commission met again on October 25 and November 22, 1996. The Commission conducted a day-long public hearing at the Maine State Office Building in Augusta, Maine, on December 11, 1996. The Commission developed and completed this written report at meetings conducted on January 3 and 10, 1997.

The Commission has been assisted in its efforts by District Court Judge Jessie B. Gunther and Administrative Court Judge Joyce K. Wheeler who have served as consultants. The Commission has also received assistance from Colleen McCarthy Reid,

[1] 19-A M.R.S.A Section 351.

Esq. and Margaret Reinsch, Esq. of the Office of Policy and Legal Analysis. Maine Superior Court law clerk Jennifer M. Callahan, Esq., researched various aspects of Maine's family laws at the request of the Commission. The Commission also gratefully acknowledges the support and encouragement of Chief Justice Daniel E. Wathen, and Chief Justice Wathen's secretary Linda McPherson. In addition, Rita K. Howard, Deputy Clerk of the York District Court, provided valuable administrative support to the Commission.

II. ISSUES STUDIED

Although the Commission is authorized to examine all aspects of Maine's family laws, its initial meetings and this report focus upon the issues it was specifically directed to consider by the Legislature in section A-16 of Laws 1996, c. 694, as follows:

A. Equal consideration and treatment of mothers and fathers as primary care providers;

B. Appropriate consideration and consequences of the relocation or intended relocation of the primary care provider to a place that disrupts the child's relationship with the other parent as well as the child's relationship with friends, school, community and other family;

C. Whether the importance of the roles of the mother and father in a child's life is recognized in law and practice; and

D. Any other issues relating to parental rights and responsibilities including child support, visitation and enforcement of court orders concerning parental rights and responsibilities.

Numerous judges, lawyers and members of the public have identified other issues and proposed statutory revisions to the Commission which require serious evaluation and consideration, and which are not addressed herein. The Commission looks forward to assisting the Legislature in evaluating any proposed legislation which comes before the Judiciary Committee in the area of family law in the current legislative session and in the future.

The Commission's study has included the examination of (1) relevant statutes from Maine and other jurisdictions; (2) relevant case decisions from Maine and other jurisdictions; (3) law review articles; (4) the report of the U.S. Commission on Child & Family Welfare, **Parenting our Children: In the Best Interest of the Nation** (1996); (5) the **Report of the Maine Commission on Gender, Justice, and the Courts** (1996); (6)

the **Report of the Maine Non-Adversarial Forum Committee** (1996); (7) oral and written statements provided by over 50 Maine citizens in connection with the public hearing held on December 11, 1996; (8) a written survey of Maine's District Court Judges; and (9) a written survey of members of the Family Law Section of the Maine State Bar Association. As an advisory body, the Commission has drawn heavily upon the experience and insights of its members in formulating the recommendations contained in this Report.

Section III of this Report sets forth the findings of the Commissions, organized in accordance with 6 specific recommendations to the Legislature. Recommendations 1, 3 and 4 relate to legislative issue A. Recommendations 4 and 5 relate to legislative issue B. Recommendations 1, 2, 3 and 4 relate to legislative issue C. Recommendation 6 relates to legislative issue D. The Report cites Title 19-A of the Maine Revised Statutes Annotated which takes effect on October 1, 1997.

III. FINDINGS AND RECOMMENDATIONS

Recommendation 1

The Protection from Abuse Statute, 19-A M.R.S.A. Section 4001, et. seq., should be revised so as to fully incorporate the "best interest of the child" standard as part of a custody determination made in a final protection order.

The cornerstone of Maine statutory and case law concerning custody of minor children is the "best interest of the child" standard.[2] The "best interest of the child" standard requires the Court to give primary consideration to the safety and well-being of the child, and to consider a variety of specific factors which bear on the physical and psychological well-being of the child.[3] The "best interest of the child" standard is neutral

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[2] The U.S. Commission on Child & Family Welfare found that 45 of the 50 States employ the best interest of the child standard for custody determinations. See U.S. Commission on Child & Family Welfare, **Parenting our Children: In the Best Interest of the Nation** at 17 (1996).

[3] 19-A M.R.S.A. Section 1653(3) provides as follows:

> The court, in making an award of parental rights and responsibilities with respect to a child, shall apply the standard of the best interest of the child. In making decisions regarding primary residence and parent-child contact, the court shall consider as primary the safety and well-being of the child. In applying this standard, the court shall consider the following factors:
>
> A. The age of the child;

as to each parent's gender.

Maine's "best interest of the child standard," which is codified in section 1653(3) as part of chapter 55 of Title 19-A, is shaped by three companion statutory provisions. First, section 1653(4) requires courts to give equal consideration of parents by prohibiting

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B. The relationship of the child with the child's parents
and any other persons who may significantly affect the child's welfare;

C. The preference of the child, if old enough to express
a meaningful preference;

D. The duration and adequacy of the child's current living arrangements and
the desirability of maintaining continuity;

E. The stability of any proposed living arrangements;

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

G. The child's adjustment to the child's present home,
school and community;

H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;

I. The capacity of each parent to cooperate or to learn to cooperate in child care;

J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;

K. The effect on the child if one parent has sole authority over the child's upbringing;

K-1. The existence of domestic abuse between the parents,
in the past or currently, and how that abuse affects:

1. The child emotionally; and
2. The safety of the child.

K-2. The existence of any history of child abuse by a parent; and

L. All other factors having a reasonable bearing on the
physical and psychological well-being of the child.

19-A M.R.S.A. Section 1653(3). Even before the statutory enactment of these specific factors, the Maine courts have long required a trial judge to consider all factors which reasonably bear on the physical and psychological well-being of a child when determining custody. <u>See</u> **Costigan v. Costigan**, 418 A.2d 1144, 1146 (Me. 1980).

the application of any gender based preferences.[4] Second, section 1653(5) prohibits the court from considering a parent's departure from the family residence when determining parental rights and responsibilities where the departure is associated with actual or threatened physical harm, was by agreement, or was at the request or insistence of the other parent.[5]
Third, section 1653(6) establishes specific "conditions of parent-child contact in cases involving domestic abuse" which courts must consider when making awards of parental rights and responsibilities.[6]

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[4] 19-A M.R.S.A. Section 1653(4) states as follows:

> **Equal consideration of parents.** The Court may not apply a preference for one parent over the other in determining parental rights and responsibilities because of the parent's gender or the child's age or gender.

[5] 19-A M.R.S.A. Section 1653(5) states as follows:

> **Departure from family residence.** The court may not consider departure from the family residence as a factor in determining parental rights and responsibilities with respect to a minor child when the departing parent has been physically harmed or seriously threatened with physical harm by the other parent and that harm or threat was causally related to the departure, or when one parent has left the family residence by mutual agreement or at the request of insistence of the other parent.

[6] 19-A M.R.S.A. Section 1653(6), contains detailed standards regarding provisions for parent-child contact in cases where the court has found domestic abuse, as follows:

> **Conditions of parent-child contact in cases involving domestic abuse.** The court shall establish conditions of parent-child contact in cases involving domestic abuse as follows.
>
> A. A court may award primary residence of a minor child or parent-child contact with a minor child to a parent who has committed domestic abuse only if the court finds that contact between the parent and the child is in the best interest of the child and that adequate provision for the safety of the child and the parent who is a victim of domestic abuse can be made.
>
> B. In an order of parental rights and responsibilities, a court may:
>
> (1) Order an exchange of a child to occur in a protected setting;
>
> (2) Order contact to be supervised by another person or agency;
>
> (3) Order the parent who has committed domestic abuse to attend and complete to the satisfaction of the court a domestic abuse intervention program or other designated counseling as a condition of contact;

The "best interest of the child" principle formulated in 19-A M.R.S.A. Section 1653(3)-(6) is gender neutral. It clearly establishes that Maine's courts must focus on the child's best interest without regard to either parent's gender when determining parental rights and responsibilities. The Maine Law Court has consistently construed Maine's statutes and Constitution as prohibiting the consideration of a parent's gender when determining that parent's parental rights and responsibilities.[7]

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(4) Order either parent to abstain from possession or consumption of alcohol or controlled substances, or both, during the visitation and for 24 hours preceding the contact;

(5) Order the parent who has committed domestic abuse to pay a fee to defray the costs of supervised contact;

(6) Prohibit overnight parent-child contact; and

(7) Impose any other condition that is determined necessary to provide for the safety of the child, the victim of domestic abuse or any other family or household member.

C. The court may require security from the parent who has committed domestic abuse for the return and safety of the child.

D. The court may order the address of the child and the victim to be kept confidential.

E. The court may not order a victim of domestic abuse to attend counseling with the parent who has committed domestic abuse.

F. If a court allows a family or household member to supervise parent-child contact, the court shall establish conditions to be followed during that contact. Conditions include but are not limited to:

(1) Minimizing circumstances when the family of the parent who has committed domestic abuse would be supervising visits;

(2) Ensuring that contact does not damage the relationship with the parent with whom the child has primary physical residence;

(3) Ensuring the safety and well-being of the child; and

(4) Requiring that supervision is provided by a person who is physically and mentally capable of supervising a visit and who does not have a criminal history or history of abuse or neglect.

G. Fees set forth in this subsection incurred by the parent who has committed domestic abuse may not be considered as a mitigating factor reducing the parent's child support obligation.

[7] See, e.g., **Snyder v. Talbot**, 589 A.2d 443, 443-44 (Me. 1991)(Trial judge's possible comments to the effect that all things being equal, custody should go to the mother, were, if made, "inappropriate and contrary to law."); **Jacobs v. Jacobs**, 507 A.2d 596 (Me. 1986)("Neither parent has any rights paramount

One important area of Maine law involving child custody decisions does not expressly require adherence to the "best interest of the child" principle as formulated in section 1653(3)-(6). Maine's Protection from Abuse Statute, **19-A M.R.S.A. Section 4001, et. seq.**, provides that when a court enters a final protection order the relief granted may include:

> G. Either awarding temporary custody of minor children or establishing temporary visitation rights with regard to minor children when visitation is determined to be in the best interest of the child, or both."[8]

The protection statute only requires adherence to the best interest of the child standard in connection with the determination of visitation rights, but not other issues. In addition, the "equal consideration of parents" requirement of section 1653(4), the "departure from family residence" provision set forth in section 1653(5), and the "conditions of parent-child contact in cases involving domestic abuse" contained in section 1653(6), do not apply to the protection statute.

In the 1995 Fiscal Year, slightly more than 1 out of every 3 domestic relations cases filed in the Maine District Court was a petition for protection from abuse.[9] If neither parent subject to a final protection order initiates a separate court proceeding in which parental rights and responsibilities is considered, the custody determination made as part of a final protection from abuse order will be the only judicial determination ever made concerning the parties' children. Although protection orders expire in two years or less, as a practical matter, the parenting arrangements established by them are often permanent, particularly in cases involving unmarried parents.

Given the importance of the custody determinations made in the hundreds of final protection orders issued by Maine's District Courts each year, the core elements of the

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to the rights of the other with reference to any matter affecting [their] children."); Lane v. Lane, 446 A.2d 418, 419 (Me. 1983)(Law Court rejects the "tender years presumption" which states that all things being equal, the mother is presumed to be the best parent for a child of tender years).

[8] 19-A M.R.S.A. Section 4007(1)(G). A custody award made in a final protection order is "temporary" in two respects: First, final protection orders are in effect for no more than two years, unless the Court orders the extension of an existing order. See 19-A M.R.S.A. Section 4007(2). Second, it is not uncommon for the parties to a protection order to be parties to a separate action (such as a divorce or action for the determination of parental rights and responsibilities) in which the court's order awarding parental rights and responsibilities is intended to supersede the earlier temporary custody order made in the protection action.

[9] See **Annual Report of the State of Maine Judicial Branch - Fiscal Year 1995** at 13. In FY 1995, there was a total of 14,647 domestic relations cases filed, of which 5,468 were petitions for protection from abuse.

best interest of the child standard should be made part of the protection statute. This change would make the protection statute reflect the existing practice in Maine's courts which already apply the best interest of the child approach in protection proceedings, notwithstanding its absence from the protection statute. It is particularly anomalous that the "conditions of parent-child contact in cases involving domestic abuse" set forth in 19-A M.R.S.A. Section 1653(6) do not currently apply in actions for protection from abuse. This anomaly should be cured.

The Commission accordingly recommends that the "best interest of the child" standard" as formulated in 19-A M.R.S.A. Section 1653(3)-(6) be made expressly applicable to custody orders entered in protection proceedings.[10]

The Commission further recommends that the Protection from Abuse statute be amended by the addition of a provision which expresses what is, in current practice, presumed: That the portion of an order awarding parental rights and responsibilities does not have res judicata or collateral estoppel effect in any separate proceeding involving an award of parental rights and responsibilities regarding the same child or children pursuant to chapter 55 of Title 19-A.[11] Protection orders are by their nature temporary. They are heard on short notice. Often the parties do not have attorneys, and witnesses are unavailable. It would not be fair to children or their parents to make conclusive findings in such a setting.

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[10] The Commission does not recommend that the remaining provisions of chapter 55 of Title 19-A and, in particular, the requirement contained in 19-A M.R.S.A. Section 1653(2) that the court formulate a detailed order concerning parental rights and responsibilities, be made applicable in protection proceedings. The courts typically conduct brief hearings in protection proceedings which focus upon allegations of abuse, and not upon the circumstances of the parties' children. The temporary custody and visitation portion of the court's order must be expressed on a form in just a few handwritten sentences. It is not reasonable to expect the courts to formulate a detailed order awarding parental rights and responsibilities which satisfies the requirements of 19-A M.R.S.A. Section 1653(2) when entering a custody order in a protection proceeding.

The Commission also does not recommend that 19-A M.R.S.A. Section 1653(3)-(6) be made applicable to orders concerning the care and custody of children made as part of an award of interim relief pursuant to 19-A M.R.S.A. Section 4006(5) in a protection proceeding. Such orders must be made solely upon the sworn allegations of the plaintiff and the court cannot be expected to consider any issues beyond whether it is "necessary to protect the plaintiff or minor child from abuse, on good cause shown in an ex parte proceeding, which the court shall hear and determine as expeditiously as practicable after the filing of a complaint." 19-A M.R.S.A. Section 4006(2).

[11] Res Judicata is the rule that a "final judgment or decree on [the] merits by [a] court of competent jurisdiction is conclusive of rights of [the] parties or their privies in all later suits on points and matters determined in [the] former suit. . . . The sum and substance of the whole rule is that a matter once judicially decided is finally decided." Black's Law Dictionary at 1470 (4th ed. 1968). Collateral Estoppel is the rule that the "collateral determination of a question by a court having general jurisdiction of the subject is conclusive in a subsequent action." Black's Law Dictionary at 327 (4th ed. 1968).

In order to achieve the foregoing recommendations, 19-A M.R.S.A. Section 4007(1)(G) should be revised as follows [the recommended language is printed in bold type]:

> G. Either awarding temporary custody of minor children or establishing temporary visitation rights with regard to minor children, **or both, as determined in accordance with the best interest of the child pursuant to 19-A M.R.S.A. Section 1653(3)-(6). The court's custody and visitation award shall not be binding in any separate action involving an award of parental rights and responsibilities pursuant to Title 19-A, chpt. 55.**

Recommendation 2

Maine's statutes should discourage the misuse of the protection from abuse process by allowing the courts to consider such misuse when making an award of parental rights and responsibilities.

There is a widely held perception in Maine that the Protection from Abuse statute is regularly misused by parents seeking to gain an upper hand in child custody contests. In **Campbell v. Campbell, 604 A.2d 33 (Me. 1992)**, the Maine Law Court undertook a comprehensive examination of the circumstances under which evidence of such misuse should be considered by a divorce court undertaking a best interest analysis pursuant to 19 M.R.S.A. Section 752(5). The Law Court concluded in **Campbell** as follows:

> [T]he parent's action is relevant to the divorce court's consideration only if the court finds by clear and convincing evidence both 1) that the parent willfully misused the protection process in order to gain a tactical advantage in the divorce proceeding, and 2) that in the particular circumstances of the divorcing couple and their children, that willful misuse tends to show that the acting parent will after the divorce have a lessened ability and willingness to work with the other parent in their joint responsibilities for the children.[12]

The Law Court's holding carefully balances the "strong public interest in having available

[12] 604 A.2d at 34.

an expeditious and effective means of protecting victims of domestic abuse,"[13] with the relevance of considering a parent's misuse of the protection process "only if those actions tend to show that the children's best interests will be adversely affected in the period after the divorce case has been concluded by entry of a final judgment."[14]

The Commission recommends that the list of factors for determining a child's best interest set forth in 19-A M.R.S.A. Section 1653(3) be amended by the addition of a specific factor which expressly allows the courts to consider a parent's willful misuse of the protection process as formulated in the **Campbell** decision. The codification of this factor will firmly establish that it is contrary to public policy for a parent to misuse the protection process to gain a tactical advantage in a custody case.

The Commission also recommends, however, that the courts should be directed to not treat a party's voluntary dismissal of a protection action, standing alone, as evidence of the wilful misuse of the protection from abuse process. Often actions for protection from abuse are dismissed by the complainant out of either fear of retaliation by the defendant or due to a hope that an abuser will reform.

The Commission accordingly recommends that the following factor be added to the best interest factors set forth in 19-A M.R.S.A. Section 1653(3):

> K-3. A parent's prior willful misuse of the protection from abuse process, 19 M.R.S.A. Section 761-A, et. seq., 19-A M.R.S.A. Section 4001, et. seq., in order to gain tactical advantage in a proceeding involving the determination of parental rights and responsibilities for a minor child. Such willful misuse shall only be considered if established by clear and convincing evidence, and if it is further found by clear and convincing evidence that in the particular circumstances of the parents and child, that willful misuse tends to show that the acting parent will in the future have a lessened ability and willingness to cooperate and work with the other parent in their shared responsibilities for the child. The Court shall articulate findings of fact whenever relying upon this factor as part of its determination of a child's best interest. The voluntary dismissal of a protection from abuse petition shall not, taken alone, be treated as evidence of the willful misuse of the protection from abuse process.

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[13] 604 A.2d at 37.

[14] 604 A.2d at 36.

Recommendation 3

The "best interest of the child" standard should not be replaced by a legal presumption which favors the equal division of a child's residential care between parents over other possible residential arrangements.

The "best interest of the child" standard recognizes that every family is unique and that trial judges should not presume that one arrangement for parental rights and responsibilities is inherently better than another. A court's order must award one of three possible formulations of parental rights and responsibilities:

> The order of the court must award allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to the best interest of the child. When the parents have agreed to an award of shared parental rights and responsibilities or so agree in open court, the court shall make that award unless there is substantial evidence that it should not be ordered. The court shall state in its decision the reasons for not ordering a shared parental rights and responsibilities award agreed to by the parents.[15]

In practice, the overwhelming majority of awards of parental rights and responsibilities by Maine courts provide for shared parental rights and responsibilities, with one parent designated as having the responsibility for the child's primary residential care and the other parent as having specified rights of parent-child contact.[16] Several individuals who spoke at the Commission's public hearing advocated for the adoption of a statutory presumption which would not only favor the award of shared parental rights and responsibilities in every case, but which would also favor the equal division of children's residential care between the parents.

Under existing Maine statutes, the courts are authorized to award an equal division

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[15] 19-A M.R.S.A. Section 1653(2)(A).

[16] This statement is based upon the experience of the Commission's members, and not upon empirical research.

of a child's residential care when the circumstances so warrant.[17] Although the courts should be free to make such awards when the circumstances warrant, the Commission finds that it would be contrary to the best interests of children if the courts were bound by any arbitrary presumption when it comes to an assessment of children's needs and interests. A child's residential schedule can be influenced by a myriad of factors, not the least of which is the stress that may be generated by having to shuttle between two households every week. In some cases, the distance between the parents' residences may render this residential arrangement impossible. Some children will, no doubt, benefit from such an arrangement, while others will not.

The Commission accordingly recommends against the adoption of a legal presumption which would favor the equal division of a child's residential care over other possible awards of parental rights and responsibilities.

Recommendation 4

Maine's parental rights and responsibilities statute should be revised so as to clarify the meaning of shared parental rights and responsibilities, and to require that the definition of shared parental rights and responsibilities be stated in court orders awarding shared parental rights and responsibilities.

As previously discussed, there are three possible awards of parental rights and responsibilities in Maine: "Allocated," "Shared" and "Sole".[18] The order of the Court

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[17] 19-A M.R.S.A. Section 1501(A)(1) (An award of "allocated parental rights and responsibilities may include a division of a child's primary physical residence."). See also, **Rodrigue v. Brewer**, 667 A.2d 605 (Me. 1995)(Held: Trial Court did not err in ordering that the primary physical residence of a minor child less than 3 years of age alternate between the mother and father every four weeks). Recommendation 4 of this report recommends that 19-A M.R.S.A. Section 1501(D)(1) be amended so as to provide that an "award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent, or a sharing of the child's primary residential care by both parents."

[18] These are defined as follows:

> 1. "Allocated parental rights and responsibilities" means that responsibilities for the various aspects of a child's welfare are divided between the parents, with the parent allocated a particular responsibility having the right to control that aspect of the child's welfare. Responsibilities may be divided exclusively or proportionately. Aspects of a child's welfare for which responsibility may be divided include primary physical residence, parent-child contact, support, education, medical and dental care, religious upbringing, travel boundaries and expenses and any other aspect

"must award allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to the best interest of the child . . .."[19] Of the three possible awards, only "allocated parental rights and responsibilities" expressly recognizes in its definition the possibility of a division of a child's residential care by stating: "Aspects of a child's welfare for which responsibility may be divided include primary physical residence . . .."[20]

The division between parents of responsibility for a child's residential care is more aptly described as "shared" rather than "allocated" because the parents will be, in fact, sharing the responsibility. Under current practice in Maine, however, the award of "shared parental rights and responsibilities" has become synonymous with an award of the primary residential care of the child to one parent and the award of rights of parent-child contact to the other. This understanding finds support in the statutory definition of the "best interest of the child" which is described, in part, in current law in terms of decisions "regarding primary residence and parent-child contact . . .."[21] In addition, "primary residence" and "primary residential care provider" are terms which play a prominent role in Maine's child support statute.[22]

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of parental rights and responsibilities. A parent allocated responsibility for a certain aspect of a child's welfare may be required to inform the other parent of major changes in that aspect.

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5. "Shared parental rights and responsibilities" means that most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal parental rights and responsibilities an both parents must confer and make joint decisions regarding the child's welfare.

6. "Sole parental rights and responsibilities" means that one parent is granted exclusive parental rights and responsibilities with respect to all aspects of a child's welfare, with the possible exception of the right and responsibility for support.

19 M.R.S.A. Sections 214(2)(A), (C) and (D), 581(2)(A), (C) and (D) and 752(2)(A), (C) and (D), 19-A M.R.S.A. Section 1501(1), (5) and (6).

[19] 19-A M.R.S.A. Section 1653(2)(D)(1) (emphasis added).

[20] 19-A M.R.S.A. Section 1501(1).

[21] 19-A M.R.S.A. Section 1653(3).

[22] 19 M.R.S.A. Section 312(7) and (8) defines these terms as follows:

7. Primary residence. "Primary residence"means the residence of a child where that child receives residential

Although Maine's existing statutes do not expressly favor awards of a child's primary residential care to one parent over awards dividing a child's residential care to both parents, the foregoing review demonstrates a greater emphasis upon the establishment of a single primary residential care provider. One can fairly speculate whether the definitional inadequacies of Maine's statutes concerning "shared parental rights and responsibilities" together with the support guidelines' emphasis upon one parent being the "primary residential parent", result in the Courts considering an equal division of responsibility for a child's residential care less frequently than they might otherwise. The Commission received testimony that many members of the public perceive the law as weighted in favor of awarding the residential care of a child to one parent, and against awarding a sharing of a child's residential care.

The Commission recommends that since the overwhelming majority of awards of parental rights and responsibilities in Maine are characterized as "shared", Maine's laws should unequivocally allow for the possibility of an award of shared responsibility for the child's residential care in such cases. This can be accomplished by revising 19-A M.R.S.A. Section 1653(1)(D)(1) as follows [the recommended new language is printed in bold type]:

> D. The order of the court awarding parental rights and responsibilities must include the following:
>
> > (1) Allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to the best interest of the child as provided in subsection 3. **An award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent, or a sharing of the child's primary residential care by both parents.**

For the same reasons, the Commission also recommends that 19-A M.R.S.A. Section 1653(3) - which defines the best interest of the child standard - be revised so as

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care for more than 50% of the time on an annual basis.

> **8. Primary residential care provider.** " Primary residential care provider" mean that party who provides residential care for a child for more than 50% of the time on an annual basis.

The child support statute is silent, however, as to how a court should determine child support in the event that both parents are providing the child's residential care on an equal basis. On the contrary, the support guidelines are premised upon the assumption that one parent is considered the child's "primary residential care provider", and the other parent is considered the "nonprimary residential care provider."

to remove the word "primary" from the description of residence, as follows [the recommended new language is printed in bold type]:

> The court, in making an award of parental rights and responsibilities with respect to a child, shall apply the standard of the best interest of the child. In making decisions regarding **the child's** ~~primary~~ residence and parent-child contact, the court shall consider as primary the safety and well-being of the child.

The Commission also received evidence that some members of the public and attorneys are confused by the meaning of shared parental rights, particularly when there is an award of primary residence to one parent. As currently written, the definition of "shared parental rights and responsibilities" is an abstraction which refers only to a child's "welfare" and fails to identify specific issues which parents should seek to share with one another:

> "Shared parental rights and responsibilities" means that most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal rights and responsibilities, and both parents confer and make joint decisions regarding the child's welfare.[23]

Nonresidential parents express uncertainty as to what decisions affecting a child's welfare the primary residential parent is required to confer and share with the nonresidential parent. Not surprisingly, it is not self-evident to many people what "aspects of a child's welfare" is intended to mean in everyday life.

The Commission accordingly also recommends that the definition of shared parental rights and responsibilities be expanded to make clear the importance of the role of the both parents in parental decision-making when rights and responsibilities are shared. Specifically, the Commission endorses adding the following two sentences to the existing definition set forth in 19-A M.R.S.A. Section 1501(5) [the recommended new language is printed in bold type]:

> "Shared parental rights and responsibilities" means that that most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal rights and responsibilities, and both parents confer and make joint decisions regarding the child's welfare. **Matters pertaining to a child's welfare include,**

[23] 19-A M.R.S.A. Section 1501(5).

but are not limited to, education, religious upbringing, medical, dental and mental health care, travel arrangements, child care arrangements and residence. Parents who share parental rights and responsibilities shall keep one another informed of any major changes affecting the child's welfare.

The Commission also supports a requirement that the definition of shared parental rights and responsibilities be included in every order awarding shared parental rights and responsibilities so as to inform the parties what the award means. Section 1653 of title 19-A presently contains a number of provisions which must be included in divorce judgments. The Commission recommends the addition of a new subsection (6) to section 1653(2)(D) as follows:

> (6) A statement of the definition of "shared parental rights and responsibilities" contained in 19-A M.R.S.A. Section 1501(5) if the order of the court awards shared parental rights and responsibilities.

The Commission has also examined whether Maine's child support statute should be amended so as to provide clear direction as to how child support should be determined when parent's share the primary residential care of a child on an equal basis.[24] Although the Commission finds that there is a need for a statute to address such situations, the Commission intends to study the question further before making a specific recommendation to the Legislature.

Recommendation 5

Maine's current approach for the determination of relocation cases which requires proof of a substantial change of circumstances before the Court undertakes a best interest of the child analysis should not be changed.

Under existing Maine law, a parent awarded the primary residential care of a child is free to change his or her and the child's residence without prior court approval, unless there is a court order in effect which provides otherwise. The majority of cases involving a relocating primary residential parent never make it to court because the parents are able to adjust to the child's new circumstances without resort to judicial intervention. In

[24] Currently, a court has the discretion to deviate from the presumption established by the child support guidelines when the "nonprimary residential care provider is in fact providing primary residential care more than 30% of the time on an annual basis." 19-A M.R.S.A. Section 2007(3)(A). The statute does not explain how child support should be determined when each parent is the child's primary residential care provider 50% of the time on an annual basis.

those instances in which the child's relocation is opposed by the other parent, either parent has the right to file a motion for modification of the existing custodial arrangement.[25] The Commission's survey of Maine District Court Judges revealed that, on average, a Maine District Court Judge will preside over two contested relocation cases each year. In those cases, the primary residential care of the child(ren) is ordered to remain with the relocating primary residential parent 85% of the time.

The legal standard for the determination of relocation cases was adopted by the Law Court in the decision of **Villa v. Smith**, **534 A.2d 1310 (Me. 1987), cert. denied. _____ U.S. _____, 112 S.Ct. 201, 116 L.Ed.2d 160 (1991).** In Villa the Law Court affirmed the District Court's post-divorce order refusing to change the primary custody of the parties' three minor children from the mother to the father, even though the mother was moving from Maine to California. The mother had remarried following the divorce and her impending move resulted from her second husband's transfer to California by the Navy. The Law Court held that the issues posed by a motion to modify child custody can be expressed in the single question: "Has there occurred since the prior custody order a change in circumstances sufficiently substantial in its effect upon the children as to justify a modification of the custody arrangement?" If so, the trial court is obligated to undertake a best interest analysis and to enter a new order governing parental rights and responsibilities.

In 1987 the Legislature enacted P.L. 1987, c.179, section 2 which establishes that: "The relocation, or intended relocation, of a child resident in this State to another state by a parent, when the other parent is a resident in this State and there exists an award of shared or allocated parental rights and responsibilities concerning the child, is a substantial change in circumstances."[26] Thus, an interstate move out of Maine automatically requires the court to undertake a best interest of the child analysis if a parent seeks modification of an award of parental rights and responsibilities by filing a motion. Intrastate moves within Maine are not addressed by the statute. In accordance with Villa, however, an intrastate move within Maine may require the court to undertake a best interest of the child analysis if the Court finds that the change in circumstances is "sufficiently substantial in its effect upon the children as to justify a modification of the custody arrangement."[27]

The standard governing relocation cases was more recently considered by the Law Court in **Rowland v. Kingman, 629 A.2d 613, 616 (Me. 1992)**, in which the Court discussed the application of the best interest analysis in a relocation case as follows:

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[25] 19-A M.R.S.A. Section 1653(10).

[26] 19-A M.R.S.A. Section 1657(2)(A).

[27] 534 A.2d at 1312.

> Factors to be considered by the court in applying the standard of the best interest of the child are set forth in section 752(5). The provisions of section 725(5) [sic] do not foreclose the court's consideration of either parent's decision relating to the residence of that parent and any minor child. However, we find nothing in the statutes governing parental rights and responsibilities with respect to a minor child of divorced parents, or in our case law to support Rowland's contention that the court should defer to the decision of that parent with whom the child has primary physical residence in determining the best interests of that minor child.

Since a Maine court deciding a relocation case is required to examine all of the factors relevant to determining a child's best interest, the court will by necessity consider evidence of the effect the relocation will have on the child's relationship with each parent, friends and other family members, as well as the child's adjustment to present school and community. The trial judge is not permitted to apply any presumptions in favor of or against relocation. Rather, Maine's approach focuses the court on the singular inquiry of what residential arrangement will serve the child's best interest in view of then current circumstances.

There are a number of alternative approaches to relocation cases employed in other jurisdictions. In Illinois, the burden of proving that the relocation is in the best interest of the child is placed upon the party seeking to relocate.[28] At the other end of the spectrum, California holds that a custodial parent has a presumptive right to change a child's residence.[29] The Commission's survey of Maine's District Court Judges disclosed unanimous support for Maine's current approach since, in the words of one judge, "it allows the court to get right to the best interest of the child issue," and, in the words of another judge, it "allows case-by-case analysis with a familiar standard." All but one of the survey respondents opposed the adoption of a presumption similar to California's. A survey of members of the M.S.B.A. Family Law Section revealed 2 to 1 opposition to primary residential parents having a presumptive right to change a child's residence and majority opposition to placing the burden of proving a relocation is in the child's best interest on the relocating parent.

The Commission concludes that Maine's current approach appropriately maintains the primacy of the child's best interests in relocations situations, since (1) it requires the court to focus on the child's best interest based upon that child's particular circumstances, and (2) it does not require the court to apply any arbitrary legal presumptions which

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[28] Ill. Ann. Stat., ch. 40, para. 609.

[29] **In re Marriage of Burgess**, 913 P.2d 473 (Cal. 1996).

presume that a relocation is or is not in a child's best interest. The Commission recommends that the Legislature permit the **Villa v. Smith** holding to remain the standard governing the determination of relocation cases in Maine.

Recommendation 6

Maine needs to establish an effective procedure for the expeditious enforcement of court orders awarding parental rights and responsibilities.

Every Commission member and numerous speakers at the public hearing identified enforcement of court orders relating to issues other than child support as a critical matter requiring immediate improvement. At present, a court's order is often only as good as the willingness of a party to follow the order. Despite current provisions in the law to obtain enforcement of court orders, the mechanism to obtain compliance is complicated, time-consuming, expensive and, particularly in some cases where a parent's contact with a child is obstructed by the other parent, ineffective. Maine lacks a concrete and uniform procedure which permits the prompt consideration of alleged violations of a parent's parental rights and responsibilities.

In recent years Maine has developed innovative mechanisms for the collection of child support.[30] The State's widely publicized campaign to improve child support enforcement has not been accompanied by a concerted effort to assist nonresidential parents in the enforcement of parent-child contact rights. Not surprisingly, some nonresidential parents who faithfully pay their child support perceive the State's failure to adopt as active a posture in the enforcement of parent-child contact rights as it has with the collection of child support as evidence of an unfair bias.

The Commission concludes that existing procedures for enforcement of court ordered parental rights and responsibilities are inadequate. A joint committee of the Criminal Rules Advisory Committee and the Civil Rules Advisory Committee has spent the past two years addressing the procedural impediments to enforcing existing court orders. Recently, each Committee submitted proposed amendments to the Rules of Criminal Procedure and Rules of Civil Procedure governing contempt proceedings. The Commission has studied the proposed Civil Rule 66 (which appears in Appendix "B") and believes that this Rule, if adopted by the Maine Supreme Judicial Court, may significantly improve access to the courts to enforce orders and provide guidance to the trial courts in ruling on contempt matters. As proposed, Rule 66 lends itself to the creation of easy to use forms which can be made available to pro se litigants through the Clerks' offices.

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[30] See 19-A M.R.S.A. Sections 2101 - 2669.

The promulgation and implementation of Rule 66 holds the possibility of a clear and expeditous procedure for obtaining the enforcement of court orders awarding parental rights and responsibilities. The Commission therefore recommends that the Legislature postpone its consideration of new statutory procedures for the enforcement of court orders awarding parental rights and responsibilities. In the event proposed Rule 66 is adopted by the Maine Supreme Judicial Court, the Commission intends to review its impact and will report to the Legislature. The Commission will also evaluate and, perh propose legislation to improve the enforcement process.

Date: January _______, 1997

Respectfully submitted:

MAINE FAMILY LAW ADVISORY COMMISSION

Jon D. Levy, Chairperson
Kristin A. Gustafson, Vice Chairperson
Michael J. Levey, Treasurer
Francis C. Marsano
Carol R. Emery
Naira B. Soifer
Thomas J. Mato
Bruce Kerr
Kathleen E. Sullivan

Appendix

M.R. Civ. P. 66 (Proposed)

4. Rule 66 of the Maine Rules of Civil Procedure is adopted to read as follows:

RULE 66. CONTEMPT PROCEEDINGS

(a) In General.

(1) *Purpose and Scope.* This rule establishes procedures to implement the inherent and statutory powers of the court to impose punitive and remedial sanctions for contempt. This rule shall not apply to the imposition of sanctions specifically authorized by other provisions of these rules or by statute.

(2) *Definitions.* For purposes of this rule:

(A) "Contempt" includes but is not limited to:

(i) disorderly conduct, insolent behavior, or a breach of peace, noise or other disturbance which actually obstructs the administration of justice or which diminishes the court's authority or dignity; or

(ii) failure to comply with a lawful judgment, order, writ, subpoena, process, or formal instruction of the court.

(B) A punitive sanction is a sanction imposed retrospectively to punish a completed act of contempt.

(C) A remedial sanction is a sanction imposed to coerce the termination of an ongoing contempt or to compensate a party aggrieved by contempt.

(D) A summary proceeding is as described in subdivision (b).

(E) A plenary proceeding is as described in subdivisions (c) and (d).

(F) "Court" means a Judge of the District, Probate or Administrative Court or a Justice of the Superior or Supreme Judicial Court.

(5) *Designation of Appropriate* [illegible] moving party must designate the nature of the contempt claimed and must designate the proceeding as one under subdivision (b), (c), or (d) of this rule, as appropriate.

(b) Summary Proceedings.

(1) *Applicability.* A summary proceeding under this subdivision may be used when punitive or remedial sanctions are sought for contempt occurring in the presence of the court and actually seen or heard by the court.

(2) *Procedure.*

(A) *Initiation; Notice.* A summary proceeding is initiated by the court on its own motion or at the suggestion of a party. The proceeding must be initiated immediately after the alleged contempt has occurred or as soon thereafter as practicable. At that time, the court shall inform the alleged contemnor of the accusation of contempt.

(B) *When Conducted.* A summary proceeding shall be conducted by the court immediately after the alleged contempt has occurred or after a delay no longer than necessary to prevent further disruption or delay of ongoing proceedings.

(C) *Opportunity to be Heard.* Before imposition of sanctions the court shall allow the alleged contemnor an opportunity to be heard in defense and mitigation.

(D) *Order.* If the court finds that the alleged contemnor committed the contempt, the court shall issue and record a signed order that:

(i) specifies the conduct constituting the contempt;

(ii) certifies that the conduct constituting contempt occurred in the presence of a judge or justice in open court or chambers and was seen or heard by that judge or justice;

(iii) contains the judgment and sanction imposed.

(E) *Punitive Sanctions.* The court may impose a punitive sanction that is proportionate to the conduct constituting the contempt and that consists of either imprisonment for a definite period not to exceed 30 days or a fine of a specified amount not to exceed $1000 or a combination of imprisonment and fine.

(G) *Appeal.* A person upon whom a punitive or remedial sanction has been imposed in a proceeding brought under this subdivision may seek appellate review as provided by the Maine Rules of Criminal Procedure.

(c) Plenary Proceedings for Punitive Sanctions.

(1) *Applicability.* A plenary proceeding under this subdivision must be used when punitive sanctions are sought for contempt occurring outside the presence of the court. A proceeding under this subdivision may be used when punitive sanctions are sought for contempt occurring in the presence of the court.

(2) *Procedure.* A proceeding under this subdivision shall proceed as provided by the Maine Rules of Criminal Procedure for the prosecution of a Class D crime, except as hereinafter provided.

(A) *Initiation.* A proceeding under this subdivision is initiated by the court on its own motion or at the suggestion of a party.

(B) *Request for Prosecution.* The court may request that an attorney for the state prosecute the proceeding. If that request is refused, the court may appoint a disinterested member of the bar to act as prosecutor.

(C) *Complaint.* The prosecuting attorney shall draft a complaint and summons which shall be served upon the alleged contemnor in accordance with the Maine Rules of Criminal Procedure. The complaint shall

(i) state the essential facts constituting the contempt and whether remedial as well as punitive sanctions are sought; and

(ii) specify the time and place of a hearing.

(D) *Trial.* The date of trial shall allow the alleged contemnor a reasonable time for the preparation of a defense. Trial shall be to the court, except that, if the court concludes that in the event of an adjudication of contempt a punitive sanction of imprisonment or a serious punitive fine may be imposed, trial shall be to a jury unless waived by the alleged contemnor.

(E) *Failure to Appear.* An alleged contemnor who fails to appear as required may be arrested pursuant to a bench warrant.

(3) *Punitive Sanctions.* The court may impose a punitive sanction that is proportionate to the conduct constituting the contempt. In

order to impose a punitive sanction, the court must find beyond a reasonable doubt that

(A) the alleged contemnor has intentionally, knowingly or recklessly failed or refused to perform an act required or has done an act prohibited by a court order; and

(B) it was within the alleged contemnor's ability to perform the act required or refrain from doing the prohibited act.

(4) *Remedial Sanctions.* The court may impose such remedial sanctions as specified in subdivision (d) of this rule.

(5) *Appeal.* A person upon whom a punitive or remedial sanction has been imposed in a proceeding brought under this subdivision may seek appellate review as provided by the Maine Rules of Criminal Procedure.

(d) Plenary Proceedings for Remedial Sanctions.

(1) *Applicability.* Unless remedial sanctions are sought in plenary punitive proceedings under subdivision (c) of this rule, a plenary remedial proceeding under this subdivision must be used when remedial sanctions are sought for contempt occurring outside the presence of the court. A proceeding under this subdivision may be used when remedial sanctions are sought for contempt occurring in the presence of the court.

(2) *Procedure.*

(A) *Initiation.* A proceeding under this subdivision, or a request for remedial sanctions in a proceeding under subdivision (b) or (c) of this rule, is initiated by the court on its own motion or at the suggestion of a party. The motion of a party shall be under oath and set forth the facts that give rise to the motion or shall be accompanied by a supporting affidavit setting forth the relevant facts.

(B) *Notice.* The court shall set the matter for hearing on oral testimony, depositions, or affidavits and shall order that a contempt subpoena be served on the alleged contemnor. The subpoena shall set forth the title of the action and the date, time, and place of the hearing and shall allow the alleged contemnor a reasonable time to file an answer and prepare a defense. The

subpoena may include an order to request documents requested by the moving party. The subpoena shall contain a warning that failure to obey it may result in arrest and that if the court finds the alleged contemnor to have committed contempt, the court may impose sanctions that may include fines and imprisonment, or both.

(C) *Service.* The contempt subpoena shall be served with a copy of the court order or of the motion and any supporting affidavit upon the alleged contemnor. Service upon an individual shall be made in hand by an officer qualified to serve civil process. Service upon a party that is not an individual shall be made by any method by which service of a civil summons may be made. Service shall be completed no less than 10 days prior to the hearing.

(D) *Hearing.* All issues of law and fact shall be heard and determined by the court. The alleged contemnor shall have the right to be heard in defense and mitigation. The alleged contemnor may be represented by retained counsel but shall have no right to appointed counsel. In order to make a finding of contempt, the court must find by clear and convincing evidence that:

(i) the alleged contemnor has failed or refused to perform an act required or continues to do an act prohibited by a court order and

(ii) it is within the alleged contemnor's power to perform the act required or cease performance of the act prohibited.

(E) *Failure to Appear.* An alleged contemnor who fails to appear as required may be arrested pursuant to a bench warrant and may be subject to a default judgment.

(F) *Order.* In the event that the court makes a finding of contempt, the court shall issue an order which specifies the sanction to be imposed.

(G) *Appeal.* A person upon whom a remedial sanction has been imposed in a proceeding brought under this subdivision may seek appellate review as provided by the Maine Rules of Civil Procedure.

STATE OF MAINE
DISTRICT COURT
DISTRICT TEN

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O Box 776
York, ME 03909-0776
207-363-1230

January 27, 1997

Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

RECEIVED
JAN 30 1997
OPLA

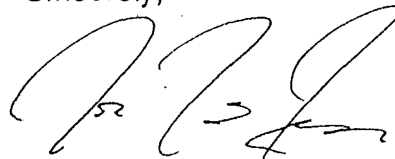
Re: **Maine Family Law Advisory Commission**

Dear Senator Longley and Representative Thompson:

I am pleased to enclose the first report of the Maine Family Law Advisory Commission. The report sets forth six specific recommendations in response to the issues the Commission was directed to consider by the Legislature in section A-16 of Laws 1996, c. 694. The Commission will soon submit to the Judiciary Committee legislation which, if enacted, would implement the Commission's recommendations.

There are numerous pending legislative proposals concerning family law which are not addressed in this first report. The Commission stands ready to assist the Judiciary Committee in evaluating proposed legislation related to family law issues. I will contact you soon to discuss how the Commission can best assist your Committee.

Sincerely,



Jon D. Levy, Chairperson
Maine Family Law Advisory Commission

cc: Hon. Angus S. King, Governor
Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court
Hon. Roland Cole, Chief Justice, Maine Superior Court
Hon. S. Kirk Studstrup, Chief Judge, Maine District Court

(3) *Remedial Sanctions.* The court may impose any of the following sanctions on a person adjudged to be in contempt after a proceeding seeking remedial sanctions. The court may also order such additional relief as has heretofore been deemed appropriate to facilitate enforcement of orders, such as appointment of a master or receiver or requirement of a detailed plan or other appropriate relief. An order containing a remedial sanction shall contain a clear description of the action that is required for the contemnor to purge the contempt.

(A) *Coercive Imprisonment.* A person adjudged to be in contempt may be committed to the county jail until such person performs the affirmative act required by the court's order.

(B) *Coercive Fine.* A person adjudged to be in contempt may be assessed a fine in a specific amount, to be paid: (i) unless such person performs an affirmative act required by the court's order; or (ii) for each day that such person fails to perform such affirmative act or continues to do an act prohibited by the court's order.

(C) *Compensatory Fine.* In addition to, or as an alternative to, sanctions imposed under subparagraph (A) or (B) of this paragraph, if loss or injury to a party in an action or proceeding has been caused by the contempt, the court may enter judgment in favor of the person aggrieved for a sum of money sufficient to indemnify the aggrieved party and to satisfy the costs and disbursements, including reasonable attorney's fees, of the aggrieved party.

NOTICE

To: All Interested Persons and Organizations
From: Maine Family Law Advisory Commission
Date: November 18, 1996
Re: Public Hearing to be Held Wednesday, December 11, 1996

The Maine Family Law Advisory Commission was created by the Maine Legislature in 1996 as part of its recodification of Title 19. The Commission is charged with studying and evaluating Maine's family laws and proposing changes at the start of each legislative session. The Commission has nine members consisting of three judges, four attorneys and two public members.

The legislation which created the Commission directed that the Commission study and report on the following issues:

A. Equal consideration and treatment of mothers and fathers as primary caregivers;

B. Appropriate consideration and consequences of the relocation or intended relocation of the primary care provider to a place that disrupts the child's relationship with the other parent as well as the child's relationship with friends, school, community and other family;

C. Whether the importance of the roles of the mother and the father in a child's life is recognized in law and practice; and

D. Any other issues relating to parental rights and responsibilities, including child support, visitation and enforcement of court orders concerning parental rights and responsibilities.

The Commission will hold a public hearing on **Wednesday, December 11, 1996, starting at 9:30 a.m.** The hearing will be held at **Room 113** of the **State Office Building, Augusta, Maine.** All interested persons and organizations are invited to attend and make statements to the Commission. Written statements will also be accepted.

For additional information or to submit a written statement, please contact the Commission's Chairman: Hon. Jon D. Levy, Maine District Court, P.O. Box 776, York, Maine 03909; (207) 363-1230.

Mailing List: Rebecca Robinson, Edith Young, Roy Thomas Powell, Lois Reckitt, Francine Stark, Lee Rand, Ed Kalish, Tracey Cooley, Louise Klaila, Freemont Anderson, Susan Lawler, Chris York, Anita St. Onge, Leyton Sewell, Elinor Goldberg, Virginia Boylston, Sharon Abrams, Sybil Jameson Coombs, Hon. James Mitchell, Lorraine Hutchins, Ralph Barnes, Dennis M. Snyder, Laura Fortman and Larry Ouellette, M.Ed.

DISTRICT COURT
DISTRICT TEN

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O Box 776
York, ME 03909-0776
207-363-1230

March 13, 1997

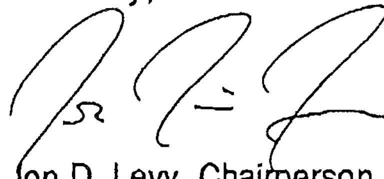
Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

Re: **Maine Family Law Advisory Commission**

Dear Senator Longley and Representative Thompson:

I enclose the third report of the Maine Family Law Advisory Commission regarding various bills pending before your Committee. The Commission will next meet on April 4, 1997. Please advise me if there are any particular bills or issues which you would like the Commission to address on April 4th.

Sincerely,



Jon D. Levy, Chairperson
Maine Family Law Advisory Commission

cc: Hon. Angus S. King, Governor
Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court
Hon. Roland Cole, Chief Justice, Maine Superior Court
Hon. S. Kirk Studstrup, Chief Judge, Maine District Court

MAR-20-1997 14:37 DISTRICT COURT YORK 2073631230 P.02

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

MARCH 20, 1997

The Maine Family Law Advisory Commission hereby reports its recommendations regarding twelve bills pending before the Joint Standing Committee on the Judiciary.

An Act Regarding the Duties of Guardian Ad Litem, L.D. 144:

The Commission supports the enactment of L.D. 144. The Act makes practical changes to the Guardian Ad Litem statute. It is not necessary for Guardian Ad Litems to be required to interview the child in every case within seven days of appointment, as is required by current law. Similarly, the special counsel provision is not needed since it is the Guardian Ad Litem's responsibility to represent the interests of the child and to inform the Court of the child's preference. Procedures already exist for the removal of a Guardian Ad Litem if he or she fails to adequately represent the child's interests. Mandatory follow-up interviews and reports needlessly add significant expense to cases. They should only be performed when the case requires.

An Act to Revise Judicial Separation, L.D. 407:

The Commission supports the enactment of L.D. 407, subject to one recommended modification. The legislation updates the separation statute by expanding the circumstances in which married couples may legally separate, and expanding the relief the Court may grant as part of a Judgment of Separation. The Commission discussed at length whether the legislation would increase the potential for married persons to seek to use the separation process to commit a fraud as to a third party (e.g., to qualify for government benefits, or to distance assets from a creditor). The Commission concludes that it will not, but does recommend that the Act

MAR-20-1997 14:37 DISTRICT COURT YORK 2073631230 P.03

be amended to include an anti-fraud provision similar to that which currently applies in divorce actions pursuant to 19-A M.R.S.A. § 901(5):

> ***Fraud. The court may not grant a separation when the parties seek to procure a judicial separation for fraudulent purposes.***

An Act to Amend the Adoption Laws Relating to Consent and Forms for Surrender and Release, L.D. 826.

The legislation would add conformity to the manner in which consents to adoption are handled throughout the State, and to how venue for adoptions is determined.

The Commission recommends against Section 5 of the Act, however, because it will permit adoptions to go forward without a current home study "if the petitioner has received the child from the Department of Human Services or from a licensed child-placing agency." It is the sense of the Commission that the Probate Judge should always have a current home study before an adoption is concluded.

An Act to Extend the Waiting Period for Obtaining a Divorce, L.D. 860.

There are many divorces in which a longer waiting period will work an injustice, particularly to the interests of children. Under current practice, either party can delay the granting of a divorce long past the current 60 day waiting period if they so choose. The Commission recommends against the enactment of L.D. 860.

An Act to Protect Traditional Marriage and Prohibit Same Sex Marriage, L.D. 1017.

The Commission offers no opinion regarding the Act.

An Act to Clarify the Adoption Laws, L.D. 1081

The Commission supports the enactment of L.D. 1081. Biological parents should not be permitted to misuse the adoption laws for any purpose. If parents wish to terminate one parent's parental rights, they should be required to comply with the requirements of the parental termination statute.

MAR-20-1997 14:37 DISTRICT COURT YORK 2073631230 P.04

An Act to Repeal the Requirement That Employers Garnish the Wages of Their Employees Who Owe Child Support, L.D. No 1154.

The Commission recommends against the enactment of L.D. 1154. The proposal violates Federal law, would likely cost the State of Maine millions in AFDC collections and Federal incentive payments, and would defeat one of the more effective mechanisms for collecting child support resulting in harm to thousands of Maine families.

An Act to Amend Child Protective Laws, L.D. 1163

The Act would affect significant changes to the child protective system, both as to the legal standard for taking custody of children, as well as the time periods for reunification of families and termination of parental rights. The Commission is concerned that the Act would have unintended negative consequences (e.g., increasing the frequency of judicial reviews in the absence of need), and, therefore, recommends that it be subject to further study before enactment. The Commission further recommends that the Act be referred to the Committee to Study the Role of the Courts in the Prevention of Child Abuse and to the Department of Human services for comment.

An Act to Unify the Court System, L.D. 1372

From the standpoint of family law, the Act would elevate family law to a coequal branch of the judiciary's jurisdiction, along with criminal and civil jurisdiction. The Commission has not otherwise studied the far reaching ramifications of court unification, however, and therefore offers no opinion.

An Act to Strengthen the Laws Governing Nonpayment of Child Support, L.D. 1322

Section 2 of the proposal is unduly punitive. It may defeat the collection of child support to the extent that a parent loses his or her license 4 or more times over a period of many years. The Commission understands that the Department of Human Services has proposed legislation to strengthen license revocation laws which will soon be printed. The Commission recommends that the consideration of the Act be postponed until the Department's proposal has been presented.

MAR-20-1997 14:37 DISTRICT COURT YORK 2073631230 P.05

An Act to Restrict Parental Rights of Convicted Sex Offenders, L.D. 1283

The Act treats convicted sex offenders as a homogeneous group when, in fact, it is heterogenous. It may discourage plea bargaining in sex crime prosecutions thus increasing the frequency with which children are required to testify in court in such cases. Current law already permits a Court to consider a parent's conviction of a sexual offense in determining a child's best interests. The Commission recommends against the Act.

An Act to Ensure Enforcement of Protection for Abuse Laws, L.D. 1272

The Commission supports the enactment of the Act.

Date: March 20, 1997

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chairperson
Kristin A. Gustafson, Esq., Vice Chairperson
Michael J. Levy, Esq., Treasurer
Hon. Francis C. Marsano
Hon. Carol R. Emery
Naira B. Soifer, Esq.
Thomas J. Mato, Esq.
Bruce B. Kerr, Ph.D.
Kathleen E. Sullivan, M.S.W.

MAR-20-1997 14:38 DISTRICT COURT YORK 2073631230 P.06

DISTRICT COURT
DISTRICT TEN

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O Box 776
York, ME 03909-0776
207-363-1230

March 27, 1997

Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

Re: **L.D. 1213, "An Act to Create a Family Division Within Maine's District Court"**

Dear Senator Longley and Representative Thompson:

I am writing to comment upon L.D. 1213 in my individual capacity, and not on behalf of the Maine Family Law Advisory Commission. The Commission's members agreed that Commissioners are free to express their individual views regarding L.D. 1213, and at least two Commissioners appeared at your Committee's public hearing for that purpose. I wish to comment on the question of whether the consent of the parties should be required before a Family Case Management Officer ("FCMO") is authorized to make an interim decision regarding parental rights and responsibilities.

For the reasons that follow, I do not agree that L.D. 1213 should be amended so as to require the consent of the parties in order for FCMOs to make interim decisions regarding parental rights and responsibilities:

1. I believe that the risk that FCMOs will be less effective than Judges in making interim decisions regarding parental rights and responsibilities is outweighed by the benefit of assuring that interim decisions are made promptly and efficiently. Children's interests are placed at risk when their parents decide to physically separate and the parents cannot agree as to where the children will reside. This risk is exacerbated if the judicial process fails to provide an effective method to obtain the prompt resolution of the issue. I believe the Judicial Branch should have the opportunity to at least test the use of FCMOs for this purpose. It should be borne in mind that L.D. 1213 requires that the individuals selected to serve as FCMOs must be attorneys experienced in the area of family law. Their decisions will be subject to judicial review. If experience demonstrates that there are problems with having FCMOs making interim decisions regarding parental rights and responsibilities, then the process can be redesigned.

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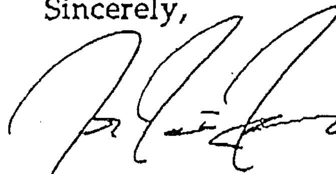
2. If the FCMOs are authorized to make all interim decisions except for parental rights and responsibilities, I fear that parents will face a disjointed legal process whereby they will have to appear in court twice (once before the FCMO and then again before a Judge) in order to have all interim matters determined. Requiring a second appearance at court will add complexity and expense to the legal process. For many parents, an additional court appearance means missing an extra day of work, as well as incurring extra child care and litigation expenses.

3. Interim decisions regarding parental rights and responsibilities are just that, interim. They carry no precedential weight for purposes of the final adjudication of parental rights and responsibilities. It is true that in some cases the parent who has the primary care of the children on an interim basis may have an advantage at the final hearing if he or she can demonstrate that the interim arrangement met the children's needs. There are also cases, however, in which the opposite is true and the experience under the interim arrangement supports the other parent's case for the permanent primary residential care of the children. In short, although interim decisions regarding parental rights and responsibilities are extremely important, they do not prejudice each parent's right to a thorough and fair final adjudication before a Judge.

Thank you for this opportunity to comment upon this issue.

Sincerely,



Jon D. Levy

JDL/ep

cc: Hon. Angus S. King, Governor
Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court
Hon. Roland Cole, Chief Justice, Maine Superior Court
Hon. S. Kirk Studstrup, Chief Judge, Maine District Court
Maine Family Law Advisory Commission Members and Consultants

MAR-27-1997 15:30 DISTRICT COURT YORK 2073631230 P.03

DISTRICT COURT
DISTRICT TEN

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O Box 776
York, ME 03909-0776
207-363-1230

April 8, 1997

Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

Dear Senator Longley and Representative Thompson:

I enclose the Maine Family Law Advisory Commission's **Report to the Maine Legislature, Joint Standing Committee on the Judiciary (April 8, 1997).**

At its meeting conducted on April 4th, the Commission unanimously voted that I should respond in writing to objections which have been voiced towards one provision in **L.D. 1053, An Act to Implement the Recommendations of the Family Law Advisory Commission Concerning Parental Rights and Responsibilities.** Section 3 of the Act expresses the standard by which the Courts will consider claims that a parent has willfully misused the protection from abuse process, when determining a child's best interest in a contested custody proceeding. Your Committee has received written comments which assert that Section 3 will have a chilling effect on the filing of protection from abuse petitions.

As explained in the Commission's January Report to your Committee,[1] in **Campbell v. Campbell, 604 A.2d 33 (Me. 1992)**, the Law Court adopted a restrictive standard which trial courts must apply before considering a claim that a parent has misused the protection from abuse process when determining parental rights and responsibilities. Prior to **Campbell**, the only standard that applied towards the consideration of such evidence was the general principle of "relevance" contained in the Maine Rules of Evidence. In **Campbell** the Law Court sought to protect the interests of victims of domestic violence through the adoption of a very strict standard which limits (not increases) the ability of a party to claim that the other parent has misused the protection from abuse process. As a result of **Campbell**, Courts may only consider claims of willful misuse; such claims must be established by the heightened standard of clear and convincing evidence; and the trial court must make written findings supporting its decision.

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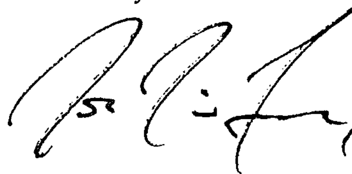
[1] Maine Family Law Advisory Commission, Report to the Maine Legislature, Joint Standing Committee on the Judiciary **at 9-10 (January, 1997).**

Section 3 of L.D. 1053 seeks to codify the standard established in Campbell. The Commission learned at its public hearing that there are many members of the public who are simply unaware that there is an existing standard. The Commission believes that it is important that the public at large, and not just judges and lawyers, know what is required before a Court will treat as relevant the claim that a parent has misused the protection process. This is particularly important since the standard is a matter of concern to many litigants who are pro se. It bears emphasis that the primary effect of the Campbell standard is to discourage such claims by imposing proof requirements that are far more restrictive than those applicable to all of the other criteria in the best interest of the child standard.

Section 3 of L.D. 1053 also proposes strengthening the Campbell standard by expressly providing that "The voluntary dismissal of a protection from abuse petition may not, taken alone, be treated as evidence of the willful misuse of the protection from abuse process." Under Campbell the voluntary dismissal of a protection from abuse petition may, without more, be considered by a Court as possible evidence of wilful misuse. The Commission believes that the law should recognize that often actions for protection from abuse are dismissed by the complainant out of either fear of retaliation by the defendant or due to a hope, frequently unfounded, that an abuser will reform. The Commission therefore recommends that the law should expressly prohibit the Courts from considering claims of wilful misuse based solely upon a parent's voluntary dismissal of one or more protection from abuse petitions.

Sincerely,



Jon D. Levy, Chairperson
Maine Family Law Advisory Commission

JDL/ep

cc: Hon. Angus S. King, Governor
Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court
Hon. Roland Cole, Chief Justice, Maine Superior Court
Hon. S. Kirk Studstrup, Chief Judge, Maine District Court
Maine Family Law Advisory Commission Members and Consultants

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

April 8, 1997

The Maine Family Law Advisory Commission hereby reports its recommendations regarding the following bills pending before the Joint Standing Committee on the Judiciary:

L.D. 1064
L.D. 1443
L.D. 1462
L.D. 1552
L.D. 1613
L.D. 1669
L.D. 1689

L.D. 1064, *An Act to Require that Reasonable Notice Be Given to the Defendant When a Protection from Abuse or Harassment Proceeding Is Started while Other Litigation is Pending Between the Parties.*

The Commission recommends against the enactment of L.D. 1064 for the following reasons:

• The Act's added procedural requirements have the potential for increasing jeopardy in situations of real violence.

• Pro se litigants will have difficulty complying with the added procedural/paperwork requirements of Rule 65(a), which will, in turn, discourage requests for temporary orders where they are truly needed.

• The additional procedural requirements of Rule 65(a) do not give defendants

any greater protection than current law allows. Existing law already gives Judges the discretion to require notice before entering a temporary protection from abuse order.

• Adding Rule 65(a)'s procedural requirements to Protection from Abuse cases will complicate Judges' ability to act quickly in granting or denying a temporary order.

L.D. 1443, ***Resolve, Directing the Family Law Advisory Commission to Review Proposals Concerning the Use of Ethical Decision-making in Family Law Cases.***

The Commission's members are uncertain as to the meaning of the Resolution and encourage the sponsors of this resolution to provide the Commission with documents pertaining to any decision-making models they have in mind. A study may require a financial appropriation for the Commission in order to pay for a staff-person and other research related expenses.

L.D. 1462, ***An Act Regarding Responsibility for Payment of Alimony Fees in Proceedings to Modify a Divorce Decree***

The Commission recommends against the enactment of L.D. 1462. Current law adequately allows for the allocation of attorneys fees between parties based upon each party's ability to pay. The Act adopts an arbitrary approach towards this issue. The Commission finds L.D. 1462 unnecessary and ill-advised. It is also observed that the Act is mistitled, and should instead be titled "An Act Regarding Responsibility for Payment of **Attorney** Fees in Proceedings to Modify a Divorce Decree."

L.D. 1552, ***An Act to Amend the Conditions upon Which a Minor May Obtain Emancipation.***

The Commission recommends against the enactment of L.D. 1552. The Commission is satisfied that current procedure allows the Courts to make an informed judgment regarding emancipation petitions. Creating a two-step process is not necessary, and would cause the courts to have to conduct additional hearings.

L.D. 1613, *An Act to Allow the Child Support Obligor the Right to Provide Regularly Scheduled Child Care*

The Commission recommends against the enactment of L.D. 1613. Current law already permits the Courts to impose such a scheme in family cases when it is in the best interest of the child. The proposal assumes that a nonprimary residential parent's parents or family members, or less expensive child care, is the preferred form of child care. The Commission opposes the adoption of such a presumption.

L.D. 1669, *An Act Regarding the Relocation of a Child by a Parent Having Primary Physical Custody.*

The Commission has previously undertaken a detailed analysis of this issue and reported its recommendations in the **Report to the Maine Legislature, Joint Standing Committee on the Judiciary at 16-19 (January, 1997).**[1] Based upon its study, the Commission recommends against the enactment of L.D. 1669. In addition, the Commission finds the transportation requirement contained in L.D. 1669 to be ill-advised since it would take the issue of responsibility for transportation of children outside of the best interest of the child analysis.

L.D. 1689, *An Act to Provide Court-ordered Income Withholding of Spousal Support.*

The Commission supports the enactment of L.D. 1689. The conditional income withholding scheme contained in the Act would introduce a more practical and less time-consuming means for the enforcement of alimony obligations than that currently available.[2] This approach is similar to the current approach available for the collection of child support, which has proven quite effective.

The Commission cautions that it has not studied the financial impact upon

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[1] For the convenience of the Committee, copies of pages 16 to 19 of the January Report are appended to this Report.

[2] Under current law, a wage garnishment order for the payment of alimony can only issue after the payee of alimony initiates and prosecutes a post-judgment motion to enforce the alimony and the Court has issued a judgment for the alimony arrearage. L.D. 1689 allows for an administrative approach to alimony enforcement.

employers who will be required to perform alimony withholding under the Act. The Commission also recommends that the Committee consider specifying in Section 2 of the Act who must pay the Department's fee and how much the fee will be (or how it will be determined).

Date: April 8, 1997

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chairperson
Kristin A. Gustafson, Esq., Vice Chairperson
Michael J. Levy, Esq., Treasurer
Hon. Francis C. Marsano
Hon. Carol R. Emery
Naira B. Soifer, Esq.
Thomas J. Mato, Esq.
Bruce B. Kerr, Ph.D.
Kathleen E. Sullivan, M.S.W.

APPENDIX

Maine Family Law Advisory Commission, Report to the Maine Legislature, Joint Standing Committee on the Judiciary, **pages16-19 (January, 1997).**

but are not limited to, education, religious upbringing, medical, dental and mental health care, travel arrangements, child care arrangements and residence. Parents who share parental rights and responsibilities shall keep one another informed of any major changes affecting the child's welfare.

The Commission also supports a requirement that the definition of shared parental rights and responsibilities be included in every order awarding shared parental rights and responsibilities so as to inform the parties what the award means. Section 1653 of title 19-A presently contains a number of provisions which must be included in divorce judgments. The Commission recommends the addition of a new subsection (6) to section 1653(2)(D) as follows:

> (6) A statement of the definition of "shared parental rights and responsibilities" contained in 19-A M.R.S.A. Section 1501(5) if the order of the court awards shared parental rights and responsibilities.

The Commission has also examined whether Maine's child support statute should be amended so as to provide clear direction as to how child support should be determined when parent's share the primary residential care of a child on an equal basis.[24] Although the Commission finds that there is a need for a statute to address such situations, the Commission intends to study the question further before making a specific recommendation to the Legislature.

Recommendation 5

Maine's current approach for the determination of relocation cases which requires proof of a substantial change of circumstances before the Court undertakes a best interest of the child analysis should not be changed.

Under existing Maine law, a parent awarded the primary residential care of a child is free to change his or her and the child's residence without prior court approval, unless there is a court order in effect which provides otherwise. The majority of cases involving a relocating primary residential parent never make it to court because the parents are able to adjust to the child's new circumstances without resort to judicial intervention. In

[24] Currently, a court has the discretion to deviate from the presumption established by the child support guidelines when the "nonprimary residential care provider is in fact providing primary residential care more than 30% of the time on an annual basis." 19-A M.R.S.A. Section 2007(3)(A). The statute does not explain how child support should be determined when each parent is the child's primary residential care provider 50% of the time on an annual basis.

those instances in which the child's relocation is opposed by the other parent, either parent has the right to file a motion for modification of the existing custodial arrangement.[25] The Commission's survey of Maine District Court Judges revealed that, on average, a Maine District Court Judge will preside over two contested relocation cases each year. In those cases, the primary residential care of the child(ren) is ordered to remain with the relocating primary residential parent 85% of the time.

The legal standard for the determination of relocation cases was adopted by the Law Court in the decision of **Villa v. Smith, 534 A.2d 1310 (Me. 1987), cert. denied. _____ U.S. _____, 112 S.Ct. 201, 116 L.Ed.2d 160 (1991).** In Villa the Law Court affirmed the District Court's post-divorce order refusing to change the primary custody of the parties' three minor children from the mother to the father, even though the mother was moving from Maine to California. The mother had remarried following the divorce and her impending move resulted from her second husband's transfer to California by the Navy. The Law Court held that the issues posed by a motion to modify child custody can be expressed in the single question: "Has there occurred since the prior custody order a change in circumstances sufficiently substantial in its effect upon the children as to justify a modification of the custody arrangement?" If so, the trial court is obligated to undertake a best interest analysis and to enter a new order governing parental rights and responsibilities.

In 1987 the Legislature enacted P.L. 1987, c.179, section 2 which establishes that: "The relocation, or intended relocation, of a child resident in this State to another state by a parent, when the other parent is a resident in this State and there exists an award of shared or allocated parental rights and responsibilities concerning the child, is a substantial change in circumstances."[26] Thus, an interstate move out of Maine automatically requires the court to undertake a best interest of the child analysis if a parent seeks modification of an award of parental rights and responsibilities by filing a motion. Intrastate moves within Maine are not addressed by the statute. In accordance with Villa, however, an intrastate move within Maine may require the court to undertake a best interest of the child analysis if the Court finds that the change in circumstances is "sufficiently substantial in its effect upon the children as to justify a modification of the custody arrangement."[27]

The standard governing relocation cases was more recently considered by the Law Court in **Rowland v. Kingman, 629 A.2d 613, 616 (Me. 1992),** in which the Court discussed the application of the best interest analysis in a relocation case as follows:

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[25] 19-A M.R.S.A. Section 1653(10).

[26] 19-A M.R.S.A. Section 1657(2)(A).

[27] 534 A.2d at 1312.

> Factors to be considered by the court in applying the standard of the best interest of the child are set forth in section 752(5). The provisions of section 725(5) [sic] do not foreclose the court's consideration of either parent's decision relating to the residence of that parent and any minor child. However, we find nothing in the statutes governing parental rights and responsibilities with respect to a minor child of divorced parents, or in our case law to support Rowland's contention that the court should defer to the decision of that parent with whom the child has primary physical residence in determining the best interests of that minor child.

Since a Maine court deciding a relocation case is required to examine all of the factors relevant to determining a child's best interest, the court will by necessity consider evidence of the effect the relocation will have on the child's relationship with each parent, friends and other family members, as well as the child's adjustment to present school and community. The trial judge is not permitted to apply any presumptions in favor of or against relocation. Rather, Maine's approach focuses the court on the singular inquiry of what residential arrangement will serve the child's best interest in view of then current circumstances.

There are a number of alternative approaches to relocation cases employed in other jurisdictions. In Illinois, the burden of proving that the relocation is in the best interest of the child is placed upon the party seeking to relocate.[28] At the other end of the spectrum, California holds that a custodial parent has a presumptive right to change a child's residence.[29] The Commission's survey of Maine's District Court Judges disclosed unanimous support for Maine's current approach since, in the words of one judge, "it allows the court to get right to the best interest of the child issue," and, in the words of another judge, it "allows case-by-case analysis with a familiar standard." All but one of the survey respondents opposed the adoption of a presumption similar to California's. A survey of members of the M.S.B.A. Family Law Section revealed 2 to 1 opposition to primary residential parents having a presumptive right to change a child's residence and majority opposition to placing the burden of proving a relocation is in the child's best interest on the relocating parent.

The Commission concludes that Maine's current approach appropriately maintains the primacy of the child's best interests in relocations situations, since (1) it requires the court to focus on the child's best interest based upon that child's particular circumstances, and (2) it does not require the court to apply any arbitrary legal presumptions which

[28] Ill. Ann. Stat., ch. 40, para. 609.

[29] In re Marriage of Burgess, 913 P.2d 473 (Cal. 1996).

presume that a relocation is or is not in a child's best interest. The Commission recommends that the Legislature permit the **Villa v. Smith** holding to remain the standard governing the determination of relocation cases in Maine.

Recommendation 6

Maine needs to establish an effective procedure for the expeditious enforcement of court orders awarding parental rights and responsibilities.

Every Commission member and numerous speakers at the public hearing identified enforcement of court orders relating to issues other than child support as a critical matter requiring immediate improvement. At present, a court's order is often only as good as the willingness of a party to follow the order. Despite current provisions in the law to obtain enforcement of court orders, the mechanism to obtain compliance is complicated, time-consuming, expensive and, particularly in some cases where a parent's contact with a child is obstructed by the other parent, ineffective. Maine lacks a concrete and uniform procedure which permits the prompt consideration of alleged violations of a parent's parental rights and responsibilities.

In recent years Maine has developed innovative mechanisms for the collection of child support.[30] The State's widely publicized campaign to improve child support enforcement has not been accompanied by a concerted effort to assist nonresidential parents in the enforcement of parent-child contact rights. Not surprisingly, some nonresidential parents who faithfully pay their child support perceive the State's failure to adopt as active a posture in the enforcement of parent-child contact rights as it has with the collection of child support as evidence of an unfair bias.

The Commission concludes that existing procedures for enforcement of court ordered parental rights and responsibilities are inadequate. A joint committee of the Criminal Rules Advisory Committee and the Civil Rules Advisory Committee has spent the past two years addressing the procedural impediments to enforcing existing court orders. Recently, each Committee submitted proposed amendments to the Rules of Criminal Procedure and Rules of Civil Procedure governing contempt proceedings. The Commission has studied the proposed Civil Rule 66 (which appears in Appendix "B") and believes that this Rule, if adopted by the Maine Supreme Judicial Court, may significantly improve access to the courts to enforce orders and provide guidance to the trial courts in ruling on contempt matters. As proposed, Rule 66 lends itself to the creation of easy to use forms which can be made available to pro se litigants through the Clerks' offices.

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[30] See 19-A M.R.S.A. Sections 2101 - 2669.

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

DECEMBER 28, 1997

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.R. 2706, "An Act to Provide for the Termination of Spousal Support upon the Death of the Payor."** The Act, sponsored by Representative Thompson, has been introduced at the initiative of the Commission in accordance with the authority established in **19-A M.R.S.A. § 354(2).**

It has not been firmly established under Maine case law whether, in the absence of express language in a Divorce Judgment, spousal support payments terminate upon the death of the payor. The few decisions on point suggest that this question should be determined based upon the intent of the parties or the Court at the time of the divorce. See Randlett v. Randlett, **401 A.2d 1008 (Me. 1979);** Miller v. Miller, **64 Me. 484, 489 (1874),** citing Burr v. Burr, **10 Paige 20.** Revisiting the issue of intent many years after a divorce and after the death of the one of the two parties, is a process ripe for acrimonious litigation between the estate of the payor and the surviving payee.

Experience establishes that the issue of the termination of alimony upon the death of the payor is often not considered by the parties at the time of the divorce. Many assume that upon a person's death, the law will not continue to impose a support obligation against their estate.

The enactment of **L.R. 2706** will bring certainty to this issue and will reduce the opportunity for disputes. Parties and the Courts will remain free to provide for the continuation of spousal support upon the death of the payor spouse, but unless the obligation is expressed in a court order it will not be inferred long after a marriage ends in divorce. This approach is consistent with the law governing the termination of spousal support upon the death of the payee. **Title 19-A, section**

951(7) currently provides that "unless otherwise stated in a court order awarding spousal support, the obligation to make [spousal support payments] ceases upon the death of the payee . . .."

The Commission recommends the enactment of **L.R. 2706.**

Date: December 28, 1997

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chairperson
Kristin A. Gustafson, Esq., Vice Chairperson
Michael J. Levy, Esq., Treasurer
Hon. Francis C. Marsano
Hon. Carol R. Emery
Naira B. Soifer, Esq.
Bruce B. Kerr, Ph.D.
Debby L. Willis, Esq.

Consultants:

Hon. Jessie B. Gunther
Hon. Joyce K. Wheeler
Diane E. Kenty, Esq.

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

FEBRUARY 2, 1998

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on the following family law related legislation currently pending:

L.D. 1786, "An Act to Adopt the Uniform Child Custody Jurisdiction and Enforcement Act"

For the reasons set forth in the Commission's Report dated January 16, 1998, the Commission recommends that L.D. 1786 should not be enacted.

L.D. 1916, "An Act to Provide for the Termination of Spousal Support upon the Death of the Payor"

For the reasons set forth in the Commission's Report dated December 28, 1997, the Commission recommends that L.D. 1916 should be enacted.

L.D. 1930, "An Act to Protect the Privacy of Alternative Dispute Resolution Participants"

The Commission is actively reviewing L.D. 1930 and will issue a report setting forth its recommendations on or before February 9, 1998.

L.D. 1978 , "An Act to Extend Legal Counsel in Child Protection Cases"

It is not uncommon for parents involved in a child protection proceeding to also be parties to a pending action for divorce or, if not married, action for determination of parental rights and responsibilities. These cases involving "parallel proceedings" can be particularly burdensome for the Courts when pro se parties fail to bring to the Court's attention the pendency of the child protection proceeding, or are simply unable to understand the interdependency of the court orders to be entered in the parallel proceedings. L.D. 1978 authorization for appointed counsel in child protection proceedings to assist their clients in related actions would remedy many of the difficulties presented by parallel proceedings.

The Commission has not studied how much the additional representation authorized by L.D. 1978 would increase the legal fees and costs associated with appointed counsel in Maine's child protection process. In addition, consideration should be given to limiting L.D. 1978's authorization to protection proceedings initiated by the Maine Department of Human Services, or a police officer or sheriff, and excluding its application from protection proceedings initiated by three or more private individuals.[1] If the authorization is extended to protection proceedings initiated by private individuals, L.D. 1978 may have the unintended consequence of encouraging the filing of private protection petitions because of the attraction of the possibility of receiving free legal counsel in a related action for divorce or determination of parental rights and responsibilities.

In view of the concerns raised in the preceding paragraph, the Commission recommends that if L.D. 1978 is enacted, a sunset provision should be added so that all of the legislation's effects, intended and otherwise, will be considered in the future.

L.D. 2058, "An Act to Ensure That Lump-sum Workers' Compensation Settlements Are Credited to Child Support Obligations"

L.D. 2058 offers a practical approach to ensuring that persons entitled to lump-sum workers' compensation settlements who have outstanding child support debts do not evade payment of those debts. The notice and hearing provisions of L.D.

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[1] Pursuant to 22 M.R.S.A. § 4032(1) a child protection proceeding may be brought by:

A. The department through an authorized agent;
B. A police officer or sheriff; or
C. Three or more persons.

2058 guarantee that persons affected by the Act have a fair opportunity to be heard before withholding can be implemented.

The Commission recommends that L.D. 2058 should be enacted.

Date: February 2, 1998

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chairperson
Kristin A. Gustafson, Esq., Vice Chairperson
Michael J. Levy, Esq., Treasurer
Hon. Francis C. Marsano
Hon. Carol R. Emery
Bruce B. Kerr, Ph.D.
Debby L. Willis, Esq.

Consultants:

Hon. Jessie B. Gunther
Hon. Joyce K. Wheeler
Diane E. Kenty, Esq.

TOTAL P.05

DISTRICT COURT
DISTRICT TEN

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O Box 776
York, ME 03909-0776
207-363-1230

December 28, 1997

Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

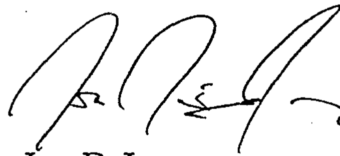
Re: **L.R. 2706, "An Act to Provide for the Termination of Spousal Support upon the Death of the Payor"**

Dear Senator Longley and Representative Thompson:

I enclose the Report of the Maine Family Law Advisory Commission regarding L.R. 2706 for consideration by your Committee.

Please let me know if you desire any additional information.

Sincerely,



Jon D. Levy

JDL/ep

cc: Hon. Angus S. King, Jr., Governor
Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court
Hon. Margaret J. Kravchuk, Chief Justice, Maine Superior Court
Hon. Michael N. Westcott, Chief Judge, Maine District Court

STATE OF MAINE

DISTRICT COURT
DISTRICT TEN

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O Box 776
York, ME 03909-0776
207-363-1230

February 9, 1998

Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

RECEIVED
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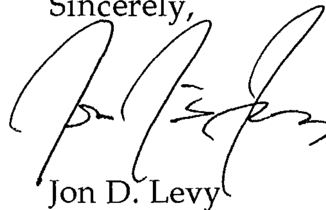
Re: **Maine Family Law Advisory Commission**

Dear Senator Longley and Representative Thompson:

I enclose the Report of the Maine Family Law Advisory Commission dated February 9, 1998, regarding **L.D. 1930, "An Act to Protect the Privacy of Alternative Dispute Resolution Participants"**.

Please let me know if you desire any additional information.

Sincerely,



Jon D. Levy

JDL/ep

cc: Hon. Angus S. King, Jr., Governor
Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court
Hon. Margaret J. Kravchuk, Chief Justice, Maine Superior Court
Hon. Michael N. Westcott, Chief Judge, Maine District Court
Hon. Thomas E. Humphrey, Deputy Chief Judge ,Maine District Court

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

FEBRUARY 9, 1998

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1930, "An Act to Protect the Privacy of Alternative Dispute Resolution Participants"**. For the reasons set forth below, the Commission strongly recommends against the enactment of **L.D. 1930**.

Discussion

Rule 408(b) of the Maine Rules of Evidence provides that "Evidence of conduct or statements by any party or mediator at a court-sponsored domestic relations mediation session is not admissible for any purpose." Rule 408(b) serves the worthwhile goal of assuring that parties are free to engage in open settlement negotiations during mediation without the fear that their statements will used against them at a subsequent hearing if a mediated settlement is not reached. Recent years have seen the expansion of the types of cases referred for mediation to the Court Alternative Dispute Resolution Service ("CADRES"), as well as the increasing availability of private mediation services in Maine. There is, therefore, reason to consider expanding Rule 408(b)'s coverage to all of the types of cases referred to CADRES, as well as to statements made by participants in privately sponsored mediation.

L.D. 1930 will establish a sweeping standard of confidentiality for all statements made in any alternative dispute resolution process, both court sponsored and private, occuring in Maine. This broad standard of confidentiality will go beyond the worthwhile goal of assuring parties that their statements made in the ADR process cannot later be used against them in Court if the parties fail to reach settlement. It will prohibit parties from discussing what occurred during the ADR

session with anyone other than the participants of the session, except in a few narrowly defined circumstances set forth in section 3 of the legislation.

L.D. 1930 is over-broad. It will, for example:

* Prohibit a party to a divorce mediation from discussing the mediation with his or her therapist, spiritual adviser, parent or friend.

* Permit parties to an ADR session to negotiate an agreement which will constitute a fraud upon the Court (e.g., an agreement to not acknowledge unreported income in the calculation of child support), without fear of that fraud being reported to the Court.

* Prohibit an ADR provider from reporting ongoing criminal conduct disclosed during the mediation unless it is conduct which falls within the two narrow exceptions set forth in subsections 3(A) and (B) of the legislation.

L.D. 1930 establishes a standard of confidentiality which is significantly broader than that granted by the Maine Rules of Evidence to communications with a physician, psychotherapist or attorney. **See M.R. Evid. 502 & 503.** Quite remarkably, the only qualification the Act requires an individual to have in order to be cloaked with the Act's confidentiality (set forth in subsection 1(B) of the Act) is the parties' written agreement that the individual assist them in resolving their dispute. This will permit anyone to hold themselves out as an ADR provider without regard to their training, experience, licensure or character.

For the foregoing reasons, the Commission strongly recommends against the enactment of **L.D. 1930**. In addition, the Commission recommends that the question of whether Rule 408(b) of the Maine Rules of Evidence needs modification should be referred to the Advisory Committee on the Maine Rules of Evidence.

Date: February 9, 1998

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chairperson
Kristin A. Gustafson, Esq., Vice Chairperson
Michael J. Levy, Esq., Treasurer
Hon. Francis C. Marsano
Hon. Carol R. Emery
Bruce B. Kerr, Ph.D.
Debby L. Willis, Esq.
Jo-Ann Cook, M.S.W.

STATE OF MAINE

DISTRICT COURT
DISTRICT TEN

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O Box 776
York, ME 03909-0776
207-363-1230

March 2, 1998

RECEIVED
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OPLA

Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

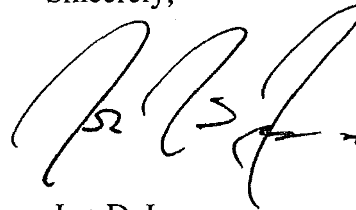
Re: L.D. 2168, "An Act to Encourage Adoptions and Reduce the Number of Children in Foster Care in this State"

Dear Senator Longley and Representative Thompson:

I enclose the Report of the Maine Family Law Advisory Commission regarding L.D. 2168 for consideration by your Committee. A copy of this Report was previously distributed to the Committee by Margaret Reinsch, Esq.

Please let me know if you desire any additional information.

Sincerely,



Jon D. Levy

cc: Hon. Angus S. King, Jr., Governor
Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court
Hon. Margaret J. Kravchuk, Chief Justice, Maine Superior Court
Hon. Michael N. Westcott, Chief Judge, Maine District Court
Hon. Thomas E. Humphrey, Deputy Chief Judge, Maine District Court

REPORT TO THE MAINE LEGISLATURE, JOINT STANDING COMMITTEE ON THE JUDICIARY

February 17, 1998

INTRODUCTION

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary on L.D. 2168, "An Act to Encourage Adoptions and Reduce the Number of Children in Foster Care in the State"

DISCUSSION

L.D. 2168 is intended to reduce the number of contested Termination of Parental Rights proceedings by permitting a child's birth parents to establish a post-termination "continuing contact" arrangement with their child. The prospect of having post-termination contact with their child should cause some birth parents to not contest a termination petition. Settling a contested termination proceeding eliminates a difficult court battle, reduces the time in which a child is in foster care, and increases the speed by which the stability of adoption can be established in a child's life.

The bill creates a "continuing contact" option in the following circumstances:

A. Presently, there are two ways that birth parents can agree, in advance, to allow the adoption of their child:

1. They can sign a surrender and release to the DHS or a licensed child placing agency. The surrender and release must be approved by the court.

2. They can sign a consent to the adoption of the child by a specified proposed adoptive parent. Such consent must be approved by the court.

L.D. 2168 will permit, in the first above described way, the birth parents and the DHS or agency to agree to "continuing contact" between the birth parents and the child. Such an agreement can address "continuing contact" both prior to and after the adoption. However, LD 2168 also provides that the contact may be unilaterally changed or eliminated by the adoptive parents after the adoption.

B. L.D. 2168 will also permit an agreement to be made between the birth parents, the adoptive parents **and the child** concerning after- adoption "continuing contact", subject to judicial approval or modification at the time of the adoption. Once the agreement is approved by the court, it may be modified thereafter by the court. The agreement may also be enforced in a separate civil action which action would require the parties to participate in mandatory mediation. It is important to note that the child is a party to the agreement.

RECOMMENDATION

The Commission recommends that L.D. 2168 not be enacted. The Commission feels that the goal of the bill, which is laudable, should be re-evaluated in view of the following issues:

1. In the near future, it is expected that the Legislature will consider comprehensive legislation which will substantially revise Maine's child protection laws. That legislation will include revisions relating to Termination of Parental Rights proceedings concerning parents whose children are in the custody of DHS. The intended goals of L.D. 2168 should be considered as part of a comprehensive revision of the child protection laws, and not in isolation.

2. The Bill suggests that birth parents can agree to a surrender and release, and, by virtue of a contract with DHS or a child placing agency, retain "continuing contact" with the child up to, and even after the adoption. However, because the adoptive parents may change or even terminate that contact arrangement, the Commission is concerned that an "agreement to continuing contact" may mislead birth parents into agreeing to a termination of their parental rights based upon the misapprehension that their contact rights are permanent.

3. L.D. 2168 suggests that a post- adoption modification to a three party "continuing contact" arrangement can be ordered by the court in a post-adoption proceeding. Although difficult to assess, the Commission believes that L.D. 2168 has the potential to generate substantial post-adoption litigation between birth parents and adoptive families. If that occurs, the negative impact it will have on the affected families will outweigh the benefits intended by L.D. 2168.

4. L.D. 2168 suggests that a three party agreement, approved by the court, between the birth parents, adoptive parents, and the child can create a legally enforceable right of contact for the birth parents after the adoption. Probate Courts have not previously had the power to establish enforceable "contact rights" for birth parents in adoption decrees. Under current law, consenting birth parents know that their contact with the child after adoption is not an enforceable right in court, and that the adoptive parents may permit or deny birth parent contact with the child as the adoptive parents deem appropriate. The consenting birth parents know that the adoption gives the adoptive parents full parental rights, as though the child were born to the adoptive parents. The wisdom of changing that clear understanding is debatable. Furthermore, the consequences of that change are unknown. Will that change, for example, cause greater hesitation on the part of birth parents to consent, or adoptive parents to proceed? If so, it may be more difficult for a child to be adopted in circumstances where the adoption will be good for the child.

5. L.D. 2168 does not define the "child" who may participate in a three party contract for "continuing contact". Is the child a child who is over the age of fourteen years, who presently has the right to consent to his/her own adoption?

Is the child also a younger child whose negotiations and agreement might be performed by a guardian ad litem?

6. Although a surrender and release must be approved by the court, there is nothing in the statute which requires the court to approve, or know about, any "continuing contact" agreement which might have been made prior to the surrender and release being presented to the court.

February 17, 1998

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin A. Gustafson, Vice-chair
Michael J. Levey , Treasurer
Hon. Francis C. Marsano
Hon. Carol R. Emery
Bruce B. Kerr, Ph.D.
Debby L. Willis, Esq.
Jo-Anne Cook, M.S.W.

Consultants:
Honorable Joyce Wheeler
Honorable Jessie Gunther
Diane Kenty, Esq.

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

FEBRUARY 9, 1999

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 432, "An Act to Adopt the Uniform Child Custody Jurisdiction and Enforcement Act" . The Commission has studied the Act and by a vote of 7 in favor and 2 opposed, supports its enactment subject to several related legislative changes which are discussed in this report.

Reasons for Enacting the UCCJEA

The Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter, "UCCJEA") was approved by the National Conference of Commissioners on Uniform State Laws in August 1998, and has since been enacted in Alaska and Oklahoma. The UCCJEA replaces its predecessor, the Uniform Child Custody and Jurisdiction Act (hereinafter, "UCCJA"), which was enacted in Maine in 1979 and is currently codified at 19-A M.R.S.A. § 1701, et seq. Both provide standards by which the nation's courts determine child custody jurisdiction when more than one state has a connection to a child custody dispute.

Since its adoption throughout the United States, the UCCJA has not achieved the uniformity in the law originally envisioned. There are at least three reasons for this:

- Some states (but not Maine) modified the text of the UCCJA when they adopted it.

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◆ Various provisions of the UCCJA have received conflicting interpretations by state appellate courts.

◆ The Parental Kidnaping Prevent Act (PKPA), 28 U.S.C § 1738A, was enacted in 1980. Although its provisions are similar to those of the UCCJA, there are important provisions which differ markedly from the corresponding provisions of the UCCJA.

The primary purpose of the new UCCJEA is to remedy the conflicts resulting from the different treatments afforded the UCCJA by the states, as well as the conflicts between the UCCJA and the PKPA. The specific inconsistencies remedied by the UCCJEA are discussed in detail in the Prefatory Note to the UCCJEA (pages 2-4 of L.D. 432), and are not, therefore, revisited in this report. The UCCJEA was also drafted to harmonize the provisions of its predecessor, the UCCJA, with the more recently developed Uniform Interstate Family Support Act ("UIFSA"). UIFSA was enacted in Maine in 1997 and is codified at 19-A M.R.S.A. § 2801, et seq.

The UCCJEA also establishes a new uniform procedure for the enforcement of custody orders which should streamline the process for obtaining the interstate enforcement of such orders. As a consequence of the UCCJA's failure to contain an enforcement provision, litigants have been required to navigate through the fifty or more different enforcement procedures in place across the country. The absence of a uniform procedure has contributed to the complexity and expense of obtaining the interstate enforcement of parental rights under an existing custody order.

The enforcement of custody and visitation provisions is an area of the law ripe for innovation and improvement. Some segments of the public believe that public policy has placed disproportionate emphasis upon improving the process for the enforcement of child support orders, while giving little or no attention to improving the process for the enforcement of child custody orders. The promulgation of Rule 66 of the Maine Rules of Civil Procedure by the Maine Supreme Judicial Court in 1997 marked a major step forward for assisting parents who turn to the courts for the enforcement of their parental rights and responsibilities. The enactment of the expedited enforcement provisions of the UCCJEA will constitute another important improvement in this area.

Reasons for Not Enacting the UCCJEA

The members of the Commission who oppose the enactment of the UCCJEA may submit their own statements to the Judiciary Committee. The following is a

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summary of the principal reasons cited in opposition to the enactment of the UCCJEA:

- The temporary emergency jurisdiction provisions of the UCCJEA will give too much finality to custody determinations made in actions for protection from abuse.

- The remedial enforcement procedure is an extraordinary remedy which may prove onerous on the responding parent who can be forced to appear in court with little prior notice.

- The counsel fees provision of the UCCJEA is premised on the "prevailing party" standard, which is inconsistent with Maine's traditional approach of employing a standard which focuses on the parties' relative abilities to absorb the cost of the litigation.

- It would be prudent to wait for more states to adopt the UCCJEA in order to have the benefit of their experience before it is enacted in Maine.

Impact of the UCCJEA on Child Custody and Visitation Orders Entered in Protection from Abuse Proceedings

Under existing Maine law the provisions of the UCCJA do not apply to custody orders entered in Protection from Abuse Cases.[1] Such custody orders are frequently made by the courts with only limited information and, by statute, are characterized as "temporary". Custody and visitation awards made in Protection from Abuse cases are "not binding in any separate action involving an award of parental rights and responsibilities pursuant to chapter 55 [(19-A M.R.S.A. § 1651, et seq.)]." 19-A M.R.S.A. § 4007(1)(G).

The UCCJEA expands the definition of "child custody proceedings" by adding proceedings for "protection from abuse" to the Act. See L.D. 432, § 3 (proposed 19-A M.R.S.A. § 1732(4)). Maine courts will, therefore, be required to afford UCCJEA recognition to custody orders entered by foreign courts in protection from abuse proceedings. In addition, the custody orders entered by Maine courts in protection

[1] "The provisions and limitations of the Uniform Child Custody Jurisdiction Act do not apply to a proceeding under this chapter unless it is joined with another proceeding under section 4010, subsection 2." 19-A M.R.S.A. § 4004.

from abuse proceedings will be afforded UCCJEA recognition by those states which also enact the UCCJEA.

Based upon the foregoing, the Commission makes the following two recommendations:

1. Maine's Protection from Abuse statute should be made consistent with the new definition of "child custody proceedings" in the UCCJEA by amending 19-A § 4004 as follows (new language in bold):

> *The provisions and limitations of the Uniform Child Custody Jurisdiction* ***and Enforcement*** *Act ~~do not~~ apply to a proceeding under this chapter ~~unless~~* ***regardless of whether*** *it is joined with another proceeding under section 4010, subsection 2.*

2. The Protection from Abuse statute should be amended so that it is clear that a custody order entered in a Maine Protection from Abuse proceeding is not binding in a separate action brought in another state in which that state otherwise has jurisdiction under the UCCJEA to redetermine the issue. This can be achieved by amending section 4007(1)(G) as follows (new language in bold):

> *(G) Either awarding temporary custody of minor children or establishing temporary visitation rights with regard to minor children when the visitation is determined to be in the best interest of the child, or both, as determined in accordance with the best interest of the child pursuant to section 1653, subsection 3 to 6. The court's custody and visitation award shall not be binding in any separate action involving an award of parental rights and responsibilities pursuant to chapter 55.* ***or in a similar action brought in another jurisdiction exercising child custody jurisdiction in accordance with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act.***

Clarifying the Reach of the UCCJEA's Provisions for the Expedited Enforcement of Child Custody Determinations

The UCCJEA establishes a straightforward process under which a parent may obtain the expedited enforcement of an existing child custody determination. See L.D. 432, § 3 (proposed 19-A M.R.S.A. §§ 1768 - 1772). The Uniform Comment to section 1768 states that "This section provides the normal remedy that will be used in interstate cases; the production of the child in a summary, remedial process based on habeas corpus." The Comment is silent, however, as to whether this section also

applies to intrastate cases.[2] The expedited procedure afforded by section 1768 presents a valuable remedy to an aggrieved parent regardless of whether the custody dispute is interstate or intrastate in nature.

A party seeking the expedited enforcement of a custody order by a Maine Court may currently seek relief pursuant to the civil contempt remedy established by M.R. Civ. P. 66(d). Although Rule 66(d) provides for a streamlined process, it is not nearly as expeditious as the remedy afforded by section 1768. The former does not establish a time frame within which the Court must act, while the latter requires a hearing to be held "on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible." L.D. 432, § 3 (proposed 19-A M.R.S.A. § 1768(3)).

The Family Law Advisory Commission does not support the extension of the remedy provided by section 1768 to intrastate cases without a concomitant increase in the number of judges and clerks to respond to the new caseload it would create. Maine's courts must currently comply with several mandatory expedited time-frames in Child Protection, Forcible Entry and Detainer, Protection from Abuse and other proceedings. While section 1768 will undoubtedly add to the number of cases the courts will schedule on an expedited basis, that number will be many times greater if section 1768 is construed as also being applicable to intrastate disputes.[3] This additional responsibility should not be imposed on the courts unless additional appropriations are made so as to increase the number of judges and staff available to process these cases.

The Family Law Advisory Commission accordingly recommends that if the

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[2] Although the Official Comment does not state it, the UCCJEA was intended to be limited to interstate cases:

> The UCCJEA, including Article 3 of the Act[,] is limited to interstate matters. It was the conclusion of the drafting committee that this act shall not apply to intrastate situations, although the issue was discussed at length during drafting sessions.

Letter of Deborah Rand Perelman, Esq. to Hon. Jon D. Levy, dated January 19, 1999. Attorney Perelman is a legal consultant to the committee of the National Conference of Commissioners on Uniform State Laws which drafted the UCCJEA.

[3] Although there is no readily available statistical data which shows the number of interstate and intrastate enforcement proceedings brought in Maine each year, the Commission estimates that intrastate proceedings are at least 5 times greater than the number of interstate proceedings. The District Court's representative to the Commission, Judge Jon D. Levy, estimates that he presided over three interstate enforcement actions and 24 intrastate enforcement actions during 1998.

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UCCJEA is enacted in Maine, the following "MAINE COMMENT" should be added to section 1768:

Maine Comment

The remedy provided by this section does not apply in intrastate cases. Parties to intrastate cases may seek the enforcement of child custody determinations in accordance with M.R. Civ. P. 66 and as otherwise provided by Maine law.

Fiscal Impact of the UCCJEA

The Commission has not studied the fiscal requirements for implementing the UCCJEA in Maine. There will, however, likely be added costs to the Judicial Branch associated with:

- The development of the various forms and procedures required to conform Maine's protection from abuse process to the requirements of the UCCJEA.
- The development of the various forms and procedures required to implement the new enforcement provisions of the UCCJEA.
- Staff training.
- Upgrading the telephone systems in some courthouses to enable compliance with new requirements regarding telephonic communications between courts. See Proposed 19-A M.R.S.A. § 1740.

There will also be added costs to the Office of the Attorney General or Maine's District Attorneys associated with implementing the new civil enforcement role expected of prosecutors under the UCCJEA. See Proposed 19-A M.R.S.A. § 1775. There is no parallel provision in the UCCJA. It is not known to what extent the Attorney General or the District Attorneys will become involved in UCCJEA enforcement actions because the Act appears to make their participation discretionary. The UCCJEA also authorizes the courts in certain circumstances to order the responding parent to reimburse "all direct expenses and costs incurred by the prosecutor and law enforcement officers . . .." See Proposed 19-A M.R.S.A. § 1777.

FEB-09-1999 09:51 2074901543 99% P.07

Date: February 9, 1999

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth J. Scheffee, Esq.
Mary-Anne E. Martell, Esq.

FEB-09-1999 09:51 2074901543 99% TOTAL P.08 P.08

State of Maine

District Court

District Ten

Hon. Jon D. Levy
District Court Judge

11 Chases Pond Road
P.O. Box 770
York, ME 03909-0770
207-363-1230

February 17, 1999

Senator Susan W. Longley, Chairperson
Representative Richard H. Thompson, Chairperson
Joint Standing Committee on the Judiciary
13 State House Station
Augusta, Maine 04333

Re: **L.D. 38, L.D. 88, L.D. 181 and L.D. 231**

Dear Senator Longley and Representative Thompson:

I enclose the Report of the Maine Family Law Advisory Commission regarding L.D. 38, L.D. 88, L.D. 181 and L.D. 231 for consideration by your Committee.

Please let me know if you desire any additional information.

Sincerely,

Jon D. Levy

cc: Wayne R. Douglas, Esq.

FEB-17-1999 13:24 DISTRICT COURT YORK 2073633783 P.02

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

FEBRUARY 17, 1999

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on the following bills:

L.D. 38,	**"An Act to Give the Probate Court Power to Order Child Support in Cases Involving Guardianship of a Minor"**
L.D. 88,	**"An Act to Add to the List of Mandatory Reporters of Suspected Child Abuse Children's Summer Camp Employees"**
L.D. 181	**"An Act Providing for Post-adoption Contact in Limited Situations"**
L.D. 231	**"An Act to Initiate Covenant Marriage in the State"**

Discussion

L.D. 38, "An Act to Give the Probate Court Power to Order Child Support in Cases Involving Guardianship of a Minor"

The Commission recommends the enactment of L.D. 38. Under current law, a guardian for a child appointed by the Probate Court must initiate a separate action in order to obtain a child support order. L.D. 38 will expedite the establishment of child support by authorizing the Probate Court to determine support at the same

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time the guardianship is established.

L.D. 88, "An Act to Add to the List of Mandatory Reporters of Suspected Child Abuse Children's Summer Camp Employees"

The Commission recommends the enactment of L.D. 88. The legislation will have the salutary effect of causing the many summer camps in Maine to direct their staff to report suspected abuse or neglect. The reporting requirement will not negatively impact the relationships formed between staff members and campers.

L.D. 181, "An Act Providing for Post-adoption Contact in Limited Situations"

The Commission recommends that L.D. 181 be tabled so that it can subject to additional study.

L.D. 181 would establish a process by which the birth parent(s) of a child who is the subject of a jeopardy or termination petition may establish enforceable right to post-adoption contact with the child through an agreement with the adoptive parent(s). This would have the salutary effect of encouraging a birth parent who might otherwise contest a jeopardy or termination petition, to stipulate to the petition if they have the assurance of post-adoption contact with the child. The difficulty with this, however, is that guarantees that a parent or parents who have placed their child in jeopardy and are incapable of parenting the child, will remain involved in that child's life. While this may be in the best interest of some children, it certainly will not be in the best interest of others.

L.D. 181 provides some measure of assurance that post-adoption contact between the child and its birth parent(s) will not be harmful to the child by requiring court approval of the agreement. However, such agreements might be presented on an uncontested basis by the parties and, therefore, receive little scrutiny by a Judge. It is doubtful, for example, that court approval will be a meaningful check under the following circumstance:

> Foster parents A and B, who are not represented by counsel, hope to adopt their foster child. The birth mother, C, will only agree to a voluntary termination of her rights if she is guaranteed post-adoption contact with the child. C's parental rights were terminated because although she was a loving parent, she has a serious and chronic substance abuse problem resulting in the abuse and neglect of the child. The Department of Human Services' caseworker encourages A and B, hoping to avoid a time-consuming and expensive contested termination proceeding, encourages A and B to agree to post-

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adoption contact. Although A and B are wary of C and would prefer not to permit post-adoption contact, the accede to the Department's wishes to avoid an expensive contested proceeding. They know that the Department is under tremendous pressure to process petitions as quickly as possible. The agreement is presented to a Judge for approval on an uncontested basis and no evidence is received.

Another concern regarding L.D. 181 is its potential impact on the jurisdiction of the District Court. Proposed 18-A M.R.S.A. § 9-501(b) appears to transfer jurisdiction over adoption proceedings for children who are the subject to a termination proceeding under Title 22 from the Probate Court to the District Court. The reference to "section 9-104" in section 9-501(b) appears to be incorrect, and should instead be 9-103. Although good reasons exist to support the District Court having the responsibility to hear adoptions concerning children over whom they have already exercised jurisdiction under Title 22, the impact of that expanded jurisdiction on the District Court has not been studied by the Commission.

L.D. 231, "An Act to Initiate Covenant Marriage in the State"

The Commission opposes the establishment of two classes of marriage in Maine and therefore recommends against the enactment of L.D. 231.

Marriage is a time of optimism and hope. A bride and a groom should not reasonably be expected to truly appreciate the legal and practical ramifications of entering into a marriage which cannot later be ended for serious irreconcilable marital differences which arise during the marriage. The Maine Law Court has defined irreconcilable marital differences as being differences so serious as to render continued cohabitation by the parties intolerable. See Mattson v Mattson, 376 A.2d 472, 476 (Me. 1977). L.D. 231 would have the effect of compelling a party to a "covenant marriage" to remain in an intolerable situation unless they can prove one of the four "fault" related grounds set forth in proposed section 902-A(2)(A)-(D). In the alternative, a spouse would have to remain married, but live separate from his or her spouses for a period of 3 years. Three years is a long period during which a spouse desiring a divorce would be prevented from getting on with his or her life. Moreover, during that period the spouse would not be able to avail him or herself and the children of the marriage the benefit of the interim remedies available through the divorce process (e.g., orders for child support, spousal support, parental rights and responsibilities, and possession of the marital home).

No fault divorce was adopted in the 1970s in order to reduce contested litigation between spouses over questions of fault which placed "unnecessary burden upon . . . court resources and [the] . . . exacerbation and prolongation of already bitter marital litigation." Boulay v. Boulay, 393 A.2d 1339, 1340 n.1 (Me. 1978). Although L.D. 231 might have the desirable effect of causing Maine's citizens

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to be more thoughtful about the commitment they are about to make when entering into a marriage, the adoption of L.D. 231 would result in the reemergence of some of the least desirable attributes of the divorce process from the past. This runs counter to the public policy considerations announced at the time of the adoption of the Family Division of the Maine District Court, including the need for "a system of justice that is responsive to the needs of families and the support of children." 19-A M.R.S.A. § 182.

The Commission concludes that the potential negative consequences of L.D. 231 for both adults and children outweigh its potential benefits.

Date: February 17, 1999

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth J. Scheffee, Esq.
Mary-Anne E. Martell, Esq.

FEB-17-1999 13:25 DISTRICT COURT YORK 2073633783 P.06

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

LAW & LEGISLATIVE
REFERENCE LIBRARY
43 STATE HOUSE STATION
AUGUSTA, ME 04333

March 10, 1999

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on the following bills:

L.D. 1213	**"An Act Regarding the Effective Date of Guardian Ad Litem Training"**
L.D. 1243,	**"An Act to Strengthen the Kinship Laws"**
L.D. 1284	**"An Act Regarding Test Results Used in Determining Paternity"**
L.D. 1324	**"An Act to Eliminate the Need for Foster Home License for Adoptive Parents"**
L.D. 1427	**"An Act to Amend the Laws Regarding Domestic Violence Incidence Reports"**
L.D. 1460	"An Act to Allow Sharing of Information for Child Protective Investigations"
L.D. 1487	**"An Act to Bring Equity in Custodial Agreements"**
L.D. 1488	**"An Act to Ensure Compliance with Court Orders Relating to Child Visitation"**

MAR 19 1999

Discussion

L.D. 1213 "An Act Regarding the Effective Date of Guardian Ad Litem Training"

The Commission supports the enactment of L.D. 1213.

L.D. 1243, "An Act to Strengthen the Kinship Laws"

The Commission opposes the enactment of L.D. 1243. Although a preference in favor of placing a child with relatives is appropriate in some cases, it is equally inappropriate in many others. For example, if a child's relatives failed to prevent the child from being placed in circumstances of jeopardy, it is inimical to the child's best interest for those relatives to benefit from a statutory preference when the court is called upon to make placement decisions.

L.D. 1284 "An Act Regarding Test Results Used in Determining Paternity"

The Commission strongly opposes the enactment of L.D. 1284. Under current law, a judgment cannot be entered against a father without all of the protections of notice and an opportunity to be heard required by the Federal and State Constitutions. L.D. 1284 would enable a father, who was properly served notice of a paternity action and chose to ignore it, to reopen the issue many months or years later. L.D. 1284 would have the effect of denying finality to every paternity judgment in which the father failed to submit to paternity testing. This is clearly contrary to the interests of the children who are subject to Judgments entered in paternity cases.

If L.D. 1284 is enacted, it will result in a substantial increase in the number of paternity hearings conducted by the courts. This would impose a substantial burden on the District Court's Family Division which hears and decides child support and paternity issues. L.D. 1284 would, therefore, require additional appropriations in order to allow for the hiring of additional District Court Judges, Case Management Officers, Clerks and for other related expenses. There would likely also be need for additional assistant attorney general positions in the Office of the Attorney General.

L.D. 1324 "An Act to Eliminate the Need for Foster Home License for Adoptive Parents"

The Commission opposes the enactment of L.D. 1324. The status of a child who is the subject of a termination petition and is awaiting adoption is inherently uncertain because it cannot be known whether the trial and appellate courts will ultimately grant or deny the termination petition. There are two important objectives achieved by requiring foster home licensure by the prospective adoptive parents: First, it reinforces everyone's understanding that the child is in foster care and that the prospective adoption is not certain. Second, it assures that the home where the child is placed pending completion of the adoption is appropriate and will meet the health and safety needs of the child.

L.D. 1427 "An Act to Amend the Laws Regarding Domestic Violence Incidence Reports"

The Commission supports the enactment of L.D. 1427.

L.D. 1460 "An Act to Allow Sharing of Information for Child Protective Investigations"

The Commission supports the enactment of L.D. 1460.

L.D. 1487 "An Act to Bring Equity in Custodial Agreements"

The Commission opposes the enactment of L.D. 1487. Under existing law the courts may award either "shared", "sole" or "allocated" parental rights and responsibilities. Although L.D. 1487 appears to be introducing a new form of "equal" parental rights and responsibilities, it does not define what is meant by "an equal allocation of parental rights and responsibilities". This would introduce a significant ambiguity into Maine's custody laws.

If the legislation intends to require the courts to presume that a child's residential care should be equally allocated between the parties, such a presumption is contrary to the overwhelming majority of existing custodial arrangements in which the child resides primarily with one parent, and the other parent is awarded rights of parent/child contact. The presumption created by L.D. 1487 would clearly work against the best interests of scores of children subject to contested custody proceedings in Maine.

L.D. 1488 "An Act to Ensure Compliance with Court Orders Relating to Child Visitation"

The Commission opposes the enactment of L.D. 1488. It would have the effect of requiring the courts in every case in which a parent is found to be in noncompliance with the visitation provisions of a custody order, to award additional make-up visitation to the other parent. Although that result is certainly appropriate and equitable in many cases, it may be contrary to a child's best interests in others. If, for example, the violation was minor and did not substantially interfere with the visiting parent's opportunity to have parent/child contact, compelling additional visitation may result in unnecessary disruptions to the child's schedule and routine. The Commission believes that this issue should be left to the discretion of the court to be determined on a case by case basis.

Date: March 10, 1999

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth J. Scheffee, Esq.
Mary-Anne E. Martell, Esq.

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HOUSE STATION
AUGUSTA, ME 04333

MAINE FAMILY LAW ADVISORY COMMISSION

REPORT TO THE MAINE LEGISLATURE, JOINT STANDING COMMITTEE ON THE JUDICIARY

March 16, 1999

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on the following bill:

L.D. 1744, "An Act to Allow Child-Placing Agencies to License Pre-adoptive Homes as Foster Care Homes for a Child Placed in that Home Awaiting Adoption"

The Commission supports enactment of this legislation. The Act gives licensed child-placing agencies the ability to designate and certify pre-adoptive homes as foster homes. This should improve residential placements for children awaiting adoption. The Act requires the Department of Human Services to promulgate rules which will govern the certification process. The Commission believes that this public/ private certification process will greatly enhance the agency's ability to facilitate placement of children awaiting adoption.

Date: March 16, 1999

Respectfully submitted:

Maine Family Law Advisory Commission
Hon. Jon D. Levy, Chair
Kristin A. Gustafson, Esq., Vice Chair
Debby L. Willis, Esq., Secretary
Bruce Kerr, Ph.D
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth K. Scheffee, Esq.
Mary-Anne E. Martell

MAR 24 1999

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

March 23, 1999

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1592, "An Act to Encourage Joint Custody Practices". L.D. 1592 would establish a statutory presumption in custody cases that "joint residential care is in the best interest of a minor child."[1] The Commission strongly recommends against the enactment of this legislation.

A presumption that dividing a child's residential care between both parents is in the best interest of children is contrary to common experience. Although some parents can establish cooperative arrangements where their child's needs can be met without establishing a primary residence for the child, many cannot. Parents who cannot cooperate are the least suited to take on the special challenges of sharing a child's residential care. Children do not benefit from frequent transfers between the households of hostile or combative parents.

L.D. 1592's presumption would have the effect of encouraging parents to

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[1]It is important to note the L.D. 1592 appears to mistakenly treat "shared parental rights" and "joint residential care" as the same concept. They are not. "Shared parental rights and responsibilities" are currently awarded in the overwhelming majority of contested custody proceedings in Maine. "Joint residence" (also known as "shared residential care") arrangements are not commonly awarded in contested proceedings because, by definition, sharing a child's residential care requires a high degree of cooperation and communication between the parents. Joint residential arrangements are more frequently awarded in uncontested proceedings where the parents, by their agreement, have already demonstrated an ability to cooperate and communicate with one another.

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contest custody more frequently than under current law. With the presumption in place, contested litigation will be viewed as more likely resulting in an award of shared residential care of the child, and less likely resulting in an award of primary residential care of the child to one parent. Parents will, therefore, have less incentive to agree to primary residential care arrangements, although that is the arrangement which is, more often than not, found to be in the best interest of children. The net effect of this change to the calculation associated with deciding whether to contest custody is to discourage agreements and to encourage litigation.

In reality, the presumption established by L.D. 1592 may make the law appear more even-handed in addressing the interests of parents who live apart, but it does not follow that it will make the law more responsive to children's interests. The presumption does not account for (1) the developmental needs of children (e.g., the impact of shared residential care is different on a 2 year old than it is on a 12 year old), (2) the impact of geography on the practicality of a shared residential arrangement, or (3) the varying and unique needs of each child.

Proposals to establish custody presumptions are understandable responses to perceived injustices in particular custody cases. Anecdotal experiences, however, should not cause us to abandon the long-standing public policy of basing difficult and complex custody decisions primarily upon a determination of the child's best interest, as opposed to the desires of a parent. If the Legislature wishes to encourage a greater number of joint residential arrangements, consideration should be given to expanding parent education and training opportunities available for parties in divorce and custody proceedings.

Date: March 23, 1999

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth J. Scheffee, Esq.
Mary-Anne E. Martell, Esq.

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

March 23, 1999

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1753, **"An Act to Require Noncustodial Parents to Contribute to the Higher Education of Their Children"**.

The Commission recommends against the enactment of L.D. 1753. The bill singles out one class of parents - those paying child support pursuant to a court order - to be mandated by law to pay the college expenses of children. Parents in intact families and parents who receive child support would not be mandated by law to pay college expenses. This distinction is, in the Commission's view, unfair and may violate the constitutional guarantee of equal protection under the law.

Date: March 23, 1999

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth J. Scheffee, Esq.
Mary-Anne E. Martell, Esq.

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary, Regarding L.D. 2511

February 8, 2000

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 2511, "An Act to Preserve the Integrity of Court-ordered Child Support Obligations."** The Commission recommends against the enactment of **L.D. 511.**

Under existing law a parent's child support debt for a child not residing with the parent does not continue to accrue while that parent receives public assistance for the benefit of another child or children living with the parent. **L.D. 2511** would reverse this policy by keeping child support orders in effect while the responsible parent receives public assistance until such time as the parent obtains a court ordered modification of the obligation.

The Commission believes the current approach is favorable to that proposed in **L.D. 2511.** Under **L.D. 2511**, those parents who fail to seek and obtain a court ordered modification would unwittingly find themselves with a substantial child support indebtedness which could extend their need for public assistance. Parents receiving public assistance are generally without legal representation and they should not be expected to routinely initiate a legal action to obtain a court ordered modification of a preexisting child support obligation.

As written, **L.D. 2511** would require a responsible parent to petition a court to order the modification of child support even in instances where there is no preexisting child support order issued by a court. Subsection 2301(1)(A) establishes a debt for child support due the Department of Human Services "[w]hen a support order has not been established . . .." Subsection 2301(1)(A) also recognizes that a debt for child support can result from an administrative decision issued by the Department. In both instances it is incongruous to call upon the courts to modify, in the words of L.D. 2511, "the support order that is the basis of the debt" where the Court has not previously issued a support order.

Although it is impossible to quantify the number of new court proceedings which would be generated by **L.D. 2511**, it has been estimated that there are approximately 300 TANF ("Temporary Assistance for Needy Families") cases a year

in which a parent responsible for the payment of child support also receives public assistance for the benefit of a child or children residing with that parent.[1] **L.D. 2511** has the potential, therefore, of adding substantially to the docket of the Family Division of the Maine District Court.

L.D. 2511 would have the salutary effect of preventing a parent responsible for the payment of child support from avoiding that obligation by wrongfully obtaining public assistance. The abuse of public assistance is, however, currently addressed by the standards required for the receipt of public assistance. The Commission is not aware of the percentage of the 300 cases per year previously noted in which the parent receiving public assistance is abusing the process. The number of cases which would actually benefit from the enactment of **L.D. 2511** is therefore not known.

For the foregoing reasons, the Commission recommends against the enactment of **L.D. 2511.**

Date: February 8, 2000

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth J. Scheffee, Esq.
Mary-Anne E. Martell, Esq.

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[1]This is based upon the Department of Human Services' calculation that from January 1991 to present there have been 2,971 cases in which a TANF recipient is also an obligor parent.

Maine Family Law Advisory Commission

Report to the Maine Legislature, Joint Standing Committee on the Judiciary, Regarding L.D. 2267

January 18, 2000

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, regarding L.D. 2267, "An Act to Amend the Definition of Marital Property." The Commission believes that the Act should be tabled in order to permit further study. This report considers both the Act and an amendment to the Act prepared by Attorney Michael P. Asen.

Background

Under current law, the increase in the value of a spouse's nonmarital property during marriage is presumed to be "marital property" under Maine's marital property statute, 19-A M.R.S.A. Section 953(2). A spouse can overcome the presumption to the extent that he or she demonstrates that the increase is attributable to market forces. A spouse cannot overcome the presumption to the extent the increase in value results from income generated by the nonmarital property. This principle of treating increases in value resulting from market forces differently from increases in value resulting from income is derived from the 1970 version of the Uniform Marriage and Divorce Act, which is the source of Maine's marital property law:

> The phrase "increase in value" . . . is not intended to cover the income from property acquired prior to marriage. Such income is marital property. Similarly, income from other non-marital property acquired after the marriage is marital property.

MacDonald v. MacDonald, 532 A.2d 1046, 1049 (Me. 1987) quoting Handbook of the National Conference of Commissioners on Uniform State Laws, Section 307, at 204 (1970).

If, for example, the value of a mutual fund owned by a spouse prior to marriage increases during the marriage, the entire increase in the value of the mutual fund is presumed to be marital property, but the presumption may be overcome to the extent it is shown that the increase was the result of market

fluctuations in the value of the mutual fund (i.e., capital gains and stock splits). To the extent the increase in value is attributable to reinvestment of income such as dividends or interest, the increase in value remains marital property.

L.D. 2267 would amend Maine's marital property statute to require the courts to treat the entire increase in the value of a spouse's nonmarital investment assets as nonmarital property regardless of the source of the increase in value. The Commission understands that the Act is submitted in response to two recent decisions of the Maine Law Court. In Harriman v. Harriman, 1998 ME 108, 710 A.2d 923 (1998), Mr. Harriman owned three investment accounts prior to marriage with a total value of $24,173. At the time of the divorce the accounts had a combined value of $171,293. The Law Court upheld the trial court's treatment of the entire increase in value of the accounts as marital property because Mr. Harriman failed to establish "what percentage of the increase in value of the different accounts was attributable to stock splits or market growth and what was attributable to reinvested dividends." 1998 ME 108, paragraph 5, 710 A.2d at 924.

The same result was reached in the more recent decision of Clum v. Graves, 1999 ME 77, 729 A.2d 900 (Me. 1999). At trial Mr. Clum testified that his four premarital accounts "were too interwoven to be able to determine which portion of the appreciation is attributable to interest, dividends, capital gains or market fluctuations." 1999 ME 77, paragraph 6, 729 A.2d at 903. The Law Court affirmed the trial court's treatment of the entire increase in value of the investments as marital property based upon the application of the marital property presumption, and explained:

> A party seeking to rebut the statutory presumption must present evidence describing the sources of the increases in value *and* the amount of the increases in value attributable to each source. Meeting this burden may require expert testimony. That the burden may be difficult to meet, however, is not a sufficient reason for altering the statutory presumption. That presumption, and the corresponding burden of proof to rebut the presumption, are consistent with the shared enterprise theory of marriage expressed in the statute, and are designed to ensure that property value attributed to the marriage enterprise is credited fairly to both parties participating in that enterprise.

1999 ME 77, paragraph 15, 729 A.2d at 907.

L.D. 2267 would reverse the outcomes reached in Harriman and Clum and treat the entire increase in value of the investments as nonmarital property. The proposed amendment to the Act submitted by Attorney Asen would also,

however, permit the divorce court to equitably distribute nonmarital investment assets to both spouses. This approach is opposite to existing law which requires the divorce court to set aside all nonmarital assets (both investment assets and all other species of property) at the time of divorce to the spouse to whom they belong.

One motivation for changing the statute is to reduce the need to hire expert witnesses to value nonmarital intangible assets to determine what portion of any increase in value is attributable to reinvestment of income (marital) and what portion is attributable to market forces (nonmarital).

Analysis

The Commission recommends that the Act be tabled and subject to further study for the following reasons:

1. Two cornerstones of Maine's marital property law are (1) that property, in whatever form, acquired during the marriage should be credited to the marriage's shared enterprise, and (2) that a spouse's nonmarital property should be set aside to that spouse free of any claim or interest by the other spouse. The Act and the proposed amendment modify these cornerstone principles with respect to investment assets, but not with respect to other types of property (such as real estate, stock in a closely held corporation, personal property, commodities and inchoate rights). The consequences of this change should be fully understood before this new policy is adopted.

2. Although the Act seeks to simplify the current evidentiary complexity associated with distinguishing between increases in value resulting from market forces on the one hand and income on the other, parties will still be required to address these issues if there was any investment of marital funds in a spouse's nonmarital investment account during the marriage.

3. Even in cases where a spouse enters the marriage with a premarital investment to which no marital funds or effort are invested during the marriage, the marital "shared enterprise" may still have made important contributions to the maintenance of the investment through (1) the payment of income taxes resulting from the investment's income during marriage, (2) the payment of management fees, and (3) the use of marital funds to pay marital living expenses which by design or chance works to preserve the nonmarital investment in its entirety to the detriment of marital savings. The proposed amendment to the Act addresses these concerns by allowing the Court to consider these factors in making an equitable distribution. These additional factors would not be relevant, however, in evaluating other types of nonmarital assets.

4. Although it appears that a primary purpose of the Act is to simplify the application of the marital property law in divorce cases, the proposed amendment to the Act may have the opposite effect. The proposed amendment creates a new claim, formerly not recognized in Maine law, by which a spouse can seek an interest in the other spouse's nonmarital investment assets. If permitted, these claims will require the courts to receive additional evidence in contested cases in order to apply the equitable distribution criteria set forth in the proposed amendment.

5. The Act has obvious merit as it would apply to a spouse's employer sponsored premarital tax deferred savings or retirement account. If a spouse enters the marriage with a savings or retirement account which does not generate any income taxes or management fees during the marriage, and which does not involve any marital effort towards the management and maintenance of the account during the marriage, the Act would permit the courts to treat all of the increase in value of the account as nonmarital property. Under current law, the treatment of a portion of the increase in value of a tax deferred savings or retirement account as marital property can operate as a windfall to the other spouse because the increase bears no meaningful connection to the marriage's shared enterprise.

Conclusion

L.D. 2267 raises important public policy questions associated with the standards for determining married persons' property rights when they divorce. For the reasons set forth in this report, the Commission recommends that L.D. 2267 be tabled in order to permit a more detailed study of the Act's effect on Maine's marital property law.

Date: January 18, 2000

Respectfully submitted:

MAINE FAMILY LAW ADVISORY COMMISSION
Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Paul T. Pierson
Hon. James E. Mitchell
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Elizabeth J. Schefee, Esq.
Mary-Ann E. Martell, Esq.

Maine Family Law Advisory Commission

Second Report to the Maine Legislature, Joint Standing Committee on the Judiciary, Regarding L.D. 2267

February 23, 2000

I. Introduction

The Maine Family Law Advisory Commission hereby provides its second report to the Maine Legislature, Joint Standing Committee on the Judiciary, regarding L.D. 2267, "An Act to Amend the Definition of Marital Property." The Commission's first report dated January 18, 2000, recommended that L.D. 2267 be tabled in order to permit further study. On January 27, 2000 the Joint Standing Committee on the Judiciary tabled L.D. 2267 and referred it to the Commission. Subsequently, the original proposal has been revised by its author as follows:

§ 953(3) shall be amended to add a provision B:

If intangible assets such as, but not limited to, deferred compensation accounts, investment retirement accounts, pensions, profit sharing plans, publicly traded stocks, bonds, trusts, bank accounts credit union accounts, mutual funds and certificates of deposits [sic] and money markets, are acquired prior to the marriage or by gift, bequest, devise or decent during the marriage, those assets and their successor accounts or assets and any growth, whether attributable to reinvestment of dividends, interest or capital gains shall be considered non-marital subject to the following:

a. Any account retitled into joint names shall be presumed marital.

b. Contributions and the growth of contributions made during the marriage from income or marital assets outside the non-marital

account shall be presumed marital.[1]

L.D. 2267 is intended to exempt non-marital intangible investment assets from the operation of the marital property presumption. As a result, the increase in the value of such assets during marriage will be treated as non-marital property. Under existing law, the portion of a non-marital asset's increase in value during the marriage that results from reinvesting the asset's income is treated as marital property. See Clum v. Graves, 1999 ME 77, ¶ 15, Harriman v. Harriman, 1998 ME 108, ¶ 5. This, in turn, often imposes complicated proof problems for litigants because expert analysis is generally required to differentiate an investment's market growth (non-marital) from its income growth (marital).

II. Analysis of L.D. 2267

Although the Commission endorses L.D. 2267's objective of simplifying the classification of non-marital investments when spouses' divorce, the Commission recommends against the enactment of L.D. 2267, as currently written, for the following reasons:

1. L.D. 2267 Fails to Distinguish Between Passive and Active Spousal Involvement in Managing or Operating the Asset During Marriage

The Clum and Harriman cases involved situations where a spouse owned mutual funds, certificates of deposit and capital stocks prior to marriage which grew in value during the marriage. The growth was the result of market forces and the reinvestment of interest, dividends and capital gains. The spouse owners did not take a substantial active role in the investment or management of the investments. Under current law, the growth was non-marital because no "marital effort" contributed to the growth. The reinvested income, however, was determined to be "marital" because the court presumed that the income generated by the investment was the result of marital effort.

L.D. 2267, as drafted, will require that the income related growth of intangible investment assets be treated as non-marital property. This change reverses the presumption that income is a result of marital effort. Thus, both existing law and L.D. 2267 fail to consider whether either or both spouses took an active role in the investment or management of the assets during the marriage. These approaches are arguably contrary to the "shared enterprise theory" which is the cornerstone of

[1] All references to "L.D. 2267" in this report are to the foregoing amended version.

Maine's equitable distribution statute. If a spouse actively manages and invests his or her premarital investments during the marriage, the marriage should benefit from the income generated by the spouse's labor. To take an extreme example, if a spouse spends most of his or her time during marriage managing his or her premarital investments, L.D. 2267 would require that all the fruits of these efforts be treated as non-marital property. Existing law yields the opposite, yet equally inequitable result. If no substantial spousal effort contributes to producing income, existing law treats the reinvested income as marital. Thus if a spouse does nothing with an asset such as stock except reinvest dividends, the increase in value is treated as marital. The Commission believes that whether an asset's income is treated as marital or non-marital property should depend on whether the income generated by a non-marital asset results from the active participation of either or both spouses.

2. L.D. 2267 Unnecessarily Discriminates Between Tangible and Intangible Assets.

The Act creates an exception to the marital property presumption, but only for intangible assets. There is, however, no reason to discriminate between tangible and intangible assets. The Commission believes that the question of whether either or both spouses took an active role in managing a non-marital asset, and not whether an asset is tangible or intangible, should determine the marital or non-marital character of the property's income. Tangible investment assets such rental property or a business should be afforded the same treatment as intangible investment assets. For example, a spouse owns a vacation rental apartment prior to marriage which is managed by a management company and which requires only the sporadic and nominal involvement of the spouse during the marriage. The income generated by that asset can be fairly viewed as not the product of the spouses' "shared enterprise" and should be treated as non-marital property. On the other hand, if a spouse is substantially involved in the management of the pre-marital rental apartment, the income produced by the asset should be viewed as marital property because it is within the ambit of the marriage's "shared enterprise." The presence or absence of marital effort is the relevant consideration, not the nature of the asset.

L.D. 2267 unnecessarily discriminates between tangible and intangible assets in another respect. L.D. 2267 would amend subsection (3) of section 953 and apply to all non-marital investment assets: Both those acquired prior to marriage as well as those acquired during the marriage by gift, bequest, devise or decent. Tangible assets will continue to be governed by subsection (2)(E) of section 953 which provides that the "increase in the value of property acquired prior to the marriage" is non-marital property. There is, however, no corresponding provision for the increase in value of non-marital property acquired during the marriage (for example, property acquired by a spouse through gift, bequest, devise or decent). L.D. 2267 also fails to

encompass non-marital property "excluded by a valid agreement of the parties." 19-A M.R.S.A. § 953(2)(D). The Commission believes that there should not only be uniform treatment afforded intangible and tangible assets, but also uniform treatment afforded all non-marital assets whether (1) acquired prior to the marriage, (2) acquired during the marriage, (3) exchanged for property acquired prior to or during the marriage or (4) excluded by valid agreement.

3. L.D. 2267's Reliance on the Term "Intangible Assets" May Lead to Inconsistent Results

L.D. 2267'S reliance on the term "intangible assets" may also lead to unintended inconsistent results. L.D. 2267 applies to "intangible assets such as, but not limited to," the twelve specific intangible assets listed in the bill. "Intangible" is an imprecise term because it often focuses on the form of ownership, not the inherent nature of the underlying asset. For example, a spouse's pre-marital vacation rental apartment is "tangible" property and would not be subject to L.D. 2267. On the other hand, a spouse's pre-marital ownership interest in a limited liability company organized for the purpose of owning a vacation rental apartment is "intangible" property and is arguably subject to L.D. 2267. Similarly, if a spouse placed the title of a pre-marital vacation rental apartment in a trust (which is one of the twelve types of intangible assets listed in L.D. 2267) prior to marriage, the apartment would be treated as an "intangible asset" governed by L.D. 2267. The reliance upon "intangible assets" as the cornerstone for L.D. 2267 results in artificial distinctions which may lead to unintended inconsistent results.

III. Recommendations

1. L.D. 2267 Should Not be Enacted in its Current Form, But Title 19-A, Section 953 Should be Revised to Achieve L.D. 2267's Objective

For the foregoing reasons, the Commission recommends that L.D. 2267 not be enacted in its present form. The Commission does recommend, however, the amendment of Title 19-A, section 953, in order to achieve L.D. 2267's objective of simplifying the classification of non-marital investments when spouses' divorce. To best understand that objective, a brief review of the relevant case law is required.

In MacDonald v. MacDonald, 532 A.2d 1046 (Me. 1987), the Law Court was faced with two questions. First, the Court decided the question of whether the increase in value or "appreciation" of non-marital property (in this case, the husband's interest in an automobile dealership he acquired by gift from his father) was non-marital. The Court determined that in accordance with the partnership or

shared enterprise theory of Maine's marital property law, the marital estate was entitled to that portion of the increase in value of the business from acquisition to the time of trial that was attributable to marital effort. The husband's separate non-marital estate was entitled to that portion of the increase in value attributable to the inherent value of the business and the economic factors affecting it. Second, the Court determined that the business' increased value associated with the reinvestment of its earnings during the marriage should be part of the martial estate. The Court concluded that income generated by a non-marital asset during marriage is itself marital property. This conclusion is consistent with commentary to the 1970 version of the Uniform Marriage and Divorce Act upon which Maine's marital property law is based.

In Clum v. Graves, 1999 ME 77, and Harriman v. Harriman, 1998 ME 108, the Law Court applied its ruling in MacDonald to the increase in value of a spouse's non-marital investment assets. The Court concluded that the portion of increase in the value of non-marital investment assets (such as stocks, mutual funds and certificates of deposit) resulting from the reinvestment of income is marital property. In so ruling, the Court did not focus on the presence or absence of martial effort. Marital effort was presumed. As a result, current law (as embodied in MacDonald on the one hand, and Clum and Harriman on the other) does not uniformly reflect the principle upon which Maine's martial property statute was enacted, namely, the partnership or shared enterprise theory of marriage. This, in turn, means that under current law even if neither party contributes substantial marital effort to the management of a spouse's premarital investment account during the marriage, the parties must engage the services of expert witnesses to analyze and distinguish (1) the account's appreciation associated with market growth, (2) the account's appreciation associated with the reinvestment of capital gains and (3) the account's appreciation associated with the reinvestment of income. Because we live in a time when many people own investments through IRA, Keogh, retirement and individual investment accounts, the law's current approach adds substantial complexity and expense to the marital dissolution process.

2. The Revision of Title 19-A, Section 953, Recommended by the Commission

The Commission accordingly recommends the enactment of the following revision to subsection (2)(E) of Title 19-A, section 953:

E. The increase in value of ~~property acquired prior to the marriage~~ *a spouse's non-marital property as defined in subsections A-D herein.*

(1) "Increase in value" includes:
(a) appreciation resulting from market forces; and
(b) appreciation resulting from reinvested income and capital gain unless either or both spouses had a substantial

active role during the marriage in managing preserving or improving the property.

(2)"Increase in value" does not include:
(a) appreciation resulting from the investment of marital funds or property in the non-marital property;
(b) appreciation resulting from marital labor; and
(c) appreciation resulting from reinvested income and capital gain if either or both spouses had a substantial active role during the marriage in managing, preserving or improving the property.

Comment

This revision of 19-A M.R.S.A. § 953(2)(E), prepared in response to the decisions of Clum v. Graves, 1999 ME 17, and Harriman v. Harriman, 1998 ME 108, makes two changes to the operation of Maine's marital property law.

First, it excludes the increase in value of non-marital property from the definition of marital property if no marital effort or money is expended. The portion of the increase resulting from the reinvestment of the property's income or appreciation during the marriage remains non-marital, so long as neither spouse had a substantial and active role in the management, preservation or improvement of the property during the marriage. For example, if dividends, interest or capital gains are routinely reinvested in a spouse's non-marital retirement, investment, savings or other financial account, the resulting increase in value remains non-marital property. On the other hand, if funds invested in a spouse's non-marital account involved the substantial active involvement of either or both spouses, the increase in value may be found to be marital property. The determination of what constitutes "substantial and active" involvement by a spouse will depend upon the type of management, maintenance or improvement customarily associated with the type of property at issue.

A spouse's active and substantial involvement does not depend upon whether the spouse received compensation for her or his efforts. A spouse's active, but uncompensated time spent managing his or her premarital stock portfolio during the marriage is marital effort and any increase in the value of the portfolio flowing from reinvested income will be treated as marital property. Similarly, the increase in value of a non-marital business during marriage resulting from reinvesting the business' income in the business will also be treated as marital property

if either or both spouses actively managed the business during the marriage. See,e.g., MacDonald v. MacDonald, 582 A.2d 976 (Me. 1990). Nominal, inconsequential or sporadic actions by a spouse in connection with non-marital property will not cause the increase in value of the property attributable to reinvested income to be treated as marital property. See,e.g., Nordberg v. Nordberg, 658 A.2d 217 (Me. 1995).

This provision also does not require proof that a spouse's active and substantial involvement in the asset's management, preservation or improvement was directly responsible for the income generated by a non-marital asset. It is a spouse's dedication of time and skills to the property during the marriage which brings the property's income within the ambit of the marriage's "shared enterprise." It is not necessary to prove that the spouse's involvement was responsible for the income produced by the property.

The second change made by the amendment is to expand the exception to the marital property presumption to include non-marital property acquired during the marriage. The predecessor provision only applied to the "increase in value of property acquired prior to the marriage. " (Emphasis added). This amendment removes this limiting language so that it now applies to all non-marital property, whether acquired prior to marriage or during the marriage (through gift, bequest, devise, or decent) or property excluded by agreement of the parties).

The amendment does not address situations in which spouses rely exclusively on their marital funds during the marriage so as to preserve either or both spouse's premarital investment, retirement or similar accounts. The Courts can achieve an equitable distribution in such circumstances through the provisions of 19-A M.R.S.A. § 953(B) (the court must consider the value of the non-marital property set apart to each spouse in arriving at an equitable distribution), as well as through an award of reimbursement spousal support. See L.D. 2276 (proposed 19-A M.R.S.A. § 951-A(2)(C)).

3. *The Commission's Recommended Statutory Change Will Decrease the Need for Expert Testimony and Decrease Litigation*

Since the Law Court decided the Clum and Harriman cases, the complexity of determining the marital or non-marital character of the increase in value of a pre-marital asset has grown. The entire increase in value will be treated as marital property unless the person can segregate (1) the increase in value of the original

non-marital property solely attributable to market forces; (2) the increase in value due to capital appreciation (such as reinvestment of capital gains); (3) the increase in value attributable to investment of marital income (which includes reinvested dividends and interest); and (4) the increase in value of the reinvested income attributable to market forces. Items 1 and 2 are non-marital property and items 3 and 4 are marital property.

The Commission's recommendation will decrease the need for expert witnesses and consequently reduce the likelihood of litigation. Under the proposal, the critical issue is whether or not a spouse had a substantial active role in managing or preserving the property. If so, the non-marital value is established as of date of the marriage, and any increase, except an increase due to market forces, is marital property.[2] If not, the increase in value is non-marital regardless of whether the increase is due to market forces or reinvested income. This approach is consistent with the martial property presumption and the shared enterprise theory of marriage.

In the case of intangible assets such as stocks or mutual funds, if there is an increase in valu and a spouse has a substantial active role in managing, preserving or improving the property, the non-marital increase in value is easy to calculate. One need only look at the unit value of the asset as of the date of the marriage and the current value of the same number of units as of the divorce hearing. The difference represents the non-marital increase in value. The remaining increase in value represents marital property. If there is no substantial active marital effort involved, the value of additional units purchased from reinvested income is non-marital. For publicly traded securities such as stocks, bonds and mutual funds, the foregoing determinations can be made based upon readily available market information and do not require the involvement of an expert witness.[3]

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[2]Where it is possible to segregate the two sources of appreciation, it is appropriate to require the person asserting that a portion of the increase is non-marital to bear the burden and expense of this proof.

[3]Under current law, in both instances set forth above, one must separately calculate the marital and non-marital increases in value by mathematically segregating the reinvested income (as well as reinvested capital gains in the case of mutual funds), determining its value "at acquisition" and calculating any increase in market value on the reinvested income to the date of the divorce hearing. Because automatic reinvestment programs commonly operate on a monthly basis, the calculations can involve the examination of monthly reinvestments occurring over a period of years. This process must be repeated for each non-marital investment at issue.

In the case of tangible assets, if there is an increase in value and a spouse has a substantial active role in managing, preserving or improving the asset, the entire increase in value will be treated as marital unless and to the extent the spouse owner of the non-marital property can specifically prove that all or a portion of the growth is attributable to market forces. On the other hand, if a tangible non-marital asset increases in value and there is no substantial active spousal role in managing, preserving or improving the asset during the marriage, the entire increase will be treated as non-marital.

The statutory change proposed by the Commission will decrease the need for expert testimony and simplify the proof required to demonstrate the marital or non-marital character of the property. Not only will this reduce the cost for divorcing spouses, it will permit attorneys to give clear advice on the law's application and promote the earlier resolution of cases.

Date: February 23, 2000

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth J. Scheffee, Esq.
Mary-Anne E. Martell, Esq.

Maine Family Law Advisory Commission

Recommendation to the Maine Legislature, Joint Standing Committee on the Judiciary, Regarding the Revision of Title 19-A, Section 953(2)(E)

February 23, 2000

For the reasons set forth in the Maine Family Law Advisory Commission's report of even date herewith, the Commission recommends that L.D. 2267 not be enacted in its present form. The Commission does recommend, however, the following revision of Title 19-A, section 953, in order to achieve L.D. 2267's objective of simplifying the classification of non-marital investments when spouses' divorce:

E. The increase in value of ~~property acquired prior to the marriage~~ *a spouse's non-marital property as defined in subsections A-D herein.*

(1) "Increase in value" includes:
(a) appreciation resulting from market forces; and
(b) appreciation resulting from reinvested income and capital gain unless either or both spouses had a substantial active role during the marriage in managing, preserving or improving the property.

(2)"Increase in value" does not include:
(a) appreciation resulting from the investment of marital funds or property in the non-marital property;
(b) appreciation resulting from marital labor; and
(c) appreciation resulting from reinvested income and capital gain if either or both spouses had a substantial active role during the marriage in managing, preserving or improving the property.

Comment

This revision of 19-A M.R.S.A. § 953(2)(E), prepared in response to the decisions of Clum v. Graves, 1999 ME 17, and Harriman v.

Harriman, 1998 ME 108, makes two changes to the operation of Maine's marital property law.

First, it excludes the increase in value of non-marital property from the definition of marital property if no marital effort or money is expended. The portion of the increase resulting from the reinvestment of the property's income or appreciation during the marriage, so long as neither spouse had a substantial and active role in the management, preservation or improvement of the property during the marriage, remains non-marital. For example, if dividends, interest or capital gains are routinely reinvested in a spouse's non-marital retirement, investment, savings or other financial account, the resulting increase in value remains non-marital property. On the other hand, if funds invested in a spouse's non-marital account involved the substantial active involvement of either or both spouses, the increase in value may be found to be marital property. The determination of what constitutes "substantial and active" involvement by a spouse will depend upon the type of management, maintenance or improvement customarily associated with the type of property at issue.

A spouse's active and substantial involvement does not depend upon whether the spouse received compensation for her or his efforts. A spouse's active, but uncompensated time spent managing his or her premarital stock portfolio during the marriage is marital effort and any increase in the value of the portfolio flowing from reinvested income will be treated as marital property. Similarly, the increase in value of a non-marital business during marriage resulting from reinvesting the business' income in the business will also be treated as marital property if either or both spouses actively managed the business during the marriage. See,e.g., MacDonald v. MacDonald, 582 A.2d 976 (Me. 1990). Nominal, inconsequential or sporadic actions by a spouse in connection with non-marital property will not cause the increase in value of the property attributable to reinvested income to be treated as marital property. See,e.g., Nordberg v. Nordberg, 658 A.2d 217 (Me. 1995).

This provision also does not require proof that a spouse's active and substantial involvement in the asset's management, preservation or improvement was directly responsible for the income generated by a non-marital asset. It is a spouse's dedication of time and skills to the property during the marriage which brings the property's income within the ambit of the marriage's "shared enterprise." It is not necessary to prove that the spouse's involvement was responsible for the income produced by the property.

The second change made by the amendment is to expand the exception to the marital property presumption to include non-marital property acquired during the marriage. The predecessor provision only applied to the "increase in value of property acquired prior to the marriage. " (Emphasis added). This amendment removes this limiting language so that it now applies to all non-marital property, whether acquired prior to marriage or during the marriage (through gift, bequest, devise, or decent) or property excluded by agreement of the parties).

The amendment does not address situations in which spouses rely exclusively on their marital funds during the marriage so as to preserve either or both spouse's premarital investment, retirement or similar accounts. The Courts can achieve an equitable distribution in such circumstances through the provisions of 19-A M.R.S.A. § 953(B) (the court must consider the value of the non-marital property set apart to each spouse in arriving at an equitable distribution), as well as through an award of reimbursement spousal support. See L.D. 2276 (proposed 19-A M.R.S.A. § 951-A(2)(C)).

Date: February 23, 2000

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Jon D. Levy, Chair
Kristin Gustafson, Esq., Vice Chair
Debbie L. Willis, Esq., Secretary
Dr. Bruce Kerr, Ph.D.
Jo-Ann Cook, M.S.W.
Hon. Paul T. Pierson
Hon. James E. Mitchell
Elizabeth J. Scheffee, Esq.
Mary-Anne E. Martell, Esq.

Maine District Court

25 Adams Street, Biddeford, Maine 04005

Frances E. Norton
Judicial Secretary
Telephone: (207) 283-1199
Fax: (207) 286-8398

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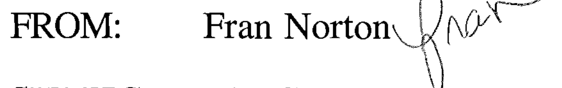
MEMORANDUM

DATE: December 19, 2002

TO: Hon. Jon D. Levy

FROM: Fran Norton



SUBJECT: FLAC Reports

Here are copies of the FLAC Reports issued after February 2000, that Judge Wheeler had in her files. In the future, we will automatically send you copies of the Commission's reports as we receive them. As I understand it, you will make the reports available to all Law Court Justices.

Have a wonderful holiday!

encl:

cc: Peggy Reinsch (for the Augusta Law Library)
Hon. Joyce A. Wheeler (no enclosure)

2002

02/04/02 - L.D. 1969:	An Act to Prohibit a Convicted Sexual Offender From Acquiring Custody or Obtaining Visitation Rights Without Adult Supervision
01/28/02 - L.D. 1969:	Same as above.
01/15/02 - L.D. 1986:	An Act to Allow the State to Attach and Hold in Escrow Funds from Legal Settlements and Awards for the Purpose of Paying Child Support.
01/15/02 - L.D. 2025	An Act to Make Certain Changes to the State's Child Support Enforcement Laws.

2001

10/04/01 - L.D.	Child Support Guidelines
04/27/01 - L.D. 1405:	An Act to Encourage Joint Child Rearing between Divorced Parents.
04/05/01 - L.D. 1364:	An Act to Decrease the Length of Time a Person Has to Make Child Support Payments Before Being Considered Not in Compliance.
04/05/02 - L.D. 1347:	An Act to Restrict the Issuance of Recreational Licenses for Nonpayment of Child Support.
04/05/01 - L.D. 684:	An Act to Require Courts to Take Federal Disability Payments into Account when Determining Child Support Awards.

04/02/01 - L.D. 1522:	An Act to Clarify the Status of Support Obligations if an Obligor Begins to Receive Public Assistance.
03/27/01 - L.D. 1405:	An Act to Encourage Joint Child Rearing between Divorced Parents.
03/26/01 - L.D. 1473:	An Act to Make Uniform the Language Governing Parental Rights and Responsibilities.
03/23/01 - L.D. 1716:	An Act to Improve Child Support Services.
03/23/01 - L.D. 954:	Protection from PA/PH.
03/22/01 - L.D. 1522:	Same as 04/02/01 date.
03/21/01 - L.D. 1450	An Act to Protect Parents from Undue Influence in Child Protective Actions.
03/21/01 - L.D. 724	An Act to Implement the Recommendations of the Courts' Guardian ad Litem Committee.
03/09/01 - L.D. 1079:	An Act to Protect Families by Easing the Standard of Proof for Certain Child Protection Proceedings.
03/09/01 - L.D. 1074:	An Act to Require proceedings by the DHS to Terminate Parental Rights by Open.
03/09/01 - L.D. 1070:	An Act to Require Background Checks for Adoptions.
03/09/01 - L.D. 1009:	An Act to Amend the Child and Family Services and Child Protection Act.
03/09/01 - L.D. 876:	An Act to Require the DHS to Provide Automatic Discovery to Opposing Attorneys.

03/09/01 - L.D. 862:	An Act to Clarify the Jurisdiction and Qualification for Protection from Abuse Hearings.
03/09/01 - L.D. 836:	An Act to Grant Foster Parents Intervenor Status in Child Protection Proceedings.
03/09/01 - L.D. 745:	An Act to Require the Audio Recordings of Interviews of Children by the DHS.
03/09/01 - L.D. 683:	An Act to Allow Godparents as Omtervemprs onm Cjild Custody Cases with the DHS.
03/05/01 - L.D. 862:	Same as 03/09/01 date.
02/20/01 - L.D. 1070:	Same as 03/09/01 date.
02/20/01 - L.D. 363	An Act to Clarify the Law Regarding Name Changes.
02/19/01 - L.D. 472	Resolve, to Establish a Fatherhood Issues Study Commission.
02/19/01 - L.D. 195	An Act to Place a Time Limit on the Award of Spousal Support.

2000

2/08/00 - L.D. 2511 An Act to Preserve the Integrity of Court-ordered Child Support Obligations.

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

February 19, 2001

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 472, "Resolve, to Establish a Fatherhood Issues Study Commission." FLAC is uncertain what this Resolve entails. However, FLAC has considered L.D. 472 and has decided to take no position on L.D. 472.

Date: February 19, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

February 19, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 195, "An Act to Place a Time Limit on the Award of Spousal Support." For the reasons set forth below, the Commission recommends against the enactment of **L.D. 195**.

Discussion

L.D. 195 would create fixed maximum terms on spousal support and eliminate the rebuttable presumption established in 19-A M.R.S.A. §951-A, sub-§2, ¶A, which was enacted by PL 1999, c. 634, §3. The rebuttable presumption established in Title 19-A §951-A was the result of an extended analysis performed by the Maine Family Law Advisory Commission, which considered all of the ramifications of employing a rebuttable presumption, rather than fixed term limits in connection with an award of "General" spousal support.

Title 19-A, §951-A recognized "General" support as one of five specific types of spousal support. "General" support is the traditional reason for spousal support and is most commonly associated with marriages of long duration. "General" support is awarded "to provide financial assistance to a spouse with substantially less income potential than the other spouse so that both spouses can maintain a reasonable standard of living." 19-A M.R.S.A. §951-A(2)(A). Title 19-A, 951-A, sub-§2, ¶A established two rebuttable presumptions regarding the award of "General" support. In marriages of less than ten years duration, it is presumed that "General" support should not be awarded, and in marriages of less than twenty years duration, it is presumed that spousal support

should not exceed a term of one-half the length of the marriage. These presumptions establish limits which are rebuttable based upon a finding that their application in a particular case would be inequitable or unjust. The statute retains the discretion of the court to award indefinite "General" spousal support, where merited by the facts.

L.D. 195 would reject the rebuttable presumptions of the current law, and would create fixed limits of no more than one-half of the length of the marriage with a cap of twenty years regardless of the duration of the marriage, or the other facts of the case. The court would have no discretion to set spousal support without a term limit, even in a case where the facts concerning the family would make such a result fair. The fixed limits proposed in the bill could result in an inequitable and unjust result in long term marriages in which one spouse leaves the marriage in a much stronger earning capacity in the marriage and the other spouse has dedicated a substantial portion of his or her adult life to non-economic responsibilities and, as a consequence, sacrificed the opportunity to develop an earning capacity which would enable him or her to become totally self-supporting within a reasonable period following the dissolution of the marriage. The determination of what, in the end, is an equitable and just spousal support award in long term marriages is inextricably tied to the facts of each case, including factors such as the income, education, training and experience of each spouse, and the health and disability of each spouse.

Date: February 19, 2001 Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

February 20, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 363, "An Act to Clarify the Law Regarding Name Changes."** For the reasons set forth below, the Commission supports the concept of providing probate court judges with the discretion to permit name changes for victims of domestic abuse without notice to a spouse when there is a reasonable fear for the safety of the victim and if the court can keep confidential the name change record.

Discussion

Threats of domestic abuse can be very real and force victims to flee. Relocation of the victim often cannot provide adequate obstacles to abusers who are intent on finding their victims. Some victims must change their identity to make sure they are not found.

Section 1-701 of Title 18-A M.R.S.A. authorizes the probate court to change the name of a petitioner "after due notice" Court ordered name changes requiring notice raise significant safety concerns for victims of domestic abuse and their children. L.D. 363 would waive the notice requirement of Section 1-701 of Title 18-A M.R.S.A. for victims of domestic abuse.

We have the following additional observations for improving L.D. 363. First, L.D. 363 could require that the petitioner establish that he or she is or was a victim of domestic abuse and that the petitioner seeks to have the name change due to a reasonable fear for his or her safety. Such an amendment would clarify that it is not only a history of domestic abuse, but also a reasonable fear for the victim's safety that would allow a probate court judge to consider and weigh the concerns and safety of

domestic abuse victims as paramount to the rights of others, including a spouse.

Second, L.D. 363 could be amended to permit a probate court judge to seal name change records of victims of domestic abuse if the judge finds that the safety of the person seeking the name change warrants sealing the file. Section 1-701 of Title 18-A M.R.S.A. requires the court to "make and preserve a record of the name change." Court ordered name changes produce court documents which are part of the public record, raising significant safety concerns for victims of domestic abuse and their children. Abusers often find their victims who have relocated through public records, such as court or school records. Thus, authorizing a probate court judge to seal name change records of victims of domestic abuse would further protect the safety of victims of domestic abuse.

The safety measures contained in L.D. 363 are consistent with other legislation passed by the Maine Legislature when it recognized the need of a domestic abuse victim to protect the privacy of his or her address, and enacted laws to keep a victim's address confidential. For example, when establishing the conditions of parent-child contact in cases involving domestic abuse, a court may order the address of the child and the victim be kept confidential, <u>see</u> 19-A M.R.S.A. §1653(6)(D), and when a parent who is relocating believes notifying the other parent will cause danger to the relocating parent or child, a court "shall provide appropriate notice to the other parent in manner determined to provide safety to the relocating parent and child," <u>see</u> 19-A M.R.S.A. §1653(14).

Date: February 20, 2001 Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

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MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

February 20, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1070, "An Act to Require Background Checks for Adoptions." The bill has been introduced at the initiative of the Commission, in accordance with the authority established in 19-A M.R.S.A. §354(2). For the reasons set forth below, the Commission supports enactment of L.D. 1070.

Discussion

Under existing adoption law, a probate court judge may waive an investigation when the petitioner is a blood relative of the child. See 18-A M.R.S.A. §9-304(a)(2). L.D. 1070 would require, at a minimum, a check of child abuse and state and national crimnal records in all prospective adoptions.

In a fairly common practice in what is known as "step-parent" adoptions, a mother may petition the probate court for her husband to adopt her children. The petitioner may not be using a public or private adoption agency, and therefore not have a home study performed by such agencies. Unless the self-report from utilized by the probate court raises concern for further inquiry, the probate court may waive further investigation and, in so doing, may fail to detect if the adoptive parent has a child abuse and criminal history which may endanger the welfare of a child.

L.D. 1070 seeks to ensure that the court does not sanction an adoption which may jeopardize the health and safety of a child, and will

establish a standard for all adoption petitions, requiring child abuse and state and national criminal record checks. The Commission consulted with the Maine State Police and the Department of Human Services to draft a bill that includes the necessary procedures for protecting confidentiality and meeting federal requirements for national criminal record checks.

The Commission is the intiator of this legislation.

The Commission recommends enactment of L.D. 1070.

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

March 17, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 961, "An Act Clarifying Child Support Obligations." FLAC suggests that L.D. 961 be carried over and given to FLAC to study and report back to the Judiciary Committee for the reasons set forth below.

Discussion

L.D. 961 provides that once an alleged father establishes through genetic testing or otherwise that he is not the biological father of the child, he is not responsible for paying child support for that child. This proposal leaves too many questions unanswered. For example, it does not address the mechanics for genetic testing, including without limitation, the payment of the costs of the testing. The bill does not explain how this declaration with respect to testing impacts a child who has a presumed, acknowledged or adjudicated father. L.D. 961 doe it address the effect of a man's knowing and voluntary acknowledgement of paternity. Nor does it address de facto fatherhood questions. L.D. 961 does not address issues concerning parental rights and responsibilities.

Like L.D. 865, L.D. 961 raises important questions about the Parent-Child Relationship, including whom the lawful parents are and who is obligated to pay maintenance and support for the child. The National Conference of Commissioners on Uniform State Laws has studied these questions and has approved and recommended for enactment the Uniform Parentage Act, last amended and revised in 2002. The Uniform Parentage Act attempts to give states guidance on the difficult issues of parentage, including issues of paternity. The Uniform Parentage Act, along with other laws and proposals relating to parentage and nonparentage, should be studied before Maine enacts

any legislation on such important issues. FLAC is willing to undertake this study and submit a report no later than January 1, 2004, together with any necessary implementing legislation, for presentation to the Second Regular Session of the 121st Legislature.

Dated: March 17, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

March 28, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 1265, "An Act to Allow a Judge to Grant Visitation Rights to a Parent of a Child in Foster Care," FLAC opposes L.D. 1265 as unnecessary and burdensome as set forth below.

Discussion

L.D. 1265 provides that a court may order that a parent, whose rights have been terminated pursuant to 22 M.R.S.A. §4055 be allowed visitation rights with the child, if the court determines such visitation to be in the child's best interests. Secondly, this bill would allow a parent whose rights have been terminated, to have notice of and the opportunity to participate in adoption proceedings, if a court determines that it would be in the best interests of the child. FLAC believes that L.D. 1265 is unnecessary and burdensome.

Procedurally, L.D. 1265 would result in additional court hearings. A court would have to decide, after terminating parental rights, whether it is in the best interests of a child(ren) to allow biological parents to visit. This would require retaining the Guardian ad Litem, as well as the parents' attorneys to remain active in the case. L.D. 1265 places no time limitation on the visitation provision, which could cause delays in an adoption proceeding. After termination of parental rights has occurred, a visitation request could be brought at any time, which might necessitate a full hearing. Such hearings could be costly for the court system and the State, as expert testimony from therapists, psychologists/psychiatrists, medical doctors and other professionals as well as court appointed counsel fees could continue to be generated. There would be a need for additional hearing time, in an already over-crowed docket and more judges.

At the present time, following termination of parental rights, the Department of Human Services already has a procedure in place for a visit(s) to occur between a biological parent and the child, so long as it is deemed safe and in the child's best interests. The agency, not the court, determines whether such "good-bye" visits should occur, and in many cases, they do. Finally, in cases where a court finds that a child has been seriously abused/neglected by a parent and has concluded, by clear and convincing evidence that termination is in the best interests of the child, that child, if old enough, should not have to face the prospect, however, remote, of a visit with the parent. FLAC believes that L.D. 1265 would force a child to face this possibility.

With respect to the provision involving adoptions, FLAC believes that L.D. 1265 could discourage adoptions. Adoptive parents may not wish to face hearings on whether to allow biological parents, whose parental rights have been terminated, to have notice of and participate in adoption proceedings. Again, there would be a need for additional hearings, with additional costs and adoptions would be delayed for children, many of whom have waited years to become adopted. Lastly, L.D. 1265 gives no explanation for allowing a parent whose rights have been terminated to have notice of or participate in an adoption proceeding. This provision appears to be contrary to a finding in a termination order that it is in the best interests of the child to terminate a parent's rights.

Dated: March 28, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

April 1, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 1298 An Act to Penalize a Person Who is Habitually Late Making Child Support Payments. FLAC supports L.D. 1298.

Discussion

L.D. 1298 amends the definition of compliance with a support order for purposes of license revocation for failure to pay support. Under current law a child support obligor is in compliance with a support order if not more than 60 days in arrears in paying child support. L.D. 1298 would include a provision of not being more than 30 days in arrears if the obligor has been more than 30 days late within the past 24 months. Effectively this reduces the time period for compliance from 60 days to 30 days if the obligor is repeatedly two months late in paying child support.

In practice, this change would be used with self-employed child support obligors who have an ability to pay, but for one reason or another, chose to pay only when under the threat of license revocation. Obligors working for employers already have immediate income withholding order in place. In effect, L.D. 1298 will motivate people who do not pay on a timely basis to pay promptly.

This amendment provides an effective child support mechanism to reach obligors who are self-employed or have resources and chose to pay child support only when facing license revocation.

Children need support on an ongoing and current basis, and not when an obligor decides he or she wants to pay support. Child support paid on a timely basis could be budgeted on a monthly basis. Families receiving public assistance could receive

additional child support funds if payments were received monthly. The portion of the child support payment the family receives from the Department of Human Services is based solely on collections in a particular month. In the end, custodial parents and children benefit from more regular and timely child support payments in the home.

Dated: April 2, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

April 30, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 1568, An Act to Protect Plaintiffs and Minor Children in Certain Civil Protection Order Cases. FLAC supports L.D. 1568.

Discussion

Current law is interpreted to mean that a judge cannot prohibit the possession of a firearm in a temporary order for protection from abuse - even when the alleged abuse includes the threat or use of a gun or a judge concludes that the temporary protection order is not likely to achieve its purpose in the absence of a gun prohibition. An order for protection from abuse is often sought when the parties are separating. Studies and experience disclose that the time of leaving a relationship can be the most dangerous for a plaintiff.[1] In the midst of a dangerous time, a judge needs the discretion to enter orders that help to protect the safety of all persons and that might help to prevent future violence and criminal conduct.

Firearm prohibitions are enacted "to prevent harm and promote safety under circumstances in which reasonable restrictions on firearms possessions are warranted." See Mitchell and Carbon, "Firearms and Domestic Violence: A Primer for Judges", Court Review: Special Issue on Domestic Violence, Summer 2002 at 43. L.D. 1568 is intended to do just this. L.D. 1568 gives the judge the authority to prohibit possession of

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[1] See Florida Governor's Task Force of Domestic and Sexual Violence, Florida Mortality Review Project, Report, at 44, table 7 (1997). This report disclosed that in a study of domestic homicides in Florida, 65% of intimate homicide victims had physically separated from the perpetrator prior to their death.

firearms pending a final hearing at the time the judge enters a temporary protection order. In exercising his or her discretion, a judge must make an assessment of dangerousness based on whether the complaint demonstrates abuse that involves a firearm or other dangerous weapon or whether the defendant presents a heightened risk of immediate abuse to the plaintiff or a minor child. L.D. 1568 spells out very specific criteria[2] for a court to use in determining whether a heightened risk exists sufficient to prohibit the possession of a firearm. The bill also requires that when the court prohibits the possession of a firearm, the court direct the defendant to turn over within 24 hours or such shorter time that the court may determine all firearms and specified dangerous weapons in the possession of the defendant.

L.D. 1568 includes protection for that defendant who opposes the gun prohibition contained in a temporary protection order by requiring that the court afford the defendant a hearing that is to occur as expeditiously as possible and that results in a written decision issued within 24 hours of the hearing.

For all of these reasons, FLAC supports L.D. 1568 as providing an important tool that will help to protect the safety of all persons and might prevent future violence and criminal conduct.

Dated: April 30, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

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[2] Those criteria include whether the protection order is not likely to achieve its purpose in the absence of a firearm prohibition condition, violation of past protection orders, past or present abuse resulting in injury, threats of homicide or suicide, and so forth.

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on the Judiciary

January 1, 2004

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 865, 2003, chapter 25, "Resolve Directing the Family Law Advisory Commission To Study and Report on Legal Issues Surrounding Surrogate Parenting and Gestational Agreements." Resolve 2003, chapter 25 specifically directs FLAC to study issues concerning the Uniform Parentage Act (UPA) and to submit a report with any applicable implementing legislation to the Second Regular Session of the 121st Legislature no later than January 1, 2004.

FLAC recommends the passage of the UPA together with amendments to the UPA that FLAC proposes.[1] FLAC files with this report the UPA and has designated the amendments by crossing out the portions of the UPA to be deleted and underlining the additions to the UPA.

The UPA, if adopted, will bring many changes and important guidance to Maine law. The UPA, as amended, will provide equal treatment of all children regardless of their parent or parents' marital status, greater certainty and stability to children, statutory guidance in determining parentage, and more predictable results for these determinations.

Determinations of parentage have become more complicated with the development of improved DNA testing and new reproductive technologies. The development of accurate DNA testing makes possible the highly accurate determination of paternity or non-paternity, even long after parent-child relationships may have been

[1] FLAC had the invaluable assistance of two law clerks, Danny Coyne and Lori Londis, in the research and preparation of this report. FLAC also worked with a subcommittee of the Family Law Section of the Maine State Bar Association. The subcommittee was comprised of the following individuals: Tobi Schneider, Chair, Judy Andrucki, Ed David, Steven Hayes, Sharon McHold, John Sheldon, Tamar Mathieu, Judy Berry, and Karen Boston. In preparation for this report, FLAC spoke with family law practitioners to understand the current parentage issues in Maine, reviewed unpublished Maine trial court decisions where many of these issues appear, and studied the experience of other states in addressing the issues raised in the UPA.

established. Maine courts and families struggle with what to do when a perceived father has been disestablished by DNA results, but there is an established parent-child relationship. Maine has an insufficient statutory framework to guide these families, and case law reveals inconsistent results.

New reproductive technologies make possible embryo implantation, artificial insemination and surrogacy agreements. Maine does not have, for the most part, the legal guidance necessary for addressing the new and unanticipated issues relating to the parentage of children born through the use of assisted reproduction and gestational agreements. Consequently, Maine courts and families are left to find new theories to maintain or dissolve the parent-child relationship created as a result of these new technologies.

The UPA addresses some of the complicated issues that arise as a result of the new reproductive technologies and the late accurate determination of paternity or non-paternity. Because advances in DNA testing have created results not anticipated by Maine statutes, and because advanced reproductive technologies permit the creation of new parent-child relationships beyond those specifically addressed in Maine's current law, FLAC recommends that the UPA be enacted, with additional Maine amendments that are recommended to ensure predictable results for Maine people and equal treatment of every child in Maine.

In this report, FLAC will summarize the highlights of the more significant provisions of the UPA, compare existing Maine law with the UPA, address the changes that FLAC proposes to the UPA.

Discussion

I. The UPA 2002

To address the inadequacies of existing law, the National Conference of Commissioners on Uniform State Laws ("Commissioners") promulgated the Uniform Parentage Act, last amended and revised in 2002. The UPA contains seven articles with

an eighth optional article. FLAC recommends the adoption of all eight articles.[2] The articles as adopted by the Commissioners may be summarized as follows:

Article 1	General Provisions
Article 2	Parent-Child Relationship
Article 3	Voluntary Acknowledgment of Paternity
Article 4	Registry of Paternity
Article 5	Genetic Testing
Article 6	Proceeding to Adjudicate Parentage
Article 7	Child of Assisted Reproduction
Article 8	Gestational Agreement

Article 1 contains definitions and choice of law rules.

Article 2 defines all possible bases for establishing the parent-child relationship, including presumptions of paternity, acknowledgement, adjudication, consent to assisted reproduction, adoption, and gestational agreements.

Article 2 clarifies that a legal mother is not only one who carries a child to birth, but may also be one who is adjudicated as the legal mother, who adopts the child, or who is the legal mother under a gestational agreement. Under the last three circumstances, the woman who carries the child to birth is not necessarily the legal mother.

Under Article 2 there are many possible ways to be considered the legal father. Under the UPA, the genetic father or the presumed genetic father is not necessarily the legal father. A legal father is an unrebutted presumed father, that is a man married to the birth mother at the time of the conception, or a man who resided in the same household as the child during the first two years of life and openly held the child out as his own. A legal father is also one who acknowledges his paternity under Article 3. An adjudicated father results from a judgment in a paternity action. A legal father may result from an adoption. Other possible ways to be considered a legal father include a man who

[2] FLAC recommends the adoption of all eight articles together with the amendments proposed by FLAC and discussed in section III below.

consents to assisted reproduction under Article 7 or an adjudicated father in a proceeding to confirm a gestational agreement under Article 8.

Article 3 provides for a non-judicial acknowledgment of paternity that is the equivalent of a judgment of paternity for child support enforcement purposes. Article III seeks to prevent the circumvention of adoption laws by requiring a sworn assertion of actual parentage of the child through sexual intercourse in support of acknowledgment. An acknowledgment is effective provided there is not another presumed, acknowledged or adjudicated father. There is also a provision for a presumed father, such as man married to the birth mother at the time of conception, to deny paternity as part of the acknowledgment process, that has the effect of a judgment of non-paternity if another man acknowledges paternity or is adjudicated to be the natural father.

Article 4 authorizes a registry for putative and unknown fathers. The registry permits individuals listed in the registry to be notified if there is a proceeding for adoption or termination of parental rights. Before a child is one year old there must be a certificate of search of the registry presented to the court. If the certificate shows that no putative or unknown father has registered within 30 days of the birth of the child, parental rights may be terminated without further notice. Once a child has reached the age of one year, the registry no longer has any effect and actual notice is required before there can be a termination of parental rights. The intent of this provision is to expedite adoption proceedings for infants under one year of age at the time of the hearing. The registry has no impact on a father who has established a father-child relationship. Thus, no presumed, acknowledged or adjudicated father may have his parental rights terminated under this provision.

Article 5 addresses genetic testing. It covers genetic testing pursuant to a court order or support enforcement agency. The article contemplates that testing for paternity may take place without testing the mother and, when the putative father is unavailable, by testing close relatives of the father. A court may order testing without a paternity action: A reasonable probability of sexual contact between the putative father and the mother suffices to initiate a proceeding, and a putative father may initiate the proceeding to show that he is not the genetic father. Article 5 establishes standards for genetic testing, setting a standard for a presumption of paternity of 99% probability of paternity based on

appropriate calculations of "the combined paternity index", and limits the rebuttal of the 99% presumption only by competing further genetic evidence that excludes the putative father or identifies another man as the genetic father. Article 5 also covers the mechanics of genetic testing, including the form of the report of genetic testing, the rebuttal of that report, confidentiality of that report, and the payment of costs of genetic testing.

Article 6 governs the proceeding to determine parentage. It takes into consideration the need to adjudicate in some circumstances the legal parentage of a woman, as well as that of a man. An action may be brought by the child, the mother of the child, a man whose paternity is to be adjudicated, a support-enforcement agency, an authorized adoption agency or licensed child-placing agency, a representative of a deceased, incapacitated or minor person, or an intended parent under a gestational agreement. If there is not a presumed, acknowledged or adjudicated father, an action may be brought at any time. If there is a presumed father, the statute of limitations for an action is two years from the birth of the child, but an action to disprove the presumed father's paternity may be brought at any time if the presumed father and mother did not cohabit or have sexual intercourse during the time of conception and the presumed father did not treat the child as his own. A court may deny on the basis of the best interest of the child a request for genetic testing in a proceeding to challenge the parentage of a child with a presumed or acknowledged father. A refusal to submit to genetic testing can ripen into an adjudication of paternity for the putative father who refuses. A child is not bound by an adjudication of fatherhood unless the adjudication was based on a finding consistent with the results of genetic testing. The time bars in Article 6, when combined with the presumptions of parentage defined in Article 2, put families on notice that the determination of parentage is important and become final early in the child's life. They have the effect of telling the mother, the genetic father, and the presumed parent, that the child is to be protected from late arguments about the child's parentage, as the law tries very hard to have parentage become final early in the child's life.

Article 7 addresses assisted reproduction. It includes donor eggs, the implantation of embryos, and artificial insemination. It does not apply to the birth of a child conceived by sexual intercourse or as a result of a gestational agreement, which is addressed in Article 8. If a man and a woman consent to any sort of assisted conception,

and the woman gives birth to a child, they are the legal parents. Consent may be withdrawn at any time before the placement of the eggs, sperm or embryos. A donor of either sperm or eggs used in an assisted conception may not be a legal parent.

Article 8 provides for gestational agreements. A gestational agreement occurs between a woman and a married or unmarried couple obligating that a woman carry a child that may or may not be genetically related to the intended parents. The conception must be an assisted conception. The woman who carries the child to birth pursuant to a gestational agreement is not the legal mother of the child. The intended parents become the legal parents.

The Drafting Committee of the UPA considered the passage of the UPA too important an event to have the UPA jeopardized by controversy surrounding gestational agreements; therefore, the UPA makes Article 8 optional. The Drafting Committee also believed that having available to states statutory provisions that address gestational agreements was important because gestational agreements are being used all the time, and the legal parenthood of children born pursuant to such agreements should not be in doubt because such agreements are used. Article 8 acknowledges that a child born pursuant to a gestational agreement is entitled to have his/her status determined before the conception of that child.

Article 8 considers a gestational agreement to be a significant legal act that should be reviewed by a court prior to the assisted reproduction. Judicially approved gestational agreements are enforceable legal agreements. Under the UPA, agreements are permitted if all parties sign the necessary documents, and make provisions granting the intended parents parentage and relinquishing the other parties' parental rights. Compensation is permitted and health decisions during pregnancy are left to the gestational mother.

Gestational agreements are carefully controlled under Article 8. To validate a gestational agreement, the mother or intended parents must meet a ninety-day residency requirement, and the gestational mother's husband (if married) is joined in the proceeding. Prior to the assisted reproduction, a court may issue an order declaring the intended parents as parents if the agreement meets the requisite criteria.

Article 8 provides that there is no requirement of a genetic link between the intended parents and the child. Furthermore, the Article confers exclusive and continuing

jurisdiction upon the appropriate court until the child attains the age of 180 days in order to minimize parallel litigation in other states. Before pregnancy, any party on written notice can terminate an agreement. In addition, the court can terminate the agreement for good cause. The gestational mother and husband are not liable to the intended parents if they terminate the agreement prior to pregnancy.

The intended parents must file a notice of birth with the court within 300 days after assisted reproduction. The court will then issue an order confirming the intended parents as parents, ordering surrender if necessary, and directing the Bureau of Vital Records to issue a birth certificate. If assisted reproduction is alleged not to have been used, genetic testing will be used. If the intended parents do not file, the gestational mother can file for child support after 300 days if a pre-birth order has been issued pursuant to Section 803.

Non-judicially reviewed gestational agreements are not enforceable. If a birth occurs under such an unenforceable agreement, parentage is determined under Article 2 (i.e., the gestational mother is the mother and her husband is presumed to be the father; the intended parents have no recourse; and if all parties still want to transfer the baby then adoption is the proper process). However, the intended parents can still be held liable for child support. This provision provides an incentive for all parties to seek prior judicial review of any agreement.

II. The UPA 2002 Compared to Existing Maine Family Law

The UPA codifies clear standards for determining parentage. Although there may be Maine law concerning one of the concepts contained in the first six articles of the UPA, the UPA rounds out and codifies the concept. For example, Maine statute does not define "presumed father", that is a father by operation of law; however, the presumption arises under Rule 302 of the Maine Rules of Evidence to establish that a husband of a woman who gives birth to a child is the presumed father. The presumption does not apply to paternity actions or unmarried fathers. The UPA defines presumed father more specifically to include when a child is born during the marriage, but to also include, for

example, when for the first two years of the child's life, the man resided in the same household with the child and openly held the child out as his own.

Maine law fails to define parent-child relationship. It does define parent to mean the legal parent or the legal guardian when no legal parent exists. See 19-A M.R.S.A. §101. Maine law also defines parent to mean a natural or adoptive parent, unless parental rights have been terminated. The UPA clarifies with very specific examples of when the legal relationship between a child and the parent of a child arises. Section 201 of the UPA provides, for example, that a father-child relationship is established by an unrebutted presumption of paternity; effective acknowledgment of paternity; adoption of the child by the man; an adjudication of paternity; consenting to assisted reproduction under Article 7; or an adjudication confirming the man as a parent of a child born pursuant to a gestational agreement under Article 8.

The UPA tightens the requirements for voluntary acknowledgment of paternity by requiring the mother of the child and the man claiming to be the genetic father sign an acknowledgment of genetic paternity with the intent to establish the man's paternity. That acknowledgement must state that there is no presumed, acknowledged or adjudicated father. If there is a presumed father, he must file simultaneously a denial of paternity. Existing Maine law provides for the acknowledgement of paternity but does not require that the acknowledgement be of genetic paternity. By requiring that the acknowledgement be of genetic paternity, the UPA attempts to foreclose those who would circumvent the adoption law with an acknowledgment not based on a genetic tie to the child. Further, the UPA brings certainty and stability to a child promptly by providing that an acknowledgement can only be challenged by a person not a signatory to the acknowledgement within two years of filing of the acknowledgement. A signatory to the acknowledgement may challenge it only on the basis of fraud, duress or material mistake of fact and only within two years after filing of the acknowledgment.

Bringing prompt stability to a child's life is also a goal of the UPA's provisions for genetic testing. A court may order genetic testing with a sworn affidavit alleging or denying the requisite sexual contact. The UPA requires that the test results establish paternity by a probability of 99% or greater. The UPA grants a court far more discretion than current Maine law allows when considering a request for paternity testing. The

UPA allows for fault-based determinations by denying testing on an equitable estoppel basis to parties who come to the court with unclean hands. In making this determination, the court must consider the best interest of the child, including the timeliness of the request, the amount of time a party has served as a parent, the nature of the relationship between the child and the acknowledged or presumed father, the age of the child, the harm that may result to the child, and any other factors relating to the disruption of the father-child relationship.

Current Maine law does not authorize a paternity registry. The permanency of a child's life is often delayed because of the inability to identify the genetic father of the child. The UPA addresses this gap and creates a paternity registry to facilitate adoption of infants less than one year old. A father must register before the birth of a child or within 30 days of the child's birth in order to be given notice of adoption proceedings. Parental rights of a man may be terminated without notice if the child hasn't attained one year of age at the time of the termination, the man did not register timely, and he is not exempt from the registration requirements. A man is not required to register if a father-child relationship has been established or the man starts a paternity action. Once a child has attained one years of age notice must be given to every alleged father of the child, whether or not he has registered. The UPA facilitates infant adoptions but also protects the rights of unmarried fathers who may not have registered but who have established a relationship with the child.

The UPA corrects an omission in Maine law by providing that a donor is not a parent of a child conceived of assisted reproduction, except as authorized under Articles 7 or 8. Nothing in current Maine statutory law allows a sperm or egg donor to relinquish parental rights by contract. Only recently has Maine case law begun to address the rights of donors. In Guardianship of I.H., 2003 ME 130, the court held that the probate court may waive notice to an anonymous sperm donor. The court cited section 702 of the UPA in its analysis of the rights of donors.

The UPA does not address child support issues that arise as the result of the late discovery of paternity or nonpaternity. Child support is a complicated, separate topic that is governed to large extent by federal law. Although the UPA does not directly address the issue of relief from a child support order, by limiting the time-frame in which

challenges to paternity mat be made, the UPA indirectly forecloses much of the litigation that currently clogs family courts by eliminating cases in which more than two years of back support payments have accumulated.

Finally, the UPA addresses in Articles 7 and 8 entirely new areas of law that are not yet addressed in Maine law. Although Maine law is silent on assisted reproduction and surrogacy agreements, children are born in Maine with the assistance of these new reproductive technologies giving rise to new and unanticipated issues. The new reproductive technologies make it possible to have as many as six potential "parents", including the donor of eggs or sperm, the birth mother and her husband, and the intended parent or parents. In Maine today, lawyers are drafting agreements that clarify who the intended parent or parents are in order to provide stability in the child's life. But when these agreements fall apart, the intent of the "parents" when the child was conceived is soon forgotten and not protected by the law. Children's lives are then thrown in limbo. The UPA recognizes that a child can be procreated because of a medical procedure that was initiated and consented to by the intended parents, whether or not there is a genetic tie. Clear legal standards governing these arrangements are critical to providing predictability and stability into the lives of children born of these new reproductive technologies.

III. FLAC'S Amendments to the UPA

The UPA provides a uniform act that updates and modernizes parentage law for the 21st century. It recognizes the importance to children of having their parentage legally established early in their lives. It acknowledges that the parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent. See Uniform Parentage Act, Prefatory Note. It recognizes that a child born of assisted reproduction or gestational agreements is entitled to have that child's parentage clarified. However, the UPA uses limiting gender-specific language to establish a parent-child relationship with one mother and one father. The National Conference of Commissioners of Uniform State Laws, in recommending the adoption of the UPA, apparently left for another day the determination of parentage of children born to relationships that do not fit the UPA model. Across the United States and in Maine,

children are born into a wide variety of circumstances from married parents, unmarried heterosexual parents, single moms, single dads, to same-sex parents. Each of these children is entitled to equal treatment under the law. Every child has the right to know who his or her parent or parents are and to be able to rely on that determination for the child's life. When a relationship is disrupted, a child's life should not be disrupted because the law ignored and did not give legal recognition to that child's established parent-child relationship.

Eliminating specific gender references from the act and making the UPA gender neutral so that the provisions of the UPA will protect every child may easily remedy this significant omission of the UPA. Maine trial courts are already hearing these cases without any comprehensive, uniform, predictable statutory guidance. These courts try to look at the best interest of the child and how the child will be affected by a disruption of what the child believed was a parent-child relationship, and struggle to find a legal concept that would support preserving that parent-child relationship. By amending the UPA to be gender neutral, the Legislature will not only provide clear and consistent legal standards to be applied by the courts, but also will ensure the stability and welfare of every child.

Conclusion

For the foregoing reasons, FLAC urges the adoption of the UPA, as amended by the recommendations of FLAC.

Dated: January 1, 2004

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire

Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director
UPA Subcommittee, Family Law Section of Maine State Bar Association

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Committee on Health and Human Services

January 26, 2004

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Committee on Health and Human Services, on L.D. 1640, "An Act to Provide Accurate Vital Records for Adults in Maine." FLAC opposes L.D. 1640 in its present format for the reasons set forth below.

Discussion

L.D. 1640 permits the state registrar to amend a certificate of birth to reflect the identity of the biological parent on a birth certificate when there is DNA proof of parentage and the biological parent consents. This means that a genetic father of a child, who consents, can have the birth record changed to state that he is the father. Under L.D. 1640, this result would occur even if the child has been adopted and is living comfortably with the adoptive parents. This could also happen under L.D. 1640 if the genetic father's parental rights have been terminated as the result of abuse and neglect of the child. Or, another man may have been adjudicated to be the father of the child and that father is raising the child; yet under L.D. 1640, that parent-child arrangement could be disrupted. L.D. 1640 also does not take into consideration the wishes of an adult child, who may or may not want to have the birth certificate changed. For all of these reasons, FLAC does not support a change to the birth record based solely on a recent DNA test and the genetic father's consent.

Dated: January 26, 2004

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

January 13, 2004

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1669, "An Act to Abrogate the Hearsay Rule in Cases Involving Custody or Protection of Children." FLAC supports the passage of this bill with an amendment for the reasons set forth below.

Discussion

L.D. 1669 allows the admission of out-of-court statements in certain civil actions that involve the custody or protection of children. Out-of-court statements offered to prove the truth of the statement are generally excluded from evidence in a case, except in child protection cases under Title 22 M.R.S.A. § 4007(2). Section 4007(2) authorizes a court to admit into evidence in child protection proceedings out-of-court statements made by a child. Section 4007(2) specifically provides: "The court may admit and consider oral or written evidence of out-of-court statements made by a child, and may rely on that evidence to the extent of its probative value." Because of this exception, courts that hear child protection proceedings regularly consider a child's statements without requiring the child to appear in court. This protects children from having to appear in court, potentially itself a traumatizing experience, and also being caught in the untenable position of testifying in matters relating to the child's parent. However, this same family may also be involved in a protection from abuse or a custody proceeding in which the child's statements under current law are inadmissible. Such a rule places the child in the difficult position of having to come into court and testify against one parent or another.

L.D. 1669 will not prohibit a child from testifying in court, but it will eliminate the need of a child testifying in court against a parent. L.D. 1669 further contains all the

safeguards to ensure that the child's statement has the same guarantee of trustworthiness that other exceptions to the hearsay rule supply. A child's statement will only be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs and if the statement serves the interests of justice.

FLAC finally recommends that subsection 1 of L.D. 1669 be broaden to include adoption proceedings. L.D. 1669 appears to limit the abrogation of the hearsay rule to actions relating to parental rights and responsibilities, protection from abuse, protection from harassment, and guardianship proceedings. The rationale for abrogating the hearsay rule in other proceedings relating to the care and custody of children is equally applicable to contested adoption proceedings.

Conclusion

For the foregoing reasons, FLAC approves the adoption of L.D. 1669 with the suggested amendment.

Dated: January 13, 2004

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

January 13, 2004

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 1754, "An Act to Permit Background Checks on Prospective Adoptive Parents." FLAC supports L.D. 1754 for the reasons set forth below.

Discussion

L.D. 1754 authorizes the Department of Human Services to conduct background checks for a prospective adoptive parent at any time before filing a petition for adoption. This bill simply amends legislation originally proposed by FLAC and enacted by the legislature. This amendment does not alter or change any of the procedures or requirements of the prior legislation. Rather, this legislation clarifies that the Department of Human Services does not need to wait for the filing of a petition for adoption or a court order to conduct a background check of a prospective adoptive parent.

Conclusion

For these reasons, FLAC supports the adoption of L.D. 1754.

Dated: January 13, 2004

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar

Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

January 13, 2004

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 1771, "An Act Regarding Child Support Collection Practices." FLAC supports in principle L.D. 1771 but has some concerns about specific provisions for the reasons set forth below.

Discussion

L.D. 1771 attempts to regulate the collection of child support arrears by private companies. Private child support collection agencies are currently not regulated as a collection agency and are not subject to child support distribution rules. This allows the private collection agency to use a payment intended by the child support obligor and obligee as a current support for the week as a payment on arrears. Every child support order must have an immediate income withholding order for current support and sometimes includes an arrears payment. The income withholding order should be applied to current support for the week with any additional sums collected applied towards arrears.

FLAC believes section one should be rewritten to clearly state that a payment less than or equal to the current support obligation must be applied to current support. Any payment collected in excess of the current support obligation would be applied to arrears.

FLAC supports placing private companies and persons who collect child support as a principle activity under the provisions of the Fair Debt Collection Practices Act. However, care should be taken that the amendment does not hamper or interfere with the ability of an attorney to use procedures available to collect child support through the enforcement of a child support order. A parent should be able to seek enforcement, with the assistance of an attorney, through existing child support enforcement provisions set forth in 19-A M.R.S.A. §2101 et seq without falling within the provisions of L.D. 1771 intended for private child support collection agencies.

Conclusion

For these reasons, FLAC supports the concept of L.D. 1771.

Dated: January 13, 2004

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

January 13, 2004

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 1797, "An Act to Clarify the Standards for Granting a Name Change." FLAC takes no position on L.D. 1797 for the reasons set forth below.

Discussion

L.D. 1797 allows a judge to order a criminal history check, a motor vehicle check, and a credit check of an applicant for a name change and to assess the applicant for the cost of the record check. FLAC is concerned that the delay that may be caused by a records check and the increased cost related to the record checks may deter a victim of abuse from seeking the protection that subsection 1-701(b) of Title 18-A is intended to afford a victim who is in reasonable fear of his or her safety. Although L.D. 1797 leaves the requirement and the assessment to the discretion of the court, the bill should clarify that the records check and assessment may not unreasonably delay the consideration of a petition that is filed by a victim of abuse who demonstrates that the person is currently in reasonable fear of his or her safety.

FLAC supports the portion of L.D. 1797 that permits a court to deny a name change if the court has reason to believe the change is for fraudulent purposes or against the public interest.

Dated: January 13, 2004

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

January 13, 2004

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 1800, "An Act to Discourage Misuse of the Protection-from-abuse Proceedings." FLAC opposes L.D. 1800 for the reasons set forth below.

Discussion

L.D. 1800 would change recent amendments to 19-A M.R.S.A. § 1653(3)(O) that provided criteria for when a willful misuse of protection from abuse process could be used in determining the best interest of the child in custody determination. L.D. 1800 would permit a court to consider the willful misuse whenever the court finds that the misuse was to gain a tactical advantage in a proceeding involving a determination of parental rights. L.D. 1800 removes from section 1653(3)(O) the high standard of proof (clear and convincing), the connection to the ability to work with the other parent in sharing parental rights and responsibilities, and the articulation of findings by the court when it relies in a best interest determination on the misuse of the protection process. These provisions, which would be eliminated under L.D. 1800, provide the court and the public with clear standards to be applied when one parent raises the issue that the other parent willfully misused the protection of abuse process.

Furthermore, L.D. 1800 eliminates the protection afforded under section 1653(3)(O) to victims of abuse who voluntarily dismiss the protection from abuse proceeding. Current law ensures that a voluntary dismissal may not be treated as evidence of willful misuse of the protection from abuse process. Current law should be preserved. Victims of abuse may often turn to law enforcement and courts many times

before they ever feel that they or their children will be safe enough to follow through with the protection process. Many victims enter voluntary dismissals because they believe that the dismissal is the safest route for them and their children. Other victims enter voluntary dismissals because the perpetrator is pressuring them to dismiss the action.

The overall affect of L.D. 1800 might be to reduce the use of the protection process and to increase the number of claims of misuse of the protection process. A victim might hesitate to use the temporary protection order process to protect the victim's safety and the safety of the victim's children if the victim understood the potential consequences if the victim then did not proceed with the final protection order process.

Opposing parties might raise more often the claim of misuse of the protection from abuse process if the protections were removed from section 1653(3)(O). This could result in mini trials on the misuse of process issue within the trial on the claim of abuse requiring lengthier protection from abuse hearings.

For all of these reasons, FLAC opposes L.D. 1800.

Dated: January 13, 2004

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 5, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 862, "An Act to Clarify the Jurisdiction and Qualification for Protection from Abuse Hearings." For the reasons set forth below, the Commission recommends against the enactment of **L.D. 862**. Existing law adequately limits the appointment of a referee in protection from abuse cases.

Summary

L.D. 862 would prohibit referring protection from abuse and protection from harassment proceedings to a referee for hearing unless all the parties agree and the court provides the equivalent of court security for the proceedings conducted by a referee. The law does not permit alternative dispure resolution in protection of abuse cases. The court may not mandate mediation in protection from abuse cases. See 19-A M.R.S.A. §4010(5). The law does not authorize a court to appoint a referee in a protection from abuse case. See 19-A M.R.S.A. §252(1).

The question is more complex when the same family has pending in court both a protection from abuse case and a family law case (divorce or parental rights and responsibilities case). However, the example of mediation provides a court, and the legislature, with guidance. Mediation is mandated in family law cases , unless it is waived for good cause shown. See 19-A M.R.S.A. §1653(11). See also 19-A M.R.S.A. §252(2). The court can and often does waive mediation in family law cases when there is also a protection from abuse order or evidence of safety or abuse issues.

Although not mandated, the court may appoint a referee in a family law case. See 19-A M.R.S.A. §252(1). However, as with mediation, the court generally would not appoint a referee in a family law case when there is also a protection from abuse order or evidence of safety or abuse issues unless the court is assured that the proceedings may be conducted in a safe manner.

Discussion

In enacting the protection from abuse statute, the legislature constructed a specialized and expedited process to ensure safety in families where there is violence. It is by its very nature emergency litigation. The case comes up quickly, an ex parte temporary order of protection often is entered upon the filing of the complaint, the case is scheduled for a final hearing within 21 days of the filing of the complaint, and a judge decides the case very quickly, generally on the day of the hearing. Under the protection from abuse statute, the court may not mandate mediation in a protection from abuse proceeding. See 19-A M.R.S.A. §4010(5). And, by implication, the court cannot appoint a referee in a protection from abuse action. See 19-A M.R.S.A. §252(1). Section 252 authorizes the appointment of a referee "in any proceeding for paternity, divorce, judicial separation or modification of existing judgments" brought under Title 19-A when the parties agree the case may be tried by a referee or "[u]pon a motion demonstrating exceptional circumstances that require a referee." The omission of protection from abuse cases from section 252(1) means that Section 252(1) does not authorize the appointment of a referee in a protection from abuse matter. This conclusion is supported by the primary purpose of a protection of abuse proceeding which is to provide expeditious and effective court ordered safety in a family where violence exists. See 19-A M.R.S.A. §4001(2) and (3).

A family law case proceeds in a very different manner from a protection from abuse case. A family law case involves oversight of the case by the case management officer. Additionally, there may be discovery on some issues, and a guardian ad litem may be appointed to conduct an investigation. If there are children, mediation is mandated in the family law case, unless the court waives mediation. See 19-A M.R.S.A.§1653(11). All of these procedures slow down the process in the

family law case as compared to the expedited process in the protection from abuse case.

In some family law cases, the parties may decide that would like to have their case heard by a referee. In a divorce or parental rights and responsibilities case, the court may appoint a referee. See 19-A M.R.S.A. §252(1). Under this procedure, a referee is appointed for trial of the case. The referee, a private individual who is generally paid directly by the parties, hears the case and makes a report back to the court. The rules for how the referee hears the case range from formal to informal, depending on the parties' agreement. The referee can act with some of the formality of a judge in a courtroom or the referee can hear a case in a very informal environment that could include some mediation. The referee hears the evidence, make a report and files the report with the court. If neither party objects to the report, the court, as a matter of course, adopts the report and enters the judgment of the court. See 19-A M.R.S.A. §252(3). If either party objects, then the court reviews the report and determines whether to approve it, modify it, reject it or recommit it to the referee with further instructions. See M.R.Civ. P. 53. A referee is appointed in most case only when both parties want it, and on rare occasions upon a showing of exceptional circumstances that require a referee. See 19-A M.R.S.A. §252(1).

The appointment of a referee, like mediation, is considered an alternative dispute resolution technique, see 19-A M.R.S.A. §251 and 252, and its use is growing in the family law area. A referee is used by the parties to a family law case as a means of selecting certain highly specialized persons with knowledge and experience in family law to be their decision maker. The advantages of it are that it is a way of streamlining the process, obtaining a quick resolution of a case, and minimizing costs. It also has the advantage of allowing the trial of the case in a less formal atmosphere than a courtroom and with relaxed procedures, which is often desirable to the parties, particularly in a family law case.

There are occasions when a family law case and a protection from abuse exist concurrently in the court system. When this occurs, the issues concerning the parenting of the children and the financial support of the children are often identical in both cases. The parties may ask the court to leave the temporary order for protection from abuse in place, but delay the 21 day hearing until they have time to explore in more detail the parental rights and responsibilities issues in the context of the family law

case. The parties may want to explore those issues in mediation or with the assistance of a referee. The parties do this to avoid litigating twice the same issue concerning parental rights and responsibilities. Trying this issue twice doubles the time, expense, stress, and high personal cost for all involved. There is also a risk that inconsistent results could occur. These are risks which families should not have to endure. Paramount, however, is always the safety of the children and the parties.

The court, for the most part, is able to minimize the risks of duplicative effort and resources. Under the protection from abuse statute, the court is permitted to join a protection from abuse case with a divorce. See 19-A M.R.S.A. §4010(2). Thus, the court can consolidate the two cases for trial, by entering a temporary protection from abuse order, delaying the final hearing in the protection from abuse case, and joining the two cases for a single, final hearing before the court. In this manner, the court can structure the pretrial process to ensure the safety of everyone by leaving in full force and effect the temporary protection from abuse order and allowing the family law case to go through its deliberative process. That process in the family law case may include mediation or the appointment of a referee. Upon the conclusion of that process, the court then enters one final judgment that addresses the children and child support and applies in both cases.

When there is both a protection from abuse order and a family law case, mediation is not automatically waived in all family law cases. The decision to waive mediation must be based on a finding of good cause, which involves consideration of a number of factors, including the nature, severity and frequency of the abuse, the parties' wishes, whether both parties are represented by counsel, and the ability of the mediator to manage any safety issues. In most instances, the court will waive mediation in the family law case if there is a protection from abuse order. This analysis is equally applicable to a request by the parties for the appointment of a referee in the family law case. If there is both a protection from abuse case and a family law case, the court will consider carefully the parties' request and weigh all the factors before appointing a referee. The decision, whether it is about mediation or the appointment of a referee, will be based on the circumstances of each case and a conclusion that the particular proceeding may be conducted in a safe manner.

However, under existing law, the protection from abuse case is not sent to mediation or to a referee. The court continues to maintain

jurisdiction, and hence control of the protection of abuse case, even if the family law case is sent to mediation or to a referee. See 10-A M.R.S.A. §4010(5) and 19-A M.R.S.A. §252(1).

Date: March 5, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 683, "An Act to Allow Godparents as Intervenors in Child Custody Cases with the Department of Human Services." For the reasons set forth below, the Commission recommends against the enactment of L.D. 683.

Discussion

L.D. 683 would extend intervenor status to any person who has been designated a child's godparent by the child's parent or legal guardian. Once granted standing as an intervenor, the godparent would be a party to the case. Party status allows one to view confidential records of the Department of Human Services, be present for all hearings in the case, testify and present other witnesses or evidence at hearings, and even reject an agreement reached among the Department, parents and guardian ad litem for the child.

FLAC does not see how granting a godparent standing would serve the goals of The Child and Family Services and Child Protection Act, which include the protection of children at risk of abuse and neglect and reunification of the family, if that can be accomplished within a time which is reasonably calculated to meet the child's needs. A godparent's role is to encourage and support a child's religious development. The Department of Human Services is already required to address a parent's written request for placement of a child in a family of the same religious faith by doing so when a suitable family of that faith can be found. See 22 M.R.S.A. §4063. If the parent or the guardian ad litem, on behalf of the child, is dissatisfied with the Department's efforts, each can use their standing as a party to ask a court to take action in regards to the

placement of the child. Granting a godparent intervenor status will not offer additional voices to the court, but will further complicate and prolong what are already difficult proceedings.

Date: March 9, 2001 Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 745, "An Act to Require the Audio Recordings of Interviews of Children by the Department of Human Services." For the reasons set forth below, the Commission recommends against the enactment of L.D. 745.

Discussion

L.D. 745 would require the Department of Human Services to make an audio recording of all interviews with child subject to child protection proceedings and exclude as evidence information from unrecorded interviews unless a judge determined that exigent circumstances exist to permit the use of the information. Children make statements to representatives of the Department in a wide variety of circumstances, including, for example, during transports to or from a placement or an appointment, in schools, and during walks or other activities with their caseworker. The difficulty with the logistics of recording a child's statements on short notice and at extremely inconvenient forums is readily apparent. Additionally, recording a child's statement may have an extremely chilling effect on the child, contrary to one of the stated purposes of the Act to protect the health and safety of children.

The recording issue presents some practical concerns for the court. If the recording is the only evidence allowed, the court will lose potentially valuable information: Much of what is related about an interview has to do with how the child acted and looked, in addition to what was said. It is also not uncommon for audio interviews to be of poor quality and difficult to understand. And in the event that a recording is not made, the court will have to expend time determining whether

"exigent circumstances" existed when the statement was made. For all of these reasons, FLAC recommends against enactment of L.D. 745.

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 836, "An Act to Grant Foster Parents Intervenor Status in Child Protection Proceedings." For the reasons set forth below, the Commission recommends against the enactment of **L.D. 836**.

Discussion

L.D. 836 would grant automatic intervenor status to any foster parent who has had a child in that person's home for at least 60 days. Current law permits a court to grant standing and intervenor status to a foster parent who has provided foster care to a child for 120 days if granting standing is in the best interest of the child. See 22 M.R.S.A. §§4005-A.

Sections 4005-A and 4005-B permit intervenor status to foster parents and grandparents, respectively, who meet specific criteria. In each instance, the petitioner for intervenor status must persuade the court that granting him/her party status will, in some manner, further the best interest of the child.

Once granted standing, the petitioner is a party to the case. Party status allows one to view confidential records of the Department of Human Services, be present for all hearings in the case, participate in all trials, even reject an agreement reached among the Department, parents and guardian ad litem for the child. The court is in the best position to determine whether granting standing to a foster parent is in the best interest of the child. To make standing automatic would take that discretion away from a court and shift the focus away from the best interest of the child.

Under current law, a foster parent, regardless of the number of days that the person has been a foster parent, already has the right to notice of and an opportunity to be heard in any hearing regarding the child that resides with the foster parent. This right includes the right to testify. The right does not include the rights accorded a party, such as the right to present other witnesses or to have access to pleadings or confidential records. Thus, a foster parent of 60 days already has the right to notice and the right to testify at the hearing. Granting automatic intervenor status to a foster parent who has had the child for only 60 days is unnecessary since the new foster parent may have input as a witness and would further complicate and prolong what are already very difficult proceedings.

FLAC does support so much of L.D. 836 that strikes the last sentence in Section 40005-A(2). This amendment would clarify that once intervenor status is granted to a foster parent that status is not limited to a single proceeding but continues for as long as the person is the foster parent in the case.

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Supplemental Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

The Maine Family Law Commission submits this supplemental report to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 862, "An Act to Clarify the Jurisdiction and Qualification for Protection from Abuse Hearings." On March 5, 2001, FLAC filed a report prior to the public hearing on L.D. 862. FLAC now recommends that 19-A M.R.S.A. §4010(5) be amended to make it clear that neither mediation or appointment of a referee may be mandated by a court in protection from abuse cases. The policy rationale for concluding that generally mediation is not appropriate where there has been or still is domestic violence is equally applicable to referees. Accordingly, FLAC recommends the specific following statutory change:

19-A M.R.S.A. § 4010. Procedure

5. Mediation and referees. The court may not mandate mediation or appointment of a referee in actions brought under this chapter.

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.

Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 876, "An Act to Require the Department of Human Services to Provide Automatic Discovery to Opposing Attorneys." For the reasons set forth below, the Commission recommends that L.D. 876 be tabled for further discussion.

Discussion

L.D. 876 would require the Department of Human Services to disclose relevant information in its records to the parent or the child who is the subject of a child protective investigation or proceeding or to the parent's attorney. This bill is overly broad in that it includes access to the Department's records during an investigation. Information in the Department's records during the investigatory stage is often incomplete and hence may be misleading. The Department's records include reports of abuse that may not have been substantiated and may include highly confidential psychological evaluations of the parents or the child. Such information could be misused by a parent who wishes to gain an advantage in a child custody proceeding in a family law case (divorce or parental rights and responsibilities) or in a protection from abuse case. Such an advantage could be unfair if the court is not provided with all of the information, including the Department's conclusion about whether abuse or neglect was substantiated. Therefore, FLAC recommends that L.D. 876 be tabled until there can be further discussion about the exact nature of the problem that L.D. 876 is intended to address and development of appropriate limitations on the use of such information.

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1009, "An Act to Amend the Child and Family Services and Child Protection Act." The Commission supports the enactment of L.D. 1009, which relate primarily to clarifications of existing law and the rights of foster parents, preadoptive parents, and relatives providing care regarding any review or hearing with respect to the child.

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1070, "An Act to Require Background Checks for Adoptions." The bill has been introduced at the initiative of the Commission, in accordance with the authority established in 19-A M.R.S.A. §354(2). For the reasons set forth below, the Commission supports enactment of L.D. 1070.

Discussion

Under existing adoption law, a probate court judge may waive an investigation when the petitioner is a blood relative of the child. See 18-A M.R.S.A. §9-304(a)(2). L.D. 1070 would require, at a minimum, a check of child abuse and state and national crimnal records in all prospective adoptions.

In a fairly common practice in what is known as "step-parent" adoptions, a mother may petition the probate court for her husband to adopt her children. The petitioner may not be using a public or private adoption agency, and therefore not have a home study performed by such agencies. Unless the self-report form utilized by the probate court raises concern for further inquiry, the probate court may waive further investigation and, in so doing, may fail to detect if the adoptive parent has a child abuse and criminal history which may endanger the welfare of a child.

L.D. 1070 seeks to ensure that the court does not sanction an adoption which may jeopardize the health and safety of a child, and will establish a standard for all adoption petitions, requiring child abuse and state and national criminal record checks. The Commission consulted

with the Maine State Police and the Department of Human Services to draft a bill that includes the necessary procedures for protecting confidentiality and meeting federal requirements for national criminal record checks.

The Commission is the intiator of this legislation.

The Commission recommends enactment of L.D. 1070.

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1074, "An Act to Require Proceedings by the Department of Human Services to Terminate Parental Rights be Open." For the reasons set forth below, the Commission recommends against the enactment of **L.D. 1074**.

Discussion

L.D. 1074 would require that hearings on the termination of parental rights be open to the public. The Child and Family Services and Child Protection Act, 22 M.R.S.A. §§4001 et seq, contemplates that child protection proceedings should remain as confidential as possible. The Department's records are confidential except in certain limited circumstances. See 22 M.R.S.A. §4008. Proceedings and files in the District Court are closed absent a case specific determination by the court to the contrary. See 22 M.R.S.A. §4007. Child protection proceedings often include very intimate details about abuse and neglect, the mental health status of the child and/or the parents, and the living circumstances of the parents. Confidential psychological evaluations of parents and children and other information that could be very embarrassing and detrimental to the child or family of the child if released to the public are also often part of child protection proceedings.

To the extent that there is concern that keeping the hearing closed will trample the rights of a parent or a child, there are various protections built into the act. The child is represented by a guardian ad litem whose role it is to protect the best interest of the child. A parent is entitled to court-appointed counsel, whose job it is to advocate for the parent. Foster

parents and relatives providing care of the child have the right to notice of and an opportunity to be present at the proceedings and to offer testimony as a witness. With the agreement of the parties, the court has the discretion to permit other interested persons to attend the hearing. Opening the hearing further does not advance the stated priorities of the Act, which include the protection of children at risk of abuse and neglect and reunification of the family, if that can be accomplished in a timely fashion to meet the needs of the child.

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 9, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1079, "An Act to Protect Families by Easing the Standard of Proof for Certain Child Protection Proceedings." For the reasons set forth below, the Commission recommends against the enactment of L.D. 1079.

Discussion

L.D. 1079 would increase the standard of proof from a preponderance of the evidence to clear and convincing evidence that a court uses in determining whether to grant a preliminary child protection petition, a jeopardy order or the review of a jeopardy order. Only the most contested and most difficult cases reach the court. The Department of Human Services resolves far more cases by informal means and these cases never reach the courts. However, once a case is filed in the court, each party has access to counsel, and court-appointed counsel if a parent is not able to afford counsel. The child has a guardian ad litem whose responsibility is to protect the best interest of the child. With all these resources, the case is fully litigated at each stage of the proceedings. If the case reaches a termination of parental rights proceeding, the standard of proof is appropriately raised to clear and convincing evidence. However, there is no reason for increasing the standard of proof in the earlier stages of a child protection proceeding. Preponderance of the evidence is the same standard used in protection from abuse and custody proceedings in a family law case (divorce or parental rights and responsibilities).

Date: March 9, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 21, 2001

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 724, "An Act to Implement the Recommendations of the Courts' Guardian ad Litem Committee."** The Commission supports the enactment of **L.D. 724** which relate primarily to changes regarding immunity from civil liability, and a requirement that a guardian ad litem submit a final written report reasonably in advance of a court hearing.

Date: March 21 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 21, 2001

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1450, "An Act to Protect Parents from Undue Influence in Child Protective Actions."** For the reasons set forth below, the Commission recommends against the enactment of **L.D. 1450.**

Discussion

L.D. 1450 would require the Department of Human Services to provide a written warning to a parent or custodian of children when it has determined to file a court proceeding pursuant to Title 22. The written warning would have to include notification to the parent or custodian of the right to remain silent, the right to court-appointed counsel and the fact that anything that the parent or custodian says in discussions with the Department may be used against the parent or custodian. Should the Department fail to provide such a written warning, and a court proceeding is subsequently filed, there would be a presumption in the proceeding that a statement made subsequent to the Department's determination to file a court proceeding was not made voluntarily by the parent or custodian.

This bill seeks to implement Miranda type warnings in civil proceedings, which is unnecessary. In only a small percentage of the thousands of cases, which the Department opens, does it eventually determine to file a court proceeding. Currently, prior to the filing of court proceedings pursuant to Title 22, the Department, by its own policies and procedures, communicates with a parent or custodian with respect to its concerns and intentions.

The Department's determination to file a court proceeding may result in a petition for an immediate removal of a child from a home, a petition to establish jeopardy where there is no request for removal, or a petition to terminate parental rights. In determining to file a petition for immediate removal, the Department must submit a sworn affidavit, along with the petition, in which it alleges that a child is in immediate risk of serious injury in the home. If the Department were compelled to provide a written warning to a parent or custodian such as the type this bill suggests, it could put the child at further, serious, immediate risk of harm. With respect to the other types of petitions, the Department already notifies the parent or custodian, through multiple written and oral communications, of its intent.

Finally, concluding that there is a presumption that the parent or custodian's statement made after the date on which the Department determined to file the court proceeding has not been made voluntarily, removes discretion from the presiding judge. At every Title 22 proceeding, the judge must determine the credibility of every witness and what weight to accord to the evidence presented. This bill would whittle away at the judge's discretion by requiring a presumption that such statements were not made voluntarily.

Date: March 21, 2001 Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

DATE: March 22, 2001

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1522, "An Act to Clarify the Status of Support Obligations if an Obligor Begins to Receive Public Assistance."** This LD has been initiated by FLAC, the result of the Commission's analysis of 19-A MRSA § 2302.

In summary, 19-A MRSA § 2302 prohibits DHS from collecting current or past support from an obligated payor ["obligor"] during the time that the obligor is receiving public assistance. This stops DHS from collecting support even if there is an existing court order that requires that support be paid. 19-A MRSA § 2302 does not address the existing court order -- it merely stops DHS from collecting. This statute is confusing because it treats court and administrative orders differently. Although DHS stops collecting on an existing court order while an obligor receives assistance, the obligor's debt continues to accrue during this period. In contrast, an administrative order is suspended while the obligor receives public assistance and thus no debt accrues for that obligor. Thus, the obligor who receives public assistance may not know whether he is free from an obligation of support, or whether he is accruing a continuing obligation under the court order, even though DHS cannot collect from him while he receives public assistance. The obligee under the order may also be similarly confused.

Despite these confusing impressions, the policy underlying the statute is valid. When an obligor becomes a recipient of public assistance [an "assisted Obligor], it makes sense to reduce that persons' obligation to pay child support. Upholding the existing court or administrative order of child support could exacerbate the assisted obligor's need for assistance. The Family Law Advisory Commission further believes that it is a burden to the assisted obligor, the court system, and the administrative hearing system of DHS, to undertake a review in every case when an Obligor becomes assisted in order to determine whether

the existing court order should be suspended. An assisted obligor's petition for review and relief from the existing order has a high likelihood of success.

The Family Law Advisory Commission has initiated LD 1522 to eliminate confusion, and to create a consistent and uniform approach to the subject of child support when an obligor receives public assistance. LD 1522 is based upon the belief that it is usually appropriate for a child support order to be suspended during the time that an Obligor receives public assistance. Further, it is based upon the belief that it is a burden for the lower income public, the Court or administrative system to conduct modification proceedings to suspend the support order. The Commission suggests that the suspension of child support be automatic.

LD 1522 has the following attributes:

1. It creates a presumption in favor of suspending child support during the time an Obligor receives public assistance.

2. It treats all cases (court cases or administrative cases, private collection cases or DHS collection cases) equally. LD 1522 suspends all support orders automatically, without further legal or administrative action, once the Obligor goes on public assistance. It restores, automatically, the effectiveness of the suspended support order two weeks after the public assistance ends.

3. It gives the court or administrative tribunal the power to require the payment of child support even though the Obligor has gone on public assistance, in a modification proceeding initiated by the affected Obligee.

4. It provides for DHS notification to both parties of the Obligor's status with respect to public assistance as soon as that status has been created or lost. The notification explains the presumption and the change of support, and provides blank forms, which the affected party may use to initiate modification.

The Commission is aware of the possibility that an Obligor under a court or administrative order could undermine such order, by fraudulently applying for and receiving public assistance. The Commission believes

that such instances are rare. First, the number of cases where an Obligor goes on public assistance is very few. The office of DHS support enforcement advises that approximately 400 (0.7%) of its 54,000 obligors begin to receive public assistance each year. The incidence of cases where the Obligor does this fraudulently for the purpose of avoiding a support obligation is believed by the Commission to be a very small portion of those. That problem should be addressed by appropriate screening of applications for public assistance, and by the court or administrative review in the Obligee's modification action.

We trust the thoughts and suggestions made in this report are helpful to the work of the Committee.

Date: March 13, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

Regarding LD 954

DATE: March 23, 2001

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **LD 954.** The Commission recommends support of this LD.

LD 954 proposes several amendments to the protection from harassment law. One amendment protects persons who are subjected to courses of conduct by the offender which are commonly understood to be in the nature of "stalking". The Commission feels it is appropriate and worthwhile to allow members of the public to have protection from this type of conduct.

In addition, LD 954 amends the Protection from Harassment Law, by allowing the court, in issuing a protection from harassment order, to prohibit the offender from having any contact with the victim, during the time the order is in place. The Commission is in favor of giving the court this discretion.

LD 954 also amends the protection from abuse law, by precisely expressing that the court can enter an order, prohibiting the offender from the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury against the plaintiff or minor child residing in the household. Although the statute might impliedly allow the court to grant such an order under current law, this amendment makes it clear that such authority exists, and further allows law enforcement to clearly see that such conduct, if it occurs, is a criminal violation of a protection from abuse order. The Commission is in favor of this clarification.

Furthermore, LD 954 amends both the protection from harassment and the protection from abuse laws, by **changing** the way the court keeps a victim's identifying information confidential from the offender. The proposed change requires the Plaintiff to make an affidavit in support of sealing identifying information. The clerk then seals all identifying information, which cannot be made available to the Defendant or to the public, unless the court orders it unsealed after a hearing.
The Commission is in favor of keeping identifying information which would create a risk of harm to the Plaintiff confidential from the Defendant. The current law seems to be insufficient, as it only protects the address of the victim from the Defendant in any document which is "served upon the Defendant." Any other papers, some of which might contain identifying information, are not required to have it deleted, and those papers are available to the public. Thus, identifying information which might jeopardize safety is not fully kept confidential under the law as currently written. LD 954 seems to have a sensible response to the insufficiencies of the current law.

The Commission is hopeful that an efficient set of forms can be developed to allow our already burdened clerks to easily identify those cases where information should be sealed, and an easy method for locating and sealing identifying information.

We thank you for the opportunity to comment on LD 954.

Date: March 23, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee On the Judiciary

Date: March 23, 2001

The Maine Family law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1716, "An Act to Improve Child Support Services."** The Commission recommends support of this LD, with a minor amendment the Department of Human Services will be requesting.

The Department of Human Services submitted this legislation based on recommendations made pursuant to the federally mandated quadrennial review of the State's child support guidelines. The amendments would include a definition of extraordinary medical expenses; consolidate deviation criteria; and have the cost of medical insurance borne by the parties in the same manner as child-care expenses are presently.

Section §2301 would be amended to remove an outdated provision that the payment of public assistance by another state creates a debt due that state from a responsible parent in the amount of the public assistance paid. This is illegal under federal law and has been removed as a provision when this State pays public assistance.

The Department is also seeking to amend 19A MRSA §2304 to allow hearing officers to obligate noncustodial parents to pay a percentage of the actual cost of providing health insurance with then the custodial parent is paying out of pocket to provide the insurance. This would conform to court practice and federal requirements regarding medical insurance orders.

The Department wants to amend §2152 (12) to allow the Department to submit letters received from employers, financial institutions, businesses and governmental agencies in response to the Department's request for information needed to establish paternity or establish or enforce a child support obligation. The provision as drafted is too broad. The Department has stated that they will be amending their proposed language to narrow the exception to responses supplied by employers, businesses and governmental agencies from records held in the ordinary course of business. Presently the Department must subpoena an employer to testify about the earnings of an obligor in order to authenticate the company's response to a request for information about the obligor's earnings. This places an undue burden on the employers and financial institutions to confirm something held in their records in the ordinary course of business. Records of regularly conducted business are already exempt under the hearsay rules.

The Commission would support LD 1716 after the Department's modifications to §2152 are made.

Date: March 23, 2001 Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne, LMSW

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

March 26, 2001

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1473, "An Act to Make Uniform the Language Governing Parental Rights and Responsibilities."** The Commission supports the enactment of those provisions of **L.D. 1473** that make non-substantive language changes, but recommends against the enactment of the final provision of **L.D. 1473**.

FLAC has reviewed the report from the Commission an Domestic Violence and agrees with that report

L.D. 1473 would alter 19-A M.R.S.A. §§ 4001(3), 4006(5), and 4007(1)(G) by altering language to remove obsolete terminology like "custody" and make those terms consistent with the language governing in other portions of Title 19-A. which utilize the term "parental rights and responsibilities." FLAC agrees with these proposed changes.

The last suggested language change in L.D. 1473 would add language to the statute to indicate that a court's allocation of parental rights and responsibilities in a protection from abuse order "may not be considered precedent" in a later determination of parental rights and responsibilities. The statute already states that such a prior allocation is "not binding" on the subsequent family law case.

It is difficult to determine the significance of the proposed "may not be considered precedent" language. Perhaps these new words mean the same as the original words ("not binding"), and the added language, therefore, adds no new meaning. Perhaps, on the other hand, something new must have been intended by the addition of those words, and that those new words perhaps mean, albeit not clearly, that a prior allocation of parental rights in a protection order is somehow deserving of even less consideration in the subsequent family matter action.

The difficulty in understanding the meaning or goal of the new words ("not be considered precedent") has led FLAC to two conclusions. First, if it is difficult to determine what the added words mean, then the addition of those words creates

confusion. Second, the law should do as little as possible to diminish any portion of a prior protection order.

Under current law, the family matter is not bound by the parental rights allocation in the prior protection from abuse proceeding. The family matter court presently has the flexibility to place the appropriate context on the prior order, and make fair and just long-term orders concerning the parenting of the children in the subsequent case. The law needs no further change.

For these reasons, FLAC recommends that the "may not be considered precedent" language of LD 1473 not be enacted.

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

Regarding LD 1405

DATE: March 27, 2001

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **LD 1405, "An Act to Encourage Joint Child Rearing between Divorced Parents.** The Commission does not support this LD, and recommends that the Committee oppose it.

LD 1405 establishes a statutory presumption that children should be raised equally in the households of each parent. A parent who objects to such a residential arrangement would, under this LD, have the burden to prove that such an arrangement is not in the best interest of a child.

Such a presumption is radically different from Maine's law of parental rights and responsibilities. Maine law is guided by the standard of "best interest of the child." The "best interest" standard of our law provides fifteenspecific guidelines for the court to consider, including general guideline requiring the court to consider all "...other factors having a reasonable bearing on the physical and psychological well-being of the child." See 19-A MRSA 1653.3. Based upon this standard, the Court can award sole parental rights and responsibilities, shared parental rights and responsibilities, and allocated parental rights and responsibilities. Further, the court can determine the residential arrangement which is in the best interest of the child.

In January, 1997, the Family Law Advisory Commission reported to this Committee about the advisability of an equal residential parenting presumption. The Commission has reviewed that opinion, and firmly believes that what we said then applies now:

> "...the courts are authorized to award an equal division of a child's residential care when the circumstances so warrant. Although the courts should be free to make such awards when the circumstances warrant, the Commission finds that it would be contrary to the best interests of children if the courts were bound by any arbitrary presumption when it comes to an assessment of children's needs and interests. A child's residential schedule can be influenced by a myriad of factors, not the least of which is the stress that may be generated by having to shuttle between two households each week. In some cases, the distance between the parents' residences may render this residential arrangement impossible. Some children will no doubt, benefit from such an arrangement. Others will not."

Each child and each parent are unique, and not deserving of a "one size fits all" result. A presumption which favors the equal division of time between two residences forces the Court toward a predetermined outcome for all families. That does not appeal to the Commission. The use of Maine's best interest standard, carefully crafted by statute and case law, applied on a case by case basis to each individual's circumstance, is the appropriate way to do our very best for each child whose life is affected by the separation of parents.

~~Date: March 27, 2001~~ Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair

Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

DATE: April 2, 2001

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. **1522, "An Act to Clarify the Status of Support Obligations if an Obligor Begins to Receive Public Assistance."** This L.D. has been initiated by FLAC, the result of the Commission's analysis of 19-A MRSA § 2302.

In summary, 19-A MRSA § 2302 prohibits DHS from collecting current or past support from an obligated payor ["obligor"] during the time that the obligor is receiving public assistance. This stops DHS from collecting support even if there is an existing court order which requires that support be paid. 19-A MRSA § 2302 does not address the existing court order -- it merely stops DHS from collecting. This statute is confusing, because it treats court and administrative orders differently. Although DHS stops collecting on an existing order while an obligor receives assistance, the obligor's debt continues to accrue during this period. In contrast, an administrative order is suspended while the obligor receives public assistance and thus no debt accrues for that obligor. Thus, the obligor who receives public assistance may not know whether he is free from an obligation of support, or whether he is accruing a continuing obligation under the court order, even though DHS cannot collect from him while he receives public assistance. The obligee under the order may also be similarly confused.

Despite these confusing impressions, the policy underlying the statute is valid. When an obligor becomes a recipient of public assistance [an "assisted obligor"], it makes sense to reduce that person's obligation to pay child support. Upholding the existing court or administrative order of child support could exacerbate the assisted obligor's need for assistance. The Family Law Advisory Commission further believes that it is a burden to the assisted obligor, the court system, and the administrative hearing system of DHS to undertake a review in every case when an obligor becomes assisted in order to determine whether the existing court order should be suspended. An assisted obligor's

petition for review and relief from the existing order has a high likelihood of success.

The Family Law Advisory Commission has initiated LD 1522 to eliminate confusion, and to create a consistent and uniform approach to the subject of child support when an obligor receives public assistance. LD 1522 is based upon the belief that it is usually appropriate for a child support order to be suspended during the time that an obligor receives public assistance. Further, it is based upon the belief that it is a burden for the lower income public, the Court or administrative system to conduct modification proceedings to suspend the support order. The Commission suggests that the suspension of child support be automatic.

LD 1522 has the following attributes:

1. It creates an exemption that suspends child support during the time an obligor receives public assistance.

2. It treats all cases (court cases or administrative cases, private collection cases or DHS collection cases) equally. LD 1522 suspends all support orders automatically, without further legal or administrative action, once the obligor goes on public assistance. It restores, automatically, the effectiveness of the suspended support order two weeks after the public assistance ends.

3. It gives the court or administrative tribunal the power to require the payment of child support even though the obligor has gone on public assistance, in a modification proceeding initiated by the affected obligee.

4. It provides for DHS notification to both parties of the obligor's status with respect to public assistance as soon as that status has been created or lost. The notification explains the exemption and the change of support, and provides blank forms which the affected party may use to initiate modification.

The Commission is aware of the possibility that an obligor under a court or administrative order could undermine such order, by fraudulently applying for and receiving public assistance. The Commission believes that such instances are rare. First, the number of cases where an obligor goes on public assistance

is very few. The office of DHS Support Enforcement advises that approximately 400 (0.7%) of its 54,000 obligors begin to receive public assistance each year. The incidence of cases where the obligor does this fraudulently for the purpose of avoiding a support obligation is believed by the Commission to be a very small portion of those. That problem should be addressed by appropriate screening of applications for public assistance, and by the court or administrative review in the obligee's modification action.

We trust the thoughts and suggestions made in this report are helpful to the work of the Committee.

Date: April 2, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee On the Judiciary

Date: April 5, 2001

The Maine Family law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 684 An Act to Require Courts to Take Federal Disability Payments into Account when Determining Child Support Awards**. The Commission does not support the enactment of this L.D.

This bill would appear to limit the court's ability to award child support in accordance with the State's child support guidelines when the obligor parent receives a federal disability payment and the obligor's child receives a child's benefit based on the parent's disability. The bill implies that there is a Federal guideline for establishing a child's benefit. This is not correct.

When a parent receives a social security disability payment generally there is a children's benefit that can be awarded. Usually the children's benefit is ½ of the parent's disability payment. The children's benefit is shared equally amongst all children and after born children reduce the benefits of the previous children. This children's benefit is not based on the obligor's income as is a child support obligation in Maine.

Maine courts already take into consideration an obligor's federal disability payments. Disability payments and social security benefits are included in the definition of gross income. [19A MRSA §2001(5)] Disability benefits are also included in the definition of income subject to income withholding for the payment of support. [19A MRSA §2673] If an obligor's annual gross income is less than the federal poverty guideline, the obligor's child support obligation may not exceed 10% of the obligor's weekly gross income. [19A MRSA §2006(5)(D)] Up to 50% of the obligor's income is shielded from attachment. [19A MRSA §2356] Also, if the child receives a child's benefit based on the obligor's disability, the court must give the obligor a credit for the dependent benefits paid to the child. [19A MRSA §2107]

For these reasons the Commission does not support L.D. 684.

Date: April 5, 2001 Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair

Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne, LMSW

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee On the Judiciary

Date: April 5, 2001

The Maine Family law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1347 An Act to Restrict the Issuance of Recreational Licenses for Nonpayment of Child Support**. The Commission does not support the enactment of this L.D.

This legislation appears to contain redundant language. Recreational licenses are already subject to license revocation. The current definition of licenses includes recreational licenses. [19A MRSA 2101(8)] Recreational licenses are already subject to suspension and revocation if an obligor fails to comply with a support order. The Department of Inland Fisheries and Wildlife is included in the definition of an organization that must revoke licenses and IF&W currently honors a DHS request to suspend or revoke an obligor's license. [19A MRSA 2101(1)] The single out and list by name on type of license and one Department that must comply with license revocation would be confusing and is not necessary.

For these reasons the Commission does not support L.D. 1347.

Date: April 5, 2001 Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne, LMSW

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee On the Judiciary

Date: April 5, 2001

The Maine Family law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1364 An Act to Decrease the Length of Time a Person Has to Make Child Support Payments Before Being Considered Not in Compliance.** The Commission supports the enactment of this L.D.

Under current law, the Department of Human Services can begin license revocation action against an obligor who has not made a child support payment for more than 60 days. An obligor is considered to not be in compliance with an order for support if he or she is more than 60 days in arrears. This bill would reduce that time to 30 days. Courts may still revoke licenses when a custodial parent brings a motion to enforce without regard to the 60 or 30-day limitation.

Practically speaking, license revocation is the only enforcement remedy affected by the change from 60 to 30-days. The Department of Human Services begins other enforcement actions to collect a debt when an obligor is 30 days in arrears.

For these reasons the Commission supports L.D. 1364.

Date: April 5, 2001 Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne, LMSW

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

April 27, 2001

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1405, "An Act to Encourage Joint Child Rearing between Divorced Parents." FLAC hereby requests that the Committee reconsider the recent Committee Amendment to L.D. 1405 for the reasons set forth below. Should the Committee feel that it has to create an elevated consideration of shared primary residential care, then FLAC offers the language suggested in Section II below.

I. Discussion

L.D. 1405, as amended by the Committee, requires the court, when determining the primary residence of a child in the context of shared parental rights and responsibilities, to consider whether joint residential care is in the best interests of the child. If the court does not order joint residential care, the court must make specific findings why joint residential care is not in the best interest of the child, and state those findings in its decision.

FLAC is concerned that a focus on joint residential care elevates joint residential care above primary residential care to one parent and rights of parent-child contact to the other parent and over all other parenting arrangements. In singling out joint residential care for special treatment, the Committee is suggesting that joint residential care is more important than any other. This approach moves the parties and the court away from a child centered approach and focuses instead on the parties' wishes. All possible residential arrangements should be equally available to the parties and to the court, and the determinative factor must be the best interests of the child as is required by 19-A M.R.S.A.§1653(3).

Further, the Committee's amendment creates conflict where none

may exist. Most divorces and parental rights and responsibilities cases are resolved by the parties through an agreement that is submitted to the court for approval. In those agreements, the parties may agree to primary residence or shared primary residence. If the parents have agreed that one parent shall have primary residential care or any other arrangement, including shared primary residential care, the court should not potentially disrupt the parties' agreement by inquiring about joint residential care when the parties have not asked the court to do so. Requiring the court to make such an inquiry could result in the court stimulating a dispute where none previously existed. The goal of the Family Court should be to encourage agreement between the parties, rather than create conflict. The Legislature previously found and declared as public policy that "encouraging mediated resolutions of disputes between parents is in the best interest of minor children." 19-A M.R.S.A.§1653(1)(A).

Finally, the language "joint residential care" creates a new concept that does not appear anywhere else in Title 19-A, Maine's Family Law statute. The only statutory reference that captures some of the meaning of "joint residential care" is in Section 1653(2)(D) that discusses the two distinct types of awards of shared parental rights and responsibilities: "An award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent or a sharing of the child's primary residential care by both parents." There is also the definition of shared parental rights and responsibilities contained in Section 1501(5) that infers a sharing of residential care when it provides that shared parental rights and responsibilities "means that most or all aspects of a child's welfare remain the joint responsibility of and right of both parents" and specifies that matters pertaining to the child's welfare include "child care arrangements and residence." 19-A M.R.S.A.§1501(5).

In the separate child support provisions of Title 19-A, the court is directed to consider when determining child support the special circumstance that exist "[w]hen the parties have equal gross incomes and provide residential care equally for each child for whom support is being determined." 19-A M.R.S.A.§2006(5)(D). And, Section 2007(3)(A) authorizes the court to deviate from the child support guidelines when "[t]he nonprimary residential care provider is in fact providing primary residential care for more than 30% of the time on an annual basis." The latter circumstances suggests a recognition by the legislature that when both parents share primary residential care of a child more than 30% of the time, there should be a deviation from the child support guidelines to

acknowledge the sharing of the primary residential care of the child.

To introduce the concept of "joint residential care" adds confusion to an area that is already imprecise. The Committee Amendment does not define "joint residential care." The more commonly understood term, based on the statutory provisions cited above and in the practice of family law, is shared primary residential care and the legislature should use that term in any proposed legislation to maintain consistency and minimize confusion in the area of Family Law.

II. FLAC's Proposal:

Sec. 3. 19-A M.R.S.A.§1653, sub§2(D)(1) is enacted to read:

(D). The order of the court awarding parental rights and responsibilities must include the following:

(1) Allocated parental rights and responsibilities, shared parental rights and responsibilities, or sole parental rights and responsibilities, according to the best interest of the child as provided in subsection 3. An award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent or a sharing of the child's primary residential care by both parents. <u>If either or both parents request an award of shared primary residential care and the court does not award shared primary residential care of the child, the court must state in its decision the reasons why shared primary residential care is not in the best interest of the child.</u>

Date: April 27, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

Maine Family Law Advisory Commission

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

October 4, 2001

The Maine Family Law Advisory Commission submits the proposed legislation that would amend the definition of "gross income" contained in the Child Support Guidelines to provide that spousal support not be included in gross income for purposes of computing child for children of the marriage that gives rise to the obligation to pay spousal support. Spousal support established in the dissolution of marriage from another spouse who is not the parent of the children for whom support is being determined, however, would continue to be included in gross income.

The Commission recommends the enactment of the following revision to subsection (5)(A) of Title 19-A, section 2001:

5. Gross income. "Gross income" means gross income of a party as follows:

(A) Gross income includes income from an ongoing source, including, but not limited to, salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust funds, annuities, capital gains, social security benefits, disability insurance benefits, prizes, workers' compensation benefits, spousal support actually received pursuant to a preexisting order *from a spouse who is not the parent of the children for whom support is being determined*, and educational grants, fellowships or subsidies that are available for personal living expenses. Gross income does not include child support received by either party for children other than children for whom support is being determined.

Comment

This amendment would clarify that spousal support would not be included in the computation of child support for the children of the marriage on an initial child support order and in any subsequent computation child support on an ensuing motion for children of that marriage. Spousal support is not included in the initial computation of child support for children of the marriage; rather, the court first computes child support and then considers whether spousal support should also be ordered depending on the factors set forth in 19-A M.R.S.A. § 951(5). However, when child support is modified in a subsequent proceeding, there exists confusion over whether spousal support established in the original order should be included in the new computation of child support for children of the marriage. This confusion arises from the existing language in Subsection 2001(5)(A) which reads: "spousal support actually received pursuant to a preexisting order." One interpretation is that this means only spousal support from a different marriage unrelated to the children for whom support is being determined is to be included; another interpretation is that all spousal support is to be included in the computation of child support for the children of the marriage whether from the marriage before the court or from a different marriage.

The treatment of spousal support in the computation of gross income should be clear and consistent from the entry of the initial child support order to any amendment of that child support order. The proposed amendment would do this by clarifying that the only spousal support that is to be included in gross income is spousal support paid pursuant to an order established as the result of a marriage that does not involve the children for whom child support is being computed. Further, this approach is sound when one considers that under 19-A M.R.S.A. § 951-A(5)(P)(2), the court can always consider, in determining the amount of spousal support, the impact of a child support order on a party's need for spousal support or a party's ability to pay spousal support.

Date: October 4, 2001

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair

Draft Only

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Legislature, Joint Standing Committee on the Judiciary

January 15,2002

Introduction

The Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 2025, "An Act to Make Certain Changes to the State's Child Support Enforcement Laws."** For the reasons set forth below, the Commission recommends enactment of Sections 1 and 2 of the bill and enactment of Section 3 after the Department of Human Services revises the proposed language regarding enforcement of medical support obligations.

Discussion

L.D. 2025 section 1 proposes to amend the Probate Code to allow the Commissioner of Human Services to designate employees of the Department who are not attorneys to prepare and file motions to establish a child support obligation in a guardianship proceeding for a minor and represent the Department if a hearing is held. The Commissioner presently designates employees of the Department to perform this work for the Department in District Court proceedings.

L.D. 2025 section 2 proposes changing the reference to a municipality providing maintenance in 19A MRSA §1652 to a state providing maintenance. Section 1562 authorizes a parent, spouse, guardian or municipality in this state to petition the District Court or Probate Court to order a non-supporting parent to contribute to the support of the non-supporting person's spouse or child. Since enactment of the statute, the duty to provide public assistance has moved from the local municipality to the state. Updating the statute would recognize that shift in responsibility.

Section 3 proposed the creation of a new subchapter for health insurance withholding. The Commission believes this creates a new duty and obligation in the enforcement of health insurance obligations. The Department of Human Services, through its representative on the Commission, states this is not the Department's intent. The Department wants to enforce the existing duty to provide health insurance coverage, if so ordered by the Court or the Department in a child support order, through the use of the federally mandated National Medical Support Notice. The Department has agreed to revise the proposed language to eliminate the new subchapter. Instead the Department will propose amendments to the existing language in sections 2106 and 2308. The

amendments will require the use of the National Medical Support Notice for enforcement of a health insurance obligation. Section 2308 would be re-titled Medical Support Notice instead of health insurance withholding order. The National Medical Support Notice is a withholding order to enforce a medical support obligation.

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, MSW, Vice Chair
Debby L. Willis, Esq., Secretary
Mary Dionne, LMSW
Hon. Thomas E. Humphrey
Susan R. Kominsky, Esq.
Michael J. Levey, Esq.
Hon. James E. Mitchell
Rebekah Smith, Esq.

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

January 15, 2002

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1986, "An Act to Allow the State to Attach and Hold in Escrow Funds from Legal Settlements and Awards for the Purpose of Paying Child Support."** For the reasons set forth below, the Commission takes no position on the enactment of L.D. 1986.

Discussion

L.D. 1986 is a concept draft that proposes, in the most general of terms, to allow the State to attach and hold in escrow funds from legal settlements or awards, to be used to pay the recipient's child support obligations. Without more detail, FLAC takes no position. FLAC assumes that the concept draft is referring to future child support obligations. FLAC recommends that the concept draft include safeguards, such as requiring that the recipient have a history of nonpayment of child support before attaching the award and that the attachment be limited to a short period of time.

Date: January 15, 2002

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

January 28, 2002

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 1969, "An Act to Prohibit a Convicted Sexual Offender From Acquiring Custody or Obtaining Visitation Rights Without Adult Supervision."** FLAC has several concerns about L.D. 1969 and outlines those concerns in the following.

Discussion

L.D. 1969 prohibits the award of primary residence of a minor child to a "sex offender" and limits parent-child contact for a "sex offender" to supervised contact. While FLAC shares the concern reflected in the bill, FLAC wishes to address some of the difficulties with the bill, as proposed.

First, current law already affords courts the tools to protect a child from an individual who commits a sex offense. Maine Family Law requires that the court in making an award of parental rights and responsibilities apply the best interest of the child standard and make decisions regarding the child's residence and parent-child contact that considers primary the safety and well-being of the child. See 19-A M.R.S.A. § 1653. Thus, a court has the obligation in making its best interest determination to make primary in its consideration the well-being and safety of a child. Under this standard a court may conclude that a child could not be placed safely with a parent who has committed an sex offense and hence placement would not be in that child's best interest. The best interest criteria specifically includes that the court consider in weighing the best interest of the child "[t]he existence of any history of child abuse by a parent." 19-A M.R.S.A. § 1653(3)(M). And, the court is authorized to always consider "[a]ll other factors having a reasonable bearing on the physical and

psychological well-being of the child." 19-A M.R.S.A. § 1653 (3)(N). That a parent has committed a sex offense is always a factor that may have a bearing on a child's well-being.

If the Judiciary Committee believes that there needs to be a more specific requirement that a court consider whether a parent has committed a sex offense, then that requirement should be a factor that the court weighs in its best interest analysis. This is what the Legislature has done with regard to parents who have committed domestic violence. See 19-A M.R.S.A. § 1653(6). Subsection 6 provides that the court may order primary residence or parent-child contact to a parent who has committed domestic abuse "only if the court finds that contact between the parent and the child is in the best interest of the child and that adequate provision for the safety of the child and the parent who is a victim of domestic abuse can be made." 19-A M.R.S.A. § 1653(6). The Legislature could require that when a court finds that a parent has committed a sex offense, that the analysis of custody and visitation be governed by Section 1653(6). L.D. 1969 does not do this. Rather L.D. 1969 prohibits an award of primary residence to and requires supervised visitation for a "sex offender" regardless of what might be in the best interest of the child.

There are other issues with L.D. 1969. L.D. 1969 uses the term "sex offender" as defined by 34-A M.R.S.A. §11203(5). The term "sex offender" is both too broad and too narrow. It is too broad because it includes offenses that may not necessarily threaten the safety of a minor child. Additionally, it includes offenses committed by minors which ordinarily are afforded confidentiality. L.D. 1969 is too narrow because it does not include "sexually violent offenses." Under Section 11203(5) "sex offender" means "a person who is an adult convicted or a juvenile convicted of a sex offense." Under Section 11203(6) the term "sex offense" includes the following offenses "if the victim was less than 18 years of age at the time of the criminal conduct." Those offenses are: sexual exploitation of a minor (17 M.R.S.A. §2922); gross sexual assault (17-A M.R.S.A. § 253(2)(E, F, G, H, I or J); sexual abuse of minors (17-A M.R.S.A. §254); unlawful sexual contact (17-A M.R.S.A. §255(1)(A, E, F, G, I or J) visual sexual aggression against a child (17-A M.R.S.A. § 256); sexual misconduct with a child under 14 years of age (17-A M.R.S.A. §258); solicitation of a child by computer to commit a prohibited act (17-A M.R.S.A. §259); kidnapping (unless actor is parent of victim) 17-A M.R.S.A. §301); criminal restraint 17-A M.R.S.A. § 302); violation of privacy (17-A M.R.S.A. §511(1)(D)); incest (17-A M.R.S.A. §556);

Date: January 28, 2002

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report To The Maine Legislature, Joint Standing Committee On The Judiciary

February 4, 2002

Introduction

The Maine Family Law Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 1969, "An Act to Prohibit a Convicted Sexual Offender From Acquiring Custody or Obtaining Visitation Rights Without Adult Supervision." FLAC outlines its concerns regarding L.D. 1969 in the following.

Discussion

L.D. 1969 prohibits the award of primary residence of a minor child to a "sex offender" and limits parent-child contact for a "sex offender" to supervised contact. While protecting children from individuals who commit sex offenses makes good sense, existing law can address this concern. If the Judiciary Committee wishes to make explicit that certain individuals who have committed sex offenses should not gain primary residence of a child or have unsupervised contact with a child, then FLAC believes that the Committee needs to study the issue because L.D. 1969 raises many questions.

Current law already affords courts the tools to protect a child from an individual who commits a sex offense. Maine Family Law requires that the court in making an award of parental rights and responsibilities apply the best interest of the child standard and consider primary the safety and well-being of the child in making decisions regarding the child's residence and parent-child contact. See 19-A M.R.S.A. § 1653. Under this standard, a court may conclude that a child could not be placed safely with a parent who has committed a sex offense and hence placement would not be in that child's best interest. Additionally, the best interest criteria specifically requires that the court consider in weighing the best interest

of the child "[t]he existence of any history of child abuse by a parent." 19-A M.R.S.A. §1653(3)(M). And, the court is authorized to always consider "[a]ll other factors having a reasonable bearing on the physical and psychological well-being of the child." 19-A M.R.S.A. § 1653 (3)(N). That a parent has committed a sex offense is always a factor that may have a bearing on a child's well-being.

If the Judiciary Committee believes that there needs to be a more specific requirement that a court consider whether a parent has committed a sex offense, then that requirement should be a factor that the court weighs in its best interest analysis. This is what the Legislature has done with regard to parents who have committed domestic violence. See 19-A M.R.S.A. § 1653(6). Subsection 6 provides that the court may order primary residence or parent-child contact to a parent who has committed domestic abuse "only if the court finds that contact between the parent and the child is in the best interest of the child and that adequate provision for the safety of the child and the parent who is a victim of domestic abuse can be made." 19-A M.R.S.A. § 1653(6)(emphasis added). The Legislature could require that the analysis of primary residence and parent-child contact be governed by Section 1653(6) when a court finds that a parent has committed a sex offense. L.D. 1969 does not do this. Rather L.D. 1969 requires an outright prohibition of an award of primary residence to and requires supervised visitation for a "sex offender" regardless of what might be in the best interest of the child.

L.D. 1969, in its use of the term "sex offender" as defined by 34-A M.R.S.A. §11203(5), is both too broad and too narrow. It is too broad because it includes offenses that may not necessarily threaten the safety of a minor child.[1] Additionally, it includes offenses committed by minors,

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[1] Under Section 11203(5) "sex offender" means "a person who is an adult convicted or a juvenile convicted of a sex offense." Under Section 11203(6) the term "sex offense" includes the following offenses "if the victim was less than 18 years of age at the time of the criminal conduct." Those offenses are: sexual exploitation of a minor (17 M.R.S.A. §2922); gross sexual assault (17-A M.R.S.A. § 253(2)(E, F, G, H, I or J); sexual abuse of minors (17-A M.R.S.A. §254); unlawful sexual contact (17-A M.R.S.A. §255(1)(A, E, F, G, I or J) visual sexual aggression against a child (17-A M.R.S.A. § 256); sexual misconduct with a child under 14 years of age (17-A M.R.S.A. §258); solicitation of a child by computer to commit a prohibited act (17-A M.R.S.A. §259); kidnapping (unless actor is parent of

which ordinarily are afforded confidentiality. L.D. 1969 is too narrow because it does not include "sexually violent offenses" defined in 34-A M.R.S.A. §11203(8).

"Sexually violent offenses" are not included in the definition of "sexual offenses." Individuals who commit sexually violent offenses present just as great, if not a greater, threat to the welfare of a child as those individuals contained within the meaning of "sex offender." A "sexually violent predator," includes a person who is an adult or juvenile convicted as an adult of a sexually violent offense, or sex offense when the person has a prior conviction for or an attempt to commit a sex offense or a sexually violent offense. 34-A M.R.S.A. § 11203(8).[2] Legislation intended to protect children from individuals who commit sex offenses should include sexually violent offenses in the definition of sex offenses.

There may be some sex offenses that the Committee believes are so serious that a parent should be disqualified from gaining primary residence or unsupervised contact. However, in most instances the court should have the discretion to determine whether primary residence or parent-child contact to a parent or grandparent who has committed a sex offense would be in the best interest of the child and whether adequate provision for the safety of the child can be made. Relevant factors to this analysis should include how long ago the conviction occurred, the age of the victim, whether the individual has received effective treatment since the offense, what is in the best interest of the child and how the safety and well-being of the child might be ensured.

Additionally, the Legislature should require that any party who seeks primary residence or parent-child contact report to the court any

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victim) 17-A M.R.S.A. §301); criminal restraint 17-A M.R.S.A. § 302); violation of privacy (17-A M.R.S.A. §511(1)(D)); incest (17-A M.R.S.A. §556); aggravated promotion of prostitution (17-A M.R.S.A. §852(1)(B)); patronizing prostitution of a minor (17-A M.R.S.A. §855); and a violation of an offense in another jurisdiction that includes the essential elements of any of the foregoing offenses. See 34-A M.R.S.A. §11203(6).

[2] A "sexually violent offense" does not have an age requirement for the victim and includes a conviction for or an attempt to commit gross sexual assault (17-A M.R.S.A. § 253(1) and (2)(A, B, C, D) or unlawful sexual contact (17-A M.R.S.A. § 255(1)(B, C, D, or H). See 34-A M.R.S.A. §11203(7).

conviction for a sex offense, including the date of the conviction, the name of the offense, and the court and docket number of the case where the conviction occurred. A court then should have the ability to take judicial notice of such a conviction and to make the appropriate assessment of the nature of the conviction and how it relates to the safety and well-being of the child for whom parental rights and responsibilities are being decided.

Finally, L.D. 1969 does not provide sufficient conditions concerning parent-child contact, except to require that it be supervised. Again, 19-A M.R.S.A. §1653(6), which is applicable in cases involving domestic violence, provides a model for establishing the conditions of parent-child contact and further conditions when that parent-child contact is to be supervised. FLAC recommends that the Committee look to 19-A M.R.S.A. §1653(6) as it considers how L.D. 1969 might be improved.

Date: February 4, 2002

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debbie L. Willis, Esq., Secretary
Hon. Thomas E. Humphrey
Michael J. Levey, Esq.
Susan R. Kominsky, Esq.
Rebekah Smith, Esq.
Hon. James E. Mitchell
Mary Dionne

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

February 20, 2003

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on L.D. 235, "An Act Concerning the Treatment of Gross Income in Cases in Which Both Child Support and Spousal Support Are Considered." FLAC proposed L.D. 235 to provide clarity in an area of family law in which there is considerable confusion.

L.D. 235 clarifies that spousal support is not considered as part of the gross income of the recipient of child support in the computation of child support for the children of the marriage in the initial child support order <u>and</u> in any subsequent child support computation on an ensuing motion for children of that marriage.

Spousal support from the child support payor to the recipient is not considered in the recipient's gross income in the initial computation of child support for children of the marriage because there is not a preexisting spousal support order. <u>See</u> 19-A M.R.S.A.§ 2001(5)(A). Rather, the court first computes child support and then considers whether spousal support should also be ordered depending on the factors set forth in 19-A M.R.S.A. § 951-A(5). <u>See also</u> 19-A M.R.S.A.§ 951-A(5)(P)(2).

When the child support order is modified in a subsequent proceeding, however, there exists confusion over whether spousal support from the payor of child support, established in the original order, should be considered as gross income to the recipient of child support in the new computation of child support for children of the marriage. This confusion arises from existing language of the child support law, 19-A M.R.S.A. § 2001(5)(A), which includes in the child support payee's income the amount of "spousal support actually received pursuant to a preexisting order." This language gives rise to two opposite possible interpretations. One interpretation is that this means only spousal support from a different marriage unrelated to the children for whom support is being

determined is to be included in the recipient's gross income. The other interpretation is that all spousal support, whether from the marriage before the court or from a different marriage, is included in the payee's income prior to determining child support.

The same confusion exists in 19-A M.R.S.A. § 2001(5)(E), which reduces the gross income of a child support payor for the amount of "preexisting spousal maintenance ... actually paid..." This language also gives rise to similar opposite possible interpretations.

While existing law can therefore be interpreted to suggest that spousal support as an inclusion or exclusion from gross income might be treated differently at different times for the purpose of calculating presumptive child support, there is no logical reason to treat spousal support differently in the initial child support proceeding than in a child support modification proceeding.

L.D. 235 treats spousal support as an exclusion from gross income for the purpose of calculating child support. It is practical not to include spousal support as income in calculating child support because spousal support is generally for a limited period of time and the obligation to pay spousal support often ends long before the child support obligation terminates. Not including spousal support as income eliminates the need to return to court for a recalculation of child support when there no longer is a spousal support obligation.

The treatment of spousal support in the computation of gross income should be clear and consistent from the entry of the initial child support order to any amendment of that child support order. L.D. 235 accomplishes that by clarifying that the only spousal support that is to be considered in gross income is spousal support paid or received pursuant to an order established as the result of a marriage that does not involve the children for whom child support is being computed. Not only does L.D. 235 create uniformity of treatment at all stages of the litigation, it is also consistent with the policy of the spousal support statute requiring the court to consider the child support payment when determining the spousal support payor's ability to pay spousal support. See 19-A M.R.S.A. § 951-A(5)(P)(2).

Dated: February 19, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Thomas E. Humphrey
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:

Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

February 28, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 731, "An Act Regarding Case Management Officers."** FLAC supports L.D. 731 for the reasons set forth below.

Discussion

L.D. 731 authorizes Case Management Hearing Officers to amend the paragraph in protection from abuse orders that relates to parental rights and responsibilities. The need for this authority arises to ensure that the State registry of protective orders, upon which law enforcement relies in enforcing protective orders, is accurate. While a protection order is accurate when first entered and transmitted to the State registry, the portion of the order that relates to parental rights and responsibilities may no longer be operative because of a subsequently entered parental rights and responsibilities order in a family matter.

The parental rights and responsibilities provision in the protection order is not operative because of existing Maine law that provides that an award of parental rights and responsibilities contained in an interim order entered in a divorce action supersedes the award of parental rights and responsibilities contained in an earlier protective order. The Protection from Abuse statute expressly provides that "[t]he court's award of parental rights and responsibilities or rights of contact is not binding in any separate action involving an award of parental rights and responsibilities pursuant to Chapter 55 [(19-A M.R.S.A. §§ 1651-1658)] . . . ." 19-A M.R.S.A. § 4007(1)(G) Sections 1651-1658 of relate to parental rights and responsibilities in family matter cases, as compared to protection from abuse cases. 19-A M.R.S.A. Title 19-A, section 1653(5-A) also limits the effect an award of parental rights and responsibilities in a protective order has in a separate family matter action involving a determination of parental rights and responsibilities for the same child or children: "Although the court shall consider the fact that a protective order was issued under chapter 101, the court shall determine the proper award of parental rights and responsibilities and award of rights of contact de novo and may not use as precedent the award of parental rights and responsibilities and rights of contact included in the protective order." 19-A M.R.S.A. § 1653(5-A) (Supp. 2001). Thus, under the current statutory scheme, the parental rights and responsibilities provision in a protection from abuse order is no

longer operative once a parental rights and responsibilities order is entered in a family matter case. See Young v. Young, 2002 ME 167.

The officer in the field enforcing the protection order will not ordinarily know of the subsequently entered family matter order because family matters are not placed on the State registry of protection orders. Violation of certain provisions of a protective order, including the provision that relates to parental rights and responsibilities, constitute a Class D crime. Therefore, it is very important that law enforcement have accurate and up-to-date information on the State registry. Allowing a Case Management Officer, who is often the court officer entering parental rights and responsibilities order in family cases, to amend the same provision in the protective order ensures that law enforcement has accurate information on the State Registry and that the parties have consistent orders to follow.

For all of these reasons, FLAC strongly supports the enactment of L.D. 731.

Dated: February 28, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Thomas E. Humphrey
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:

Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

February 28, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 736, "An Act to Specify Information Required in a Divorce Decree."** FLAC supports L.D. 736 for the reasons set forth below.

Discussion

L.D. 736 expands the requirements of what information must be contained in a decree of divorce or an abstract of the decree for divorce involving rights to real property when that decree or abstract is filed with the registry of deeds. This amendment to 19-A M.R.S.A. § 953(7) will reduce confusion that may exist about the disposition of real estate in a divorce decree.

Dated: February 28, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Thomas E. Humphrey
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:

Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

February 28, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on **L.D. 741, "An Act to Expand the Powers and Authority of Case Management Officers in the Family Law Division."** FLAC generally supports L.D. 741 for the reasons set forth below.

Discussion

L.D. 741 makes several very important changes that will strengthen the Case Management system in the Family Division of the District Court. First, it proposes two changes that are of a similar nature. L.D. 741 changes the name of Case Management Hearing Officer to Family Law Magistrate. This new name more accurately describes the role of the case management hearing officer for the parties, the public and other courts outside of Maine asked to enforce Maine family law orders. A case management hearing officer is an officer of the court who makes important decisions about child support and interim parental rights and responsibilities. These decisions are orders of the court unless overturned by a District Court judge. The title Family Law Magistrate more clearly advises the public and the parties of the authority vested in these decision-makers.

Similarly, the wearing of a robe is a symbol of the authority invested in the decision-maker. Many, if not most, litigants or attorneys do not need the symbols conveyed by titles or robes, but there is a small portion of the population who need to be reminded that the proceeding in which they are participating is an important one and that they must accord respect to all that are participating in the proceeding. The tone set in a family court proceeding has the capacity to set the tone for what will occur in the family after the conclusion of the proceeding. If the parties understand that they have been before an officer of the court and the orders entered are to be respected and enforced, then it is more likely that the parties will follow the order, the conflict will be reduced, and the best interest of the children will be served. The right title and a robe can assist in instilling in the parties this level of respect for the family law proceeding.

Section 4-A of L.D. 741 expands the authority of the case management hearing officers with respect to final orders in certain circumstances. Currently, case management hearing officers may issue a final order in a contested proceeding when the only issue is child support. See 19-A M.R.S.A. § 183(4). Section 4-A grants case management hearing officers the authority to issue a final order in

contested proceedings on any issue the parties agree to submit to the case management hearing officer for determination. This provision allows the parties to assess whether it is more efficient and economical for them to submit the case for final hearing to the case management hearing officer whose familiarity with the case allows a more tailored and expedited hearing.

Section 4-B authorizes case management hearing officers to issue a writ of habeas corpus. This provision simply gives case management hearing officers the authority to ensure that parties who are incarcerated are able to attend a proceeding schedule for hearing before case management hearing officers.

Section 4-C permits case management hearing officers to issue an order to the Department of Human Services to produce records in the possession of the Department that may be relevant to the issues in the family matter over which a case management hearing officer is presiding. In issuing such an order to the Department, it is critical that the records are reviewed first by the court to ensure that only those records that relate to the matter at hand are produced and that the confidentiality of other records is preserved. It is often important that the information contained in the Department's records is made available to the parties as early as possible in the proceedings so that the parties and the court may more accurately and promptly assess what is in the best interest of the child. It is the case management hearing officers who are usually conducting the proceedings in a family case at the early stages of the case. Thus, it is practical and efficient to permit the case management hearing officers to issue the orders and review the records of the Department in those cases where the Department has information relevant to the issues in the family matter.

FLAC supports the concept of giving case management hearing officers the authority to enforce their lawful orders and maintain control in the courtroom. Section F of L.D. 741, however, grants to case management hearing officers broader authority than is appropriate. Contempt power is a necessary authority used by judges to maintain control in the courtroom and to effect compliance with court orders. Under current law, contempt power is expressly reserved to District Court judges under Family Division Rule III.D.3. Contempt power has been described as an inherently judicial function, see, e.g. Opinion of Justices, 640 A.2d 784, 785 (N.H. 1994); therefore, the role of case management hearing officers in a contempt proceeding must be carefully circumscribed so that the final decision-making authority remains with a District Court judge.

The Maine Constitution does not forbid the delegation of certain judicial functions to case management officers "so long as ultimate decision making authority is retained by the district court." See Carrie Ann Arsenault v. Joseph N. Bordeau, Oxford Superior Court, Docket No. AP-99-06 (Warren, J.). FLAC believes that it is possible for case management hearing officers to have the authority to conduct certain contempt proceedings provided a district court judge retains the final decision making authority in the contempt proceeding.

It is worth studying the governing federal statute that allows federal magistrates to exercise contempt powers. There are two ways in which federal magistrates are permitted to exercise contempt power: one is an outright grant of the authority in certain cases and the other is for more serious cases where a magistrate must certify the facts and issue an order requiring the person to appear before a district judge to show cause why the person should not be adjudged in contempt by

reasons of the facts so certified. The district judge then hears the evidence as to the act or conduct and, if the conduct is such as to warrant punishment, punishes the person in the same manner and to the same extent as for a contempt committed before a district judge. See 28 U.S.C.A. § 636(e)(6).

Federal magistrates are court officers similar to case management officers in terms of the appointment process, and they have limited contempt authority, which includes the power to act in cases in which a person misbehaves in the magistrate's presence so as to obstruct the administration of justice and in any case in which a magistrate presides in order to achieve compliance with its orders. See 28 U.S.C.A. § 636(e). Case management hearing officers should similarly be able to ensure that a person does not disrupt the administration of justice and to enforce, when necessary, compliance with their lawful orders, including the payment of child support. One possible way to do this is to authorize case management hearing officers to impose monetary sanctions, but when a jail sanction is contemplated, require the case management hearing officer to certify the facts to the District Court judge so that the judge retains the right to impose incarceration as a sanction in the appropriate case. There may be other ways to support the case management hearing officers ability to enforce lawful orders and to ensure the administration of justice, and FLAC is willing to work with the Judiciary Committee to draft language that would achieve this.

Dated: February 28, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Thomas E. Humphrey
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:

Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

March 17, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 865, "Resolve, Directing the Family Law Advisory Commission to Study and Report on Legal Issues Surrounding Surrogate Parenting and Gestational Agreements." FLAC supports this Resolve.

Discussion

L.D. 865 directs FLAC to conduct a study of laws and proposals relating to surrogate parenting, gestational agreements and other nontraditional means of conception and childbearing and to submit a report no later than January 1, 2004, together with any necessary implementing legislation, for presentation to the Second Regular Session of the 121st Legislature. This is a controversial area of the law that has arisen as the result of the technological and medical advances with respect to assisted reproduction, including donor eggs, implantation of embryos, and artificial insemination. Gestational agreements tread upon the complex and controversial ground of "surrogate mother." Some states allow gestational agreements by statute or case law. Other states void such agreements by statute. Some states statutorily prohibit compensation to the gestational mother, and other states have judicially refused to recognize such agreements.

The National Conference of Commissioners on Uniform State Laws has studied these issues and approved and recommended for enactment the Uniform Parentage Act, last amended and revised in 2002. The Uniform Parentage Act attempts to give states guidance on the difficult issues of parentage, including the parentage of children born as the result of assisted reproductive technologies or gestational agreements.[1] The Uniform

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[1] With respect to gestational agreements, the Uniform Parentage Act follows the option that permits enforcement of gestational agreements, but recognizes that this is an area

Parentage Act, along with other laws and proposals, should be studied before Maine enacts any legislation on such important issues. FLAC is willing to undertake this study and submit a report no later than January 1, 2004, together with any necessary implementing legislation, for presentation to the Second Regular Session of the 121st Legislature.

Dated: March 17, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

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where state legislatures may decide that they are not yet ready to address gestational agreements or may want to treat them differently than the Uniform Parentage Act provides; therefore, in recommending enactment of the Act, the Conference acknowledges this by stating that states may omit Article 8 of the Act that addresses gestational agreements without undermining the other provisions of the Act.

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MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

March 17, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 869, "An Act Concerning the Financial Obligations of a Parent Involved in a Crime Against a Child of that Parent." FLAC generally supports L.D. 869, but believes it raises some unanswered questions as discussed below.

Discussion

L.D. 869 proposes to change current law that terminates a person's obligation to support a child once that person's parental rights are terminate. L.D. 869 addresses those cases in which a parent is convicted of a crime against his or her child before that parent's parental rights are terminated. In such cases, bill authorizes a court to require a parent to contribute to the financial support of a child at the time that the parent's rights are terminated. The court may order as part of the termination order a lump sum payment, and direct the payment to be held in trust for the child or order other protections for the preservation of the payment for support of the child.

Many parents whose rights are terminated are indigent and therefore not likely to be able to pay a lump sum for the benefit of their child. However, in those cases, where a parent is not indigent and the parent has been convicted of a crime against his or her child, FLAC supports the court ordering a lump sum as part of the termination order.

There may be some issues to work out to ensure that the money finds its way to the child. In a welfare family, Federal law may require that the money go to the Department of Human Services. In a nonwelfare family, this may not be a problem. This issue needs further study to ensure that the money will go to the child since the intent of

the bill is to benefit the child who has been a victim of a crime committed by his or her parent.

Dated: March 17, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on the Judiciary

March 17, 2003

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on L.D. 912, "An Act to Protect Children in Protection from Abuse Proceedings." FLAC opposes L.D. 912 as unnecessary and overly broad as set forth below.

Discussion

L.D. 912 defines abuse for purposes of protection from abuse orders to include threatening a minor's mental or emotional well-being by exposing a minor to the abuse of a family or household member of the minor. Essentially, L.D. 912 expands the definition of abuse to include exposure to abuse of a family or household member. FLAC believes that L.D. 912 is too broadly drawn. FLAC is concerned that the breadth and vagueness of the bill may impose an obligation on a parent for failing to protect a child from witnessing abuse. Too often there is more than a one family or household member that is a victim of abuse: one of the parents and the child may be victims of abuse. Yet, this bill is vague enough to hold a parent who is abused with responsibility for not protecting the child from exposure to the violence. This assumes that this parent is able to protect the child from exposure to the abuse. Rather than holding such a parent responsible under the Protection from Abuse Act, it may be more appropriate to offer the abused parent services so that parent may escape from the abuse and protect the child in so doing.

While it is laudable to strive to protect children from exposure to abuse, Maine law already provides in at least two ways for the protection of a child who may be exposed to violence. First, a parent who is the victim of abuse may obtain a protection from abuse order and seek protection of the child in the terms of the order. Section

4007(1)(G) of Title 19-A M.R.S.A. directs a court entering a protection from abuse order to consider the best interests if the child standard set forth in 19-A M.R.S.A. § 1653(3) to (6). The best interest of the child analysis requires that the court consider the existence of domestic abuse between parents and how that abuse affects the child emotionally and the safety of the child. See 19-A M.R.S.A. § 1653(3). Further, Section 1653(6) sets forth specific conditions that provide for the safety of the child that the court must establish in cases involving domestic abuse.

Second, for those cases, where the exposure arises to the level of abuse or neglect of the child, the Child and Family Services and Child Protection Act authorizes the state to intervene in the family to protect the child. This Act protects children from abuse or neglect and defines "abuse or neglect" to include "a threat to the child's health or welfare by physical, mental or emotional injury or impairment . . . or lack of protection from these, by a person responsible for the child." See 22 M.R.S.A. § 4002(1). Under this Act, the State may work with the parent who is abused to eliminate the child's exposure to the abuse, and when services do not work, intervene by filing a child protection proceeding. Under L.D. 912, FLAC is concerned that this parent would be held responsible without first having the supportive services that would help that parent escape the abuse and eliminate the child's exposure to the abuse.

Dated: March 17, 2003

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Debby L. Willis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Patrick F. Ende, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

March 15, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 894, An Act to Require Guardians ad Litem to Receive Counseling. FLAC raises the following concerns about LD 894.

Discussion

LD 894 requires the Court Administrator to provide counseling training to Guardians ad litem. LD 894 does not describe what type of counseling is to be provided or for what purpose. Counseling, in the form of a training program, is generally a long-term degree program that is offered at many colleges and Universities. The cost for this for the Court would be prohibitive. It is also not clear whether counseling should be a requirement for one to serve effectively as a Guardian ad litem.

Understanding child development and the impact of divorce and separation on children as well as the dynamics of domestic violence are basic requirements for a Guardian ad litem. For this reason, the Court provides a training program that is required for anyone who wishes to be rostered on the Court's approved Guardians ad litem list. A judge or case management hearing officer is required to appoint a Guardian ad litem from this rostered list, except for good cause. The Court training program is a multi-day program that includes covers all of the basic areas necessary to effective service as a Guardian ad litem, including family law, child development, domestic violence, interviewing children, and a number of other topics. Without more information about the nature of the specific concern behind LD 894, it is difficult to ascertain whether the Court's training program meets that concern.

Conclusion

FLAC does not recommend the enactment of LD 894.

Dated: March 15, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

March 15, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 859, An Act to Provide Greater Civil Relief Protection for Members of the Military. FLAC limits its comments to those sections of LD 859 that relate to parental rights and responsibilities.

Discussion

Section 4 of LD 859 seeks to protect the parental rights and responsibilities of military members who are called to duty and must be away from their children. The departure of a parent for military service may not be an adverse factor in a parental rights and responsibilities determination. Section 4 of LD 859 also provides that a court may not order a change of primary physical residence of a child when one of the child's parents is called to active duty for more than 30 days. This section would operate as a limitation on the authority of the court and would not allow a court to determine that it may be in the best interest of the child to have at least temporary physical residence transferred to the other parent. It would also not allow a court to incorporate in an order an agreement between parents to shift primary physical residence during the military parent's departure for active duty.

Further, Section 6 authorizes a court to allow the custody or visitation rights of the military parent be transferred to a relative who has a significant connection with the child or children during the military parent's absence, unless good cause is shown. This provision places the rights of the military parent's relative superior to the best interest of the child and to the other parent of the child. Certainly, a court may find that it would be in the best interest of the child to allow a relative to have visitation during the period of

absence. But the rights of the other parent and the best interest of the child should not be overridden by the rights of a relative of a military parent called to active duty.

The Servicemembers Civil Relief Act, 50 U.S.C. App. §§501-596, which replaced the Soldiers' and Sailors' Civil Relief Act of 1940, apparently covers the first 6 subsections of Section 6.

Conclusion

FLAC recommends that Sections 4 and 6 of LD 859 be carefully reviewed to ensure that the rights of the other parent and the best interest of the child are also protected.

Dated: March 15, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

March 17, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 867, An Act Regarding Child Protection Proceedings. FLAC recommends the adoption of LD 867.

Discussion

LD 867 expands the rules governing confidentiality of child protection records of the Department of Health and Human Services. LD 867 specifies that, within the Department of Health and Human Services, information in records, as well as the record itself, is protected and confidential. LD 867 clarifies that distribution of child protection records within the Department is limited to those who need the information in carrying out their job functions. LD 867 also expands the list of persons to whom the department is authorized to disclose relevant information, including various professionals and parties or other involved in a child protection proceeding. LD 867 requires that any person who receives department records or information from the department is subject to the confidentiality rules and may not further disseminate the records. The confidentiality rules limit use of department records to the purpose for which the release was intended and prohibits further dissemination of those records.

LD 867 ensures that those who need to have access to information in and about child protection proceedings obtain access and at the same time ensure that confidential information is protected.

Conclusion

FLAC recommends the adoption of LD 867 for the reasons set forth above.

Dated: March 15, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

March 25, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1067, "Resolve, To Establish the Task Force to Study and Design a Child Protection Mediation System." FLAC recommends the adoption of LD 1067.

Discussion

LD 1067 resolves to create a task force to formulate a child protection mediation system. In addition, LD 1067 directs the task force to recommend qualifications for mediators and to identify a stable funding source for this mediation system.

Mediation has proven to be highly successful in other family law matters over the last two decades. Providing mediation in child protection matters should similarly help to resolve cases without trial and to assist the parties in understanding both the child protection process and the expectations of them as parents.

In a pilot project in the Lewiston District Court in 1999-2001, the parents who were required to participate in mediation expressed satisfaction with their experience in mediation. Because these proceedings can be very confusing and emotional for parents, it is important to provide an opportunity for all participants involved in a case—the parents, parents' attorneys, GAL, Department caseworkers and Assistant Attorneys General—to come together with the help of a trained mediator. Mediation could prove to be a valuable tool in helping to clarify the issues, reduce future disputes, alleviate the

need for judicial intervention and foster a better understanding of the resulting service plan and court order.

Conclusion

FLAC recommends the enactment of LD 1067.

Dated: March 25, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

April 4, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1025, "An Act to Expedite the Divorce Process in Instances of DV." FLAC recommends that LD 1025 not be adopted.

Discussion

LD 1025 would expedite the divorce process in all cases where domestic violence was indicated. There are certainly victims of domestic violence who would be helped if their divorces were not allowed to linger or be delayed through the court process. FLAC, however, is not convinced that this can be generalized to mean that all divorces where domestic violence is indicated should be speeded up or put on a fast track. In fact, these cases often have difficult child contact issues, which may need extra time to allow a GAL to make a meaningful recommendation to the court.

This does not diminish any concern that FLAC may have that any part of the divorce process might be manipulated to harass a victim of domestic violence, but that concern is not properly addressed by this act.

Conclusion

FLAC recommends that LD 1025 not be enacted.

Dated: April 4, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

April 12, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) [1] hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1526, An Act to Amend the Uniform Parentage Act and Conforming Amendments and Additional Amendments to Laws Concerning Probate, Adoption, Child Support, Child Protection and Other Family Law Issues. In 2003, the American Bar Association (ABA) gave its endorsement to the National Conference of Commissioners on Uniform State Laws 2002 Uniform Parentage Act (NCCUSL UPA), a proposed comprehensive parentage statute. The purpose of the proposed Act is to establish who are the legal parents of a child. Once the ABA endorsement was given to the NCCUSL UPA, states, including Maine, began to consider adopting this Act.

In 2003, the 121st Legislature directed FLAC to examine parenting issues, including the NCCUSL UPA, and report back to the Judiciary Committee. FLAC did so in January 2004, initially recommending a revised version of the NCCUSL UPA (LD 1851, 121st Legislature). Recognizing the interplay between LD 1851 and other areas of law had not been fully explored, FLAC recommended that the committee vote Ought Not To Pass. The ONTP report, which the Judiciary Committee entered, gave FLAC an

[1] Over the last two years of its work on the UPA, FLAC had the invaluable assistance of the following: three law clerks, Danny Coyne, Lori Londis and Julia Greenleaf; a subcommittee of the Family Law Section of the Maine State Bar Association, including Tobi Schneider, Chair, Judy Andrucki, Ed David, Steven Hayes, Sharon McHold, the Hon. John Sheldon, Tamar Mathieu, Judy Berry, and Karen Boston; the Child Protection and Juvenile Justice Section of the Maine State Bar Association, including Donna Bailey, Chair, Norman Kominsky, Sharon Craig, Vicky Mathews, and S.M. Carey; and several Assistant Attorney Generals, including E. Mary Kelly, and Matthew Pollock. By acknowledging their valuable assistance, FLAC does not suggest that they all agree with FLAC's proposals. Many of the provisions of the UPA continue to be roundly debated in the community. In preparation for this report, FLAC also spoke with many other family law practitioners to understand the current parentage issues in Maine, reviewed unpublished Maine trial court decisions where many of these issues appear, and studied the experience of other states in addressing the issues raised in the UPA.

opportunity to contemplate how recent Maine Supreme Judicial Court rulings affect this area of the law, and to spend more time working with other family law practitioners who may be affected by the proposed changes. Over the last year, FLAC has received input from practitioners about how the UPA would affect laws governing inheritance, guardianship, adoption, child protection, child support, and other family law areas and now recommends further legislative changes to Maine law.

In this report, FLAC summarizes the rationale and workings of the FLAC version of the UPA (FLAC UPA) and how the FLAC UPA shapes and changes existing Maine law. Additionally, the appendixes to this report provide a further overview of the issues that shaped the FLAC UPA, through both a discussion of recent Law Court decisions regarding de facto parenting (Appendix A), and an overview of the provisions of the NCCUSL UPA (Appendix B).

Discussion

I. Rationale for the FLAC UPA

The FLAC UPA brings many changes to Maine law and important guidance to Maine family law practitioners, judges, case management officers and families. Determinations of parentage have become more complicated with the development of improved DNA testing and new reproductive technologies. The development of accurate DNA testing makes possible the highly accurate determination of paternity or non-paternity, even long after parent-child relationships may have been established. Maine courts and families struggle with what to do when a perceived father has been disestablished by DNA results, but there is an established parent-child relationship. Maine has an insufficient statutory framework to guide these families, and case law reveals inconsistent results.

New reproductive technologies make possible embryo implantation, artificial insemination and gestational agreements. Maine does not have the legal guidance necessary for addressing the various new and unanticipated issues relating to the parentage of children born through the use of assisted reproduction and gestational agreements. In addition, through the 2004 decisions of C.E.W. v. D.E.W. and Young v. Young, the Maine Supreme Judicial Court clarified the equitable concept of de facto parent.

The FLAC UPA addresses many of the complicated issues that arise as a result of the new reproductive technologies, the late accurate determination of paternity or non-paternity and the recognition of de facto parentage. The enactment of the FLAC UPA will provide equal treatment of all children regardless of their parents' marital status, greater certainty and stability to children, statutory guidance in determining parentage, and more predictable results for these determinations.

II. The FLAC UPA

In this section, the key provisions of the FLAC UPA are presented. Footnotes will also delineate the significant ways in which the FLAC UPA is different from the NCCUSL UPA.

A. The Presumed Parents, the Genetic Father, and the Significance of Two Years.

1. The marital presumption. The UPA has a category of parent known as the marital presumed parent. It is essentially the same as the marital presumption which has always existed in Maine law. If a child is conceived or born during the marriage, the husband is presumed to be the father of the child. Under the FLAC UPA, however, if the alleged genetic father challenges this marital presumption, that challenge must be made before the child's second birthday. If the alleged father is the genetic father, he will be recognized as the father of the child, and the marital presumed father will be disestablished as the parent.

If a successful challenge to the marital father's parentage is made after the child's second birthday, the marital father will not be disestablished. Both the parentage of the marital father and the genetic father will be recognized. The court will use the "best interest of the child" factors in Title 19-A, and will award and allocate, if appropriate, the parental rights and responsibilities in connection with the child, including support. After the child's second birthday, no one is disestablished as the parent of the child. [2]

2. The nonmarital presumption. The UPA creates a new category of legal parent, not previously recognized in Maine law - the nonmarital presumed parent, which is a gender neutral category of parent, same or different sex. If a person resides in the

[2] The NCCUSL UPA disestablished the genetic father, if no challenge to the marital presumption was made within the first two years of the child's life. The FLAC UPA rejects this and similar disestablishment concepts.

same household with a child and openly holds out as the parent of that child, for the first two years of the child's life, then that person is presumed to be the parent. If another man establishes himself as the genetic father, within the first two years of the child's life, the genetic father will be recognized as the father of the child, and the nonmarital presumption will not come into being. If the challenge to the nonmarital parent's parentage is made after the child's second birthday, the nonmarital presumed parent will not be disestablished. Instead, both the parentage of the nonmarital presumed parent and the parentage of the genetic father will be recognized.

The court will again use the "best interest of the child" factors in Title 19-A, and will award and allocate the parental rights and responsibilities. After the child's second birthday, no one is disestablished as the parent of the child. [3]

B. Acknowledgment of Parentage. The FLAC UPA contains a chapter permitting fathers and mothers to acknowledge the genetic parentage of a child. The purpose of this chapter is to update and improve the long-standing ability of parents to acknowledge paternity in Maine. This chapter introduces no significant new concepts to the substance of Maine law concerning acknowledgments, except for the time limits discussed herein. If a successful challenge to the acknowledgment, based upon genetics, is made within two years of the acknowledgment, the acknowledged parent is disestablished.

If the genetic challenge is made after the second anniversary of the acknowledgement, the acknowledged parent will not be disestablished. Both the parentage of the acknowledged parent and the parentage of the genetic father will be recognized. The court will again use the "best interest of the child" factors and will award and allocate parental rights and responsibilities. After the second anniversary of the acknowledgment, no one is disestablished as the parent of the child. [4]

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[3] The FLAC UPA is gender neutral with respect to the nonmarital presumption, allowing it to arise in families where the parents are different sex couples or same sex couples, which is different than the NCCUSL UPA. The NCCUSL UPA also differs in disestablishment of the genetic father, if no challenge to the evolving nonmarital presumed parent was made within the first two years of the child's life.

[4] The NCCUSL UPA disestablishes the genetic father if no challenge to the acknowledged parent was made within two years of the acknowledgment.

In addition to the traditional form of acknowledgment by genetic parents, the FLAC UPA adds a similar acknowledgment opportunity for a person who has evolved into the status of a nonmarital presumed parent. The FLAC UPA also has a parallel process to challenge the acknowledgment of the nonmarital presumed parent which is similar in concept to the challenge of the genetic parent acknowledgment. [5]

C. The Adjudicated Parent. The situation will arise where the adjudicated father is later determined by the courts to not be the genetic father. If the genetic father was not a party to the original action to establish parentage, the genetic father may disestablish the adjudicated father. However, that disestablishment action must be brought within two years of the parentage adjudication. If the challenge of the genetic parent is made after that point, the adjudicated parent will not be disestablished. Both the parentage of the adjudicated parent, and the parentage of the genetic father will be recognized.

Again the court will use the "best interest of the child" factors in Title 19-A and will award parental rights and responsibilities. After the second anniversary of the adjudication, no one is disestablished as the parent of the child.[6]

D. De Facto Parentage. Beginning with Stitham v. Henderson, and continuing through the decisions in CEW v. DEW and Young v. Young, the Supreme Judicial Court has recognized the fluid and complex nature of modern family relationships. Specifically, the creation of very important bonds between children and persons who perform significant parental roles in their lives, but who have not previously been accorded any legal parental status. These decisions illustrate that, in appropriate factual situations, there can and should be legal recognition for these persons. The opinion in CEW v. DEW can be easily read to include an invitation to the legislature to write a de facto parentage statute. The FLAC UPA has accepted the Court's invitation, and includes, as a category of legal parent - the de facto parent. [7]

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[5] The nonmarital presumed parent acknowledgment and challenge of acknowledgment process is not present in the NCCUSL UPA.

[6] The NCCUSL version of the UPA disestablished the genetic father, if no challenge to the adjudicated parent was made within two years of the adjudication.

[7] The NCCUSL version of the UPA does not include the concept of de facto parent.

Under the FLAC UPA, the status of a de facto parent must be awarded by the court. The status of de facto parent may be awarded after consideration of at least the following factors: (a) Whether the person has lived with the child for a significant period of time; (b) Has the person performed parental caretaking functions for the child to a significant degree; (c) Did the person accepted full and permanent responsibilities as a parent without expectation of financial compensation; (d) Whether the person has contributed financially to the support of the child; and, (e) Whether the person, with the consent and encouragement of the other parent, has formed a parental bond with the child.

Once a de facto parent is recognized, the court then determines the parental rights and responsibilities in accordance with the "best interest of the child" factors in Title 19-A. The establishment of a de facto parent does not disestablish any other legal parent. The court has the power to allocate and award, among all the legal parents, the parental rights and responsibilities of the child, including child support.

E. <u>Assisted Reproduction Technologies.</u> The FLAC UPA identifies the legal parents of children who are born through artificial reproduction technology (ART), whether the intended parents are married, unmarried heterosexual, same sex, or single. ART is currently not directly governed by any statutes. This part of the FLAC UPA creates clear rules where before, there were none.

Under the FLAC UPA, artificial reproduction technology is defined as requiring that the mother did not have sexual intercourse to conceive the child. The sperm or the sperm and egg were artificially implanted, with the woman intending to be the mother of the resulting child.

A child conceived under ART is the child of the woman giving birth. If the male who provided the sperm intends to be the father, then he is the father. If he did not intend to be the father, he is foreclosed from become the parent of the child. If the sperm donor does not intend to be the parent, then the mother and another person can agree in writing, that the resulting child is the child of those consenting adults. [8]

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[8] Unlike the NCCUSL UPA, the FLAC UPA makes parentage to ART-intended parents available on a gender-neutral basis.

F. The Gestational Agreements. The FLAC UPA identifies the legal parents of children who are born using the services of a gestational carrier (gestational agreements). Currently, gestational agreements do not had any specific statutory guidance.

Under this section of the FLAC UPA, an adult couple ("intended parents") contract with a woman 21 years of age or older, to bear a child for them through ART. The gestational agreement must require that the intended parents become the legal parents of the resulting child. The gestational carrier, and her husband if married, are required to relinquish all rights as the parents of the child. During the course of the pregnancy however, the gestational carrier retains complete control over each and every decision concerning her physical and emotional health, including control over the decision as to whether to terminate the pregnancy.

The gestational agreement may be terminated by any party to the contract, before the gestational carrier is impregnated. The agreement must also state what compensation is being paid to the gestational carrier, and provide for adequate coverage of all health care expenses related to the gestational agreement until the birth of the child.

Gestational agreements must be approved by the court before the gestational carrier is impregnated. The court then retains continuing jurisdiction over that contract. When the child is born, the court is notified and enters an order finding that the intended parents are the legal parents of the child. [9]

III. Changes to Other Provisions of Maine Law

FLAC proposes other changes to Maine law to make paternity and child support provisions of Title 19-A, guardianship, adoption and inheritance provisions of the Probate Code, and child protection provisions consistent with the FLAC UPA and recent Maine case law.

A. Paternity and Child Support under Title 19-A. FLAC proposes amendments to Title 19-A provisions concerning paternity and child support. Where necessary, provisions of Title 19-A are made gender neutral and refer to "parent" and "parentage"

[9] Unlike the NCCUSL UPA, the FLAC UPA makes parentage under a gestational agreement available to all intended parents, it is available on a gender-neutral basis.

rather than "mother" or "father" and "paternity." In addition, "parent" and "grandparent" throughout Title 19-A are made consistent with the terminology in the FLAC UPA with the deletion of "biological," "adoptive" and "natural" parents where appropriate.

Additionally, FLAC proposes The Uniform Act on Paternity (provisions of that older act are part of our current statutes) be repealed. With substantive and procedural provisions from that old act, that are not superseded by the FLAC UPA, being updated and relocated as either general provisions of Chapter 51 concerning parents and children, as part of the child support enforcement procedures or as revisions to the UPA.

Current law imposes a duty of support. That duty, which includes the obligation to support one's child and to support one's spouse when in need, is clarified. These elements of the support obligation include pregnancy and confinement expenses, child support and attorney's fees for bringing an action to establish parentage.

FLAC has included in the description of the extent of the duty of support a codification of the latest Supreme Judicial Court rulings on the support obligations of disestablished parents. Following the holdings of the 2004 Blaisdell and Bouchard decisions, the proposed amendments provide that the disestablished parent remains liable for all unpaid child support obligations that accumulated prior to the filing of the action to disestablish parentage, and that there is not a right to reimbursement for support already paid.

B. Guardianship, Adoption and Child Protection. FLAC proposes amendments to the Probate Code and Title 22 to make guardianship, adoption and the child protection statutes consistent with the FLAC UPA. For probate guardianship and adoption purposes, FLAC proposes that "parent" be defined as a person determined to be a parent under the UPA, including a person who has been declared a de facto parent by a court. This change will ensure that any person who might have parental rights will receive notification of the guardianship or adoption petition and will be able to be heard in opposition to the petition. FLAC recommends to make the adoption and guardianship statutes gender neutral.

FLAC recommends similar changes to the child protection statute in Title 22. A 'parent" is defined as a person determined to be a parent under the UPA, including a person who has been declared a de facto parent by a court. To protect the constitutional

rights of a natural parent who may not be a parent under that definition, FLAC proposes to add to the child protection act a definition of "putative parent." These changes will ensure that the proper persons receive notice of the child protective proceeding. They also define who may qualify for reunification services from the Department of Health and Human Services.

FLAC further proposes that the District Court hear and determine parentage as part of a child protection proceeding. In the past, there have been questions about whether a District Court's determination of paternity in a child protection proceeding applied outside of that child protection proceeding.

C. Inheritance under the Probate Code. FLAC proposes amendment to the intestate succession provisions of the Probate Code so that children will inherit from parents as recognized by the UPA and parents recognized by the UPA will inherit from their children. This includes de facto parents. Under FLAC's amendments, UPA parentage can be established after death. FLAC recommends a limit of four on the number of parents who can have an inheritance right from any child or from whom any child can inherit.

Conclusion

The FLAC UPA presents an important opportunity to provide a needed comprehensive approach to the establishment of parentage in the 21st century. FLAC recommends the adoption of the FLAC UPA and the proposed amendments to Title 19-A, the Child Protection Act, and the adoption, guardianship provisions and intestate succession provisions of the Probate Code.

Dated: March 29, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne

Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Officer
Diane E. Kenty, Esquire, CADRES Director

APPENDIX A: De Facto Parentage

The Maine Supreme Judicial Court has recently clarified the equitable concept of de facto parent. See, C.E.W. v. D.E.W., 2004 ME 43; Young v. Young, 2004 ME 44.[10] In C.E.W. v. D.E.W. - D.E.W., the biological mother of a child, argued that, under 19-A M.R.S.A. § 1653(2),[11] C.E.W., a woman who had parented the child equally with D.E.W., but who was not related to the child biologically or by adoption should not be eligible for an award of parental rights and responsibilities. D.E.W. further argued that even if a court may consider an award of parental rights and responsibilities, the remedy should be limited under 19-A M.R.S.A. § 1653(2)(B)[12] to an award of no more than "reasonable rights of contact" between the de facto parent and the child.

In analyzing D.E.W.'s arguments, the Court discussed the parents patriae power of the family court "to put itself in the position of a 'wise, affectionate, and careful parent' and make determinations for the child's welfare, focusing on 'what is in the best interest of the child'[13] and not on the needs or desires of the parents." C.E.W. v. D.E.W., 2004 ME 43, ¶ 10.

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[10] The Supreme Court has "recognized de facto parental rights or similar concepts in addressing rights of third persons who have played an unusual and significant parent-like role in a child's life in several opinions over the last sixty years." C.E.W. v. D.E.W., 2004 ME 43, ¶ 9, citing, Stitham v. Henderson, 2001 ME 52, 768 A. 2d 598, 603; Merchant v. Bussell, 139 Me. 118, 119-24, 27 A.2d 816, 817-819 (1942).

[11] Section 1653(2)(C) provides: The court may award parental rights and responsibilities with respect to the child to a 3rd Person, a suitable society or institution for the care and protection of children or the department, upon a finding that awarding parental rights and responsibilities to either or both parents will place the child in jeopardy as defined in Title 22, section 4002, subsection 6.

[12] Section 1653(2)(B) provides: "The court may award a reasonable rights of contact with a minor child to a 3rd person."

[13] Section 1653(3) sets forth the criteria for determining the best interest of the child:

3. Best interest of the child. The court, in making an award of parental rights and responsibilities with respect to a child, shall apply the standard of the best interest of the child. In making decisions regarding the child's residence and parent-child contact, the court shall consider as primary the safety and well-being of the child. In applying this standard, the court shall consider the following factors:

A. The age of the child;
B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;
C. The preference of the child, if old enough, to express the meaningful preference;
D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;
E. The stability of any proposed living arrangements for the child;
F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

The Supreme Judicial Court did not address the threshold question of the standard for determining de facto parenthood because the parties had agreed that C.E.W. was a de facto parent, but the Court provided guidance to the Legislature or the courts in the future as the term is ultimately developed: "[I]t must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." Id. ¶ 14. The court concluded that the de facto parent determination "authorizes a court to consider an award of parental rights and responsibilities to C.E.W as a parent based on its determination of the best interest of the child." Id., ¶ 15.

Similarly, in Young v. Young, 2004 ME 44, a case involving a step-father's claim, the Court restated the broad powers of the District Court to ensure that a child "does not, without cause, lose the relationship with the person who has previously been acknowledged to be the father . . . through the development of the parental relationship over time." Id., at ¶ 5, quoting Stitham v. Henderson, 2001 ME 52, ¶ 24.

G. The child's adjustment to the child's present home, school and community;
H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;
I. The capacity of each parent to cooperate or to learn to cooperate in child care;
J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;
K. The effect on the child if one parent has sole authority over the child's upbringing;
L. The existence of domestic abuse between the parents, in the past or currently, and how that abuse affects: (1) The child emotionally; and (2) The safety of the child;
M. The existence of any history of child abuse by a parent;
N. All other factors having a reasonable bearing on the physical and psychological well-being of the child;
O. A parent's prior willful misuse of the protection from abuse process in chapter 101 in order to gain a tactical advantage in a proceeding involving the determination of parental rights and responsibilities of a minor child. Such willful misuse may only be considered if established by clear and convincing evidence, and if it is further found by clear and convincing evidence that in the particular circumstances of the parents and the child, that willful misuse tends to show that the acting parent will in the future have a lessened ability and willingness to cooperate and work with the other parent in their shared responsibilities for the child. The court shall articulate findings of fact whenever relying upon this factor as part of its determination of a child's best interest. The voluntary dismissal of a protection from abuse petition may not, taken alone, be treated as evidence of the willful misuse of the protection from abuse process;
P. If the child is under one year of age, whether the child is being breast-fed; and
Q. The existence of a parent's conviction for a sex offense or a sexually violent offense as those terms are defined in Title 34-A, section 11203.

APPENDIX "B" - The NCCUSL UPA 2002

FLAC summarizes in this section the National Conference of Commissioners on Uniform State Laws 2002 Uniform Parentage Act (NCCUSL UPA) to assist in the understanding of the FLAC UPA that is discussed above.

To address the inadequacies of existing law, the National Conference of Commissioners on Uniform State Laws ("Commissioners") promulgated the Uniform Parentage Act, last amended and revised in 2002. The NCCUSL UPA contains seven articles with an eighth optional article. [14] The articles as adopted by the Commissioners may be summarized as follows:

Article 1	General Provisions
Article 2	Parent-Child Relationship
Article 3	Voluntary Acknowledgment of Paternity
Article 4	Registry of Paternity
Article 5	Genetic Testing
Article 6	Proceeding to Adjudicate Parentage
Article 7	Child of Assisted Reproduction
Article 8	Gestational Agreement

Article 1 contains definitions and choice of law rules.

Article 2 defines all possible bases for establishing the parent-child relationship, including presumptions of paternity, acknowledgement, adjudication, consent to assisted reproduction, adoption, and gestational agreements. Article 2 also clarifies that a legal mother is not only one who carries a child to birth, but may also be one who is adjudicated as the legal mother, who adopts the child, or who is the legal mother under a

[14] The Drafting Committee of the NCCUSL UPA considered the passage of the UPA too important an event to have the UPA jeopardized by controversy surrounding gestational agreements; therefore, the UPA makes Article 8 optional. The Drafting Committee also believed that having available to states statutory provisions that address gestational agreements was important because gestational agreements are increasingly being used, and the legal parenthood of children born pursuant to such agreements should not be in doubt. Article 8 acknowledges that a child born pursuant to a gestational agreement should have their status determined before conception. FLAC recommends the adoption of all eight articles together with the amendments proposed by FLAC.

gestational agreement. Under the last three circumstances, the woman who carries the child to birth is not necessarily the legal mother.

Under Article 2 there are many possible ways to be considered the legal father. The genetic father or the presumed genetic father is not necessarily the legal father. A legal father is an unrebutted presumed father, that is a man married to the birth mother at the time of the conception, or a man who resided in the same household as the child during the first two years of life and openly held the child out as his own. A legal father is also one who acknowledges his paternity under Article 3. An adjudicated father results from a judgment in a paternity action. A legal father may result from an adoption. Other possible ways to be considered a legal father include a man who consents to assisted reproduction under Article 7 or an adjudicated father in a proceeding to confirm a gestational agreement under Article 8.

Article 3 provides for a non-judicial acknowledgment of paternity that is the equivalent of a judgment of paternity for child support enforcement purposes. Article 3 seeks to prevent the circumvention of adoption laws by requiring a sworn assertion of actual parentage of the child through sexual intercourse in support of acknowledgment. An acknowledgment is effective provided there is not another presumed, acknowledged or adjudicated father. There is also a provision for a presumed father, such as marital presumed father, to deny paternity as part of the acknowledgment process, that has the effect of a judgment of non-paternity if another man acknowledges paternity or is adjudicated to be the natural father.

Article 4 authorizes a registry for putative and unknown fathers. The registry permits individuals listed in the registry to be notified if there is a proceeding for adoption or termination of parental rights. Before a child is one year old there must be a certificate of search of the registry presented to the court. If the certificate shows that no putative or unknown father has registered within 30 days of the birth of the child, parental rights may be terminated without further notice. Once a child has reached the age of one year, the registry no longer has any effect and actual notice is required before there can be a termination of parental rights. The intent of this provision is to expedite adoption proceedings for infants under one year of age at the time of the hearing. The registry has no impact on a father who has established a father-child relationship. Thus, no presumed,

acknowledged or adjudicated father may have his parental rights terminated under this provision.

Article 5 addresses genetic testing. It covers genetic testing pursuant to a court order or through a support enforcement agency. The article contemplates that testing for paternity may take place without testing the mother and, when the putative father is unavailable, by testing close relatives of the father. A court may order testing without a paternity action. A reasonable probability of the requisite sexual contact between the putative father and the mother suffices to initiate a proceeding, and a putative father may initiate the proceeding to show that he is not the genetic father. Article 5 establishes standards for genetic testing, setting a standard for a presumption of paternity of 99% probability of paternity based on appropriate calculations of "the combined paternity index," and limits the rebuttal of the 99% presumption only by competing further genetic evidence that excludes the putative father or identifies another man as the genetic father. Article 5 also covers the mechanics of genetic testing, including the form of the report of genetic testing, the rebuttal of that report, confidentiality of that report, and the payment of costs of genetic testing.

Article 6 governs the proceeding to determine parentage. It takes into consideration the need to adjudicate in some circumstances the legal parentage of a woman, as well as that of a man. An action may be brought by the child, the mother of the child, a man whose paternity is to be adjudicated, a support-enforcement agency, an authorized adoption agency or licensed child-placing agency, a representative of a deceased, incapacitated or minor person, or an intended parent under a gestational agreement. If there is not a presumed, acknowledged or adjudicated father, an action may be brought at any time. If there is a presumed father, the statute of limitations for an action is two years from the birth of the child, However, an action to disprove the presumed father's paternity may be brought at any time if the presumed father and mother did not cohabit or have sexual intercourse during the time of conception and the presumed father did not treat the child as his own. A court may deny, on the basis of the best interest of the child, a request for genetic testing in a proceeding to challenge the parentage of a child with a presumed or acknowledged father. A refusal to submit to genetic testing can ripen into an adjudication of paternity for the putative father who

refuses. A child is not bound by an adjudication of fatherhood unless the adjudication was based on a finding consistent with the results of genetic testing. The time bars in Article 6, when combined with the presumptions of parentage defined in Article 2, put families on notice that the determination of parentage is important and become final early in the child's life. They have the effect of telling the mother, the genetic father, and the presumed parent, that the child is to be protected from late arguments about the child's parentage, as the law tries very hard to have legal parentage identified as of a date early in the child's life.

Article 7 addresses assisted reproduction. It includes donor eggs, the implantation of embryos, and artificial insemination. It does not apply to the birth of a child conceived by sexual intercourse or as a result of a gestational agreement, (which is addressed in Article 8). If a man and a woman consent to any sort of assisted conception, and the woman gives birth to a child, they are the legal parents. Consent may be withdrawn at any time before the placement of the eggs, sperm or embryos. A donor of either sperm or eggs used in an assisted conception may not be a legal parent.

Article 8 provides for gestational agreements. A gestational agreement occurs between a woman and a married or unmarried couple, obligating that a woman carry a child that may or may not be genetically related to the intended parents. The conception must be through assisted reproduction. The woman who carries the child to birth pursuant to a gestational agreement is not the legal mother of the child. The intended parents become the legal parents.

Article 8 considers a gestational agreement to be a significant legal act that should be reviewed by a court prior to the assisted reproduction. Judicially approved gestational agreements are enforceable legal agreements. Under the UPA, agreements are permitted if all parties sign the necessary documents, and make provisions granting the intended parents' parentage and relinquishing the other parties' parental rights. Compensation is permitted and health decisions during pregnancy are left to the gestational mother.

Gestational agreements are carefully controlled under Article 8. To validate a gestational agreement, the mother or intended parents must meet a ninety-day residency requirement, and the gestational mother's husband (if married) is joined in the

proceeding. Prior to the assisted reproduction, a court may issue an order declaring the intended parents as parents if the agreement meets the requisite criteria.

Article 8 also provides that there is no requirement of a genetic link between the intended parents and the child. Furthermore, the Article confers exclusive and continuing jurisdiction upon the appropriate court until the child attains the age of 180 days in order to minimize parallel litigation in other states. Before pregnancy, any party on written notice can terminate an agreement. In addition, the court can terminate the agreement for good cause. The gestational mother and husband are not liable to the intended parents if they terminate the agreement prior to pregnancy.

The intended parents must file a notice of birth with the court within 300 days after assisted reproduction. The court will then issue an order confirming the intended parents as parents, ordering surrender if necessary, and directing the Bureau of Vital Records to issue a birth certificate. If assisted reproduction is alleged not to have been used, genetic testing will be ordered. If the intended parents do not file, the gestational mother can file for child support after 300 days if a pre-birth order has been issued pursuant to Section 803.

Non-judicially reviewed gestational agreements are not enforceable. If a birth occurs under such an unenforceable agreement, parentage is determined under Article 2 (i.e., the gestational mother is the mother and her husband is presumed to be the father; the intended parents have no recourse; and if all parties still want to transfer the baby then adoption is the proper process). However, the intended parents can still be held liable for child support. This provision provides an incentive for all parties to seek prior judicial review of any agreement.

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on the Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on LD 1073, "Resolve, Directing the Family Law Advisory Commission To Study the Child Protection Process." For the reasons stated in this report, FLAC recommends that LD1073 not be adopted.

Discussion

FLAC opposes LD 1073, not because a review of the child protection laws may or may not be needed. FLAC opposes LD 1073 because the capacity and the function of the Family Law Advisory Commission make it unable do active studies in the nature of the one encompassed by LD1073

The Family Law Advisory Commission was created approximately ten years ago, along with the recodification of the family laws into Title 19-A. The Commission consists of lawyers, judges, and public members, each representing a different segment of the legal community and the public. The members of the Commission are appointed by the Chief Justice of the Supreme Judicial Court. They serve as volunteers, with no compensation, no reimbursement for expenses, no staff, no budget, and no assets, much the same as many of the volunteer boards and commissions that exist throughout the state.

Although the language of the statute creating the Commission can be read broadly to encompass many activities, because the Commission is not funded, and is staffed by its own volunteers, the Commission has evolved a mission which is accomplishable and effective. The Commission's primary purpose and function has been to review legislation that comes before the Judiciary Committee, to give the Committee the benefit of its wisdom and experience, to help the Committee make the best possible decision about legislation affecting adults and children facing the legal family law system.

FLAC believes its function is useful one. The Commission, which works very hard, has been able to review the significant legislative proposals before the Judiciary, and to make reports, which we hope are viewed as thoughtful and helpful. If the work of the Commission

were to expand, it would dilute our current efforts, and would create the risk of doing additional work poorly. All of us would be left with less if that occurred.

There have been times when FLAC has proposed legislation. The FLAC UPA, which was before you last session, and is due come before you this session, is a notable example of that. The instances of FLAC initiated legislation occur infrequently, and only when FLAC believes there is a clear need. FLAC's desire to engage in proposing legislation is limited, as that effort strains the volunteer capital of the group. (The FLAC UPA is a notable example of that, too.) FLAC has never undertaken comprehensive studies or investigations in the past. Such activity would go far beyond what we are able to accomplish.

FLAC needs to keep its functions limited in order to perform in an effective and useful way. Our work in providing assistance and review of significant pending legislation for the Judiciary Committee allows us to do that. It is and has been our honor and privilege to serve the Judiciary Committee in that fashion.

Conclusion

For these reasons, the Family Law Advisory Commission recommends that LD 1073 not be enacted.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission
Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1229, "An Act to Strengthen the Enforcement of Decrees." For the reasons stated in this report, FLAC believes that the legislation is unnecessary and recommends against enactment.

Discussion

LD 1229 would repeal subsection (7) of 19-A M.R.S.A. § 1653 concerning parental rights and responsibilities. Existing subsection 7 provides that a parent may ask the court for a hearing on the issue of noncompliance with an order concerning parental rights and responsibilities and contact. Subsection 7 further authorizes a court to find a parent in contempt of an order concerning parental rights and responsibilities and contact, and require additional or more specific terms and conditions and order additional visitation and a forfeiture of at least $100.

LD 1229 would replace subsection 7 with a large number of very specific forms of relief that a court could order in a case involving noncompliance with a parental rights and responsibilities and contact order. Courts already have authority under existing law to order any of these forms of relief and, in fact, courts often specify many of these remedies in orders enforcing existing parental rights and responsibilities and contact orders. Existing subsection 7 contains a general authorization to fashion any additional specific terms and conditions for enforcement of an order.

Section 2 of LD 1229 also directs the Governor to ask the appropriate state agency to develop a parenting enforcement program and to seek other funding, including federal funding, to support this proposed program. The program is to facilitate enforcement of parent-child contact by an array of methods that are already available under Maine law and practice, including mediation, parental counseling, parental education and parenting plans. Under 19-A M.R.S.A. § 251, mediation is required before

a contested hearing involving parental rights and responsibilities and contact. Parenting education programs are offered through programs such as Kids First. Court orders often require family counseling and parenting education and structure a parenting plan to ensure contact with both parents.

Conclusion

The Family Law Advisory Commission recommends against LD 1229 as unnecessary in light of existing family law.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1232, "An Act To Protect Children from Individuals Who Have Engaged in Sexual Abuse in the Past." For the reasons stated in this report, FLAC supports LD 1232 as amended by proposed committee amendment.

Discussion

Under the committee amendment, LD 1232 will create a rebuttable presumption that a person who is convicted of certain sex crimes in which the victim is under fourteen years of age creates a situation of jeopardy for a child if any contact were permitted and that any contact is not in the best interest of the child. This rebuttable presumption will also apply to a person who has been adjudicated in a child protection proceeding of sexually abusing a child under fourteen years of age. The limitation applies to both primary residence and contact. The person seeking primary residence or contact with the child may rebut the presumption. Evidence that might rebut the presumption would be evidence that contact is in the best interest of the child notwithstanding the conviction or adjudication.

The limitation on contact would apply in any action involving parental rights and responsibilities, grandparent rights, child protection and adoption. LD 1232 reflects sound public policy because it protects against contact between a child and a sex abuser of children, it is based on the best interest of the child, and it may be rebutted with a certain quality of evidence. The presumption elevates the best interest of the child over the rights of the person seeking contact, who is a convicted sexual offender of children or adjudicated of sexually abusing a child.

Conclusion

The Family Law Advisory Commission supports the enactment of LD 1232 as amended by committee amendment.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1502, "An Act to Implement Recommendations of the Family Law Advisory Commission." For the reasons stated in this report, FLAC recommends the enactment of LD 1502.

Discussion

LD 1502 is proposed by FLAC, based on recommendations of the Domestic Relations Advisory Committee, a committee of the Judicial Department. LD 1502 addresses several matters relating to the practice of family law.

Section 1 of LD 1502[1] proposes that attorney fees be made available in any action filed under Title 19-A. Title 19-A encompasses all domestic relations matters. Currently, attorney fees are available in only limited types of family law actions. See for example, 19-A M.R.S.A. § 851(8) (judicial separation); 19-A M.R.S.A. § 901(6) (divorce action); 19-A M.R.S.A. § 904 (orders pending divorce); 19-A M.R.S.A. § 952(3) (spousal support); and 19-A M.R.S.A. § 1552 (paternity action). LD 1502 will treat all family matters under Title 19-A the same with respect to attorney fees. This authorization will include the right of a court to award, in the appropriate case, attorney fees in an action to modify or enforce existing orders concerning parental rights and responsibilities and contact. LD 1502 also will authorize a court to order a party to pay the fees of and expenses of third-party participants, including guardians ad litem, expert witnesses and service providers.

Section 1 of LD 1502 also will allow a court, upon a motion of at least one party, to close the courtroom to the public in any family action brought under Title 19-A, even if the other party objects to the closing of the courtroom. Under current law, the public

[1] Section 1 of LD 1502 is similar to LD 918.

can be excluded, but only in a divorce action, and the court cannot exclude the pubic from a divorce action if one party objects. See 19-A M.R.S.A. § 901(3). LD 1502 will ask the court to exercise its discretion and, in the appropriate case, determine that a family law proceeding will be closed to the public.

Section 2 of LD 1502 adds to the membership of the Family Law Advisory Commission an active family case management officer and a representative of the Court Alternative Dispute Resolution Service (CADRES). FLAC was created before the institution of the Family Division and case management officers. An active case management officer has served as a consultant to FLAC since the creation of the Family Division and case management officers. The Director of CADRES has served as a consultant to FLAC since almost the inception of FLAC. This bill will change the relationship from consultant to member of FLAC.

Section 8 of LD 1502 will amend 19-A M.R.S.A. § 952 concerning the payment of spousal support, fees and support to include actions other than, but related to divorce actions. Specifically, LD 1502 will amend the definition of "decrees of spousal support, support or costs" to include an order for the division and disposition of property ancillary to the divorce judgment, including among other actions, proceedings to effectuate a qualified domestic relations order, to reach, attach or liquidate property or to quiet title.

Finally, Section 12 of LD 1502[2] will allow the court to order either parent or both parents to provide health insurance for a child. Current law places that burden on the parent who pays support by presuming that the parent paying child support also provides health insurance. See 19-A M.R.S.A. § 1653(8)(C). Often, the other parent is in a better position to obtain affordable health insurance or both parents have available health insurance for the child. LD 1502 will provide more flexibility in child support orders and result in increase health insurance coverage for children.

Conclusion

The Family Law Advisory Commission recommends that LD 1502 be enacted.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

[2] Section 12 of LD 1502 is similar to LD 591.

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 591, "An Act To Clarify the Provisions for Child Support Orders Providing Health Insurance for Children." For the reasons stated in this report, FLAC is neither for nor against LD 591.

Discussion

In the context of child support, LD 591 provides that the court may order either parent or both parents to provide health insurance for the child. Currently, Title 19-A only allows the court to order the non-custodial parent to provide such insurance. Subsection 8(C) of Title 19-A M.R.S.A. authorizes the court to require that the "obligated parent" obtain health insurance. The obligated parent is the parent who is required to pay child support. However, some times the other parent is the one for whom health insurance is available at a reasonable cost.

This legislation would provide more flexibility in child support orders and result in increase health insurance coverage for children. This needed legislation is however, also being proposed verbatim by LD 1502 "An Act to Implement Recommendations of the Family Law Advisory Commission." See section 12 of L.D. 1502. Accordingly, LD 591 is duplicative of the broader legislative reforms proposed by LD 1502.

Conclusion

The Family Law Advisory Commission is neither for nor against the passage of LD 591.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on the Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on LD 592, "An Act To Allow Case Management Officers To Conduct Hearings in Divorce Court." For the reasons stated in this report, FLAC recommends that LD 592 be adopted.

Discussion

LD 592 authorizes a pilot project to allow the parties in a family division matter, to permit, by their agreement, a Case Management Officer conduct their final contested hearing.

Presently parties in family matters have final contested matters decided by Judges, and in some instances, by their mutual consent, by referees pursuant to Rule 53. Case Management Officers may only decide contested final hearings in cases where child support is the only issue in contest.

There are cases in which the parties have been guided by the Case Management Officer through all pretrial stages, to the satisfaction of the parties, even though they have not reached final agreement. These parties may feel that they get either the service or timing they desire, if they can leave their case in the Family Division, and have the remaining issues between them decided by their Case Management Officer. For some families, it is simply a more efficient use of their and the court's resources to have the Case Management Officer hear their case to conclusion.

LD 592 creates a pilot project to experiment and see whether this concept works for the desiring parties and for the system. This pilot will help determine whether the parties will be satisfied with this service, whether the system has the resources to accommodate this service, and whether this service will comply with the requirements of the funding sources which support the Family Division.

Conclusion

For these reasons, the Family Law Advisory Commission recommends that LD 592 be enacted.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on the Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on LD 621, "An Act Regarding Divorce and Marital Property." For the reasons stated in this report, FLAC recommends that LD 621 be adopted, with language changes.

Discussion

LD 621 makes the nonowner spouse, upon the filing of a complaint for divorce, an express owner of an interest in the other spouse's retirement or disability plans.

Under current law, the divorce court has the power to determine that a portion of a spouse's retirement or disability plan is marital, and to make an equitable distribution award of that marital portion to either or both spouses at the time of the divorce. However, pending the divorce, because the plan is "titled" only in the owner spouse's name, an owner spouse may be able, in certain instances, to file bankruptcy, claim the retirement or disability plan as an exempt asset, and keep 100% of that asset, free and clear of the nonowner spouse, and outside the reach of the divorce court, even if the divorce court needed this asset to make an equitable distribution to the nonowner spouse. This highly unfair opportunity to an "owner" spouse has actually been attempted in Maine. See Cox v. Davis, 274 B.R. 13 (Bankr. Me. 2002).

LD 621 makes the nonowner spouse a titleholder to an "inchoate equitable ownership" interest of the retirement or disability plan at the time of the filing of the divorce. This express status of title will stop the owner spouse from opportunistic and inappropriate use of the bankruptcy and exemption laws, and will permit the divorce court to retain control of the value of the plan and award the marital portion of the plan to either or both spouses to create a fair and equitable distribution of the marital assets of the parties.

LD 621, however, should be rewritten to clarify and focus the proposed law towards the exemptions it is intended to affect. FLAC offers the following for the

Committee's consideration.

Sec. 1. 19-A MRSA §953, sub§6A is enacted to read:

> 6A. **Nonowner spouse interest in certain payments or accounts.** After the filing of a divorce complaint under section 901, a nonowner spouse has an inchoate equitable ownership interest, without the need to obtain an attachment, levy or court order, in the individual retirement account or similar plan or contract on account of illness, disability, death, age or length of service of the owner spouse, to the extent that such account or plan is either exempt or beyond the reach of an attaching or judgment lien creditor under state and / or federal law.

Conclusion

For these reasons, the Family Law Advisory Commission recommends that LD 621 be enacted, as proposed above. FLAC thanks Leonard M. Gulino, Esq., and the Family Law Section of the Maine State Bar Association for its assistance in the drafting of the above proposed language.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on the Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on LD 713, "An Act To Amend Maine's Divorce Laws." For the reasons stated in this report, FLAC recommends that LD 713 not be adopted.

Report

LD 713 proposes that the fraud or financial misconduct of a spouse be a grounds for divorce under 19-A M.R.S.A. 902. Although Section 902 contains a number of listed grounds for divorce, the practice of divorce law has evolved, as a matter of fact, to use "irreconcilable differences" as the grounds for divorce in virtually every divorce case, contested or uncontested. This practice is beneficial to the legal process. Parties to a divorce are less likely to make the divorce process contentious, hostile, mean or otherwise harmful to themselves and their children when they proceed on a no fault basis. For these reasons, it is not desirable to add a new fault based grounds to section 902.

Financial misconduct or fraud by a spouse, resulting in economic harm is recognized in current law as a relevant factor in the determination of spousal support and property disposition. Economic misconduct is expressed as a factor in the determination of spousal support. See 19-A M.R.S.A. 951-A(5)(M). Although economic misconduct is not expressly stated in the marital property division statute as a factor for the court to consider, the Court certainly may consider such misconduct when exercising its authority to "...divide the marital property in proportions the court considers just after considering **all relevant factors**...." 19-A M.R.S.A. 953(1) (emphasis supplied).

Conclusion

For these reasons, the Family Law Advisory Commission recommends that LD 713 not be enacted.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on the Judiciary

April 13, 2005

Report

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on the Judiciary, on LD 918, "An Act To Provide for the Payment of Attorney's Fees in a Parental Rights and Responsibilities Action."

FLAC supports the concepts of LD 918, but recommends that the Committee review these concepts when LD 1502 comes before the Committee on April 13, 2005. LD 1502 is a bill that addresses several matters relating to the practice of family law and is based upon recommendations of the Domestic Relations Advisory Committee, a committee of the Judicial Department. LD 1502 is sponsored by FLAC, and deals, in part, with the same attorney fees issue presented by LD 918, but in a more comprehensive way. FLAC is filing with this report a separate report on LD 1502. For these reasons, the Family Law Advisory Commission recommends that action on LD 918 be deferred and discussed in conjunction with LD 1502.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature,
Joint Standing Committee on Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 973, "An Act To Make Certain Changes in the Laws Regarding the Family Division of the District Court." For the reasons stated in this report, FLAC is recommends that LD 973 be enacted.

Discussion

LD 973 will change the title of case management officers to family law magistrates. The title case management officer is inscrutable. Changing the name to family law magistrates will create a greater understanding of the role of the court officers who preside over and make decisions in family cases involving children.

Conclusion

The Family Law Advisory Commission recommends the passage of that LD 973.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven Davis, Esq.
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

April 13, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 974, An Act to Amend the Guidelines Used to Determine Child Support Payments. FLAC recommends that LD 974 not be adopted.

Discussion

LD 974 seeks to adopt another basis to deviate from the child support guidelines. This legislation requires that the court or hearings officer consider the effort made by the custodial parent "in improving the financial circumstances of that party and the child". It is difficult to ascertain the meaning of this proposed basis for a deviation.

This legislation appears to seek to avoid the situation where the non-custodial parent seeks to lessen his/her child support based on the custodial parent's increase in income. Such scenarios usually result in only a small decrease in child support.

Moreover, the child support guidelines are based on the extensive studies regarding the costs of raising a child in Maine and maintaining that child's standard of living. Under 19-A M.R.S.A. § 2007(1), the guidelines are to be used unless the application of them would be inequitable or unjust due to the considerations that are outlined in the statue as a basis for a deviation from the guidelines. The deviation proposed in LD 974 will set aside these guidelines and leave the determination of child support solely to the discretion of the court or administrative hearings officer without regard to the guidelines.

If a case arises in this fact scenario and it is clearly appropriate to lower child support, the court or hearings officer already has the authority to deviate from the guidelines under existing statutory provisions. Specifically, 19-A MRSA §2007(3)(Q) allows the court or hearings officer upon a finding that the application of the guidelines would be "unjust, inappropriate or not in the child's best interest," to deviate from the child support guidelines.

Conclusion

FLAC recommends that LD 974 not be adopted.

Dated: April 13, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire, Secretary-Treasurer
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

April 20, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1063, An Act to Improve the Guardian ad Litem System. FLAC recommends the adoption of an amended version of LD 1063.

Discussion

LD 1063 provides for the appointment, qualifications and report requirements for guardian ad litem under the Probate Code. Additionally, this legislation authorizes the appointment of a guardian ad litem in cases where a grandparent seeks contact with the child and waives certain fees for information sought by the guardian ad litem.

The appointment of a guardian ad litem serves an important and often indispensable function in determining the best interests of the child. In particular this legislation provides clarity to the rights and responsibilities of guardian ad litem that are appointed under the Probate Code.

FLAC supports this clarification. However we recognize the need, in certain circumstances, to allow Probate Courts to continue to use competent guardians ad litem that have not met the qualifications set forth by the Supreme Judicial Court. Specifically, FLAC recommends that Section 18-A MRSA §1-112(b) be amended to allow the appointment of such an otherwise qualified guardian ad litem upon a specific finding of good cause.

Conclusion

FLAC supports the enactment of LD 1063 with an amendment to allow the Probate Courts additional flexibility in the appointment of guardians ad litem.

Dated: April 20, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to the Maine Legislature, Joint Standing Committee on Judiciary

May 3, 2005

Introduction

The Maine Family Law Advisory Commission (FLAC) hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1589, "An Act to Improve Child Support Services." FLAC recommends the adoption of LD 1589.

Discussion

LD 1589 provides for several revisions in the area of child support orders. The bulk of this legislation seeks to improve and standardize the establishment, modification and enforcement of these orders.

Sections 1 and 3 provides clarification to the court in establishing child support when a child is confined to a juvenile correction facility or a caretaker relative provides primary residential care. This legislation eliminates uncertainty as how to calculate child support in these cases. Under these circumstances, either or both parents shall be ordered to pay child support.

Sections 2 and 6 permit child support agents to appear in court if the underlying paternity or child support motion is filed by a party other than the Department of Health and Human Services ("Department"). This provides increased use of agents and their practical expertise in such matters. Department agents presently appear in court in expedited paternity cases, child support modification proceedings and disclosure hearings that are initiated by the Department.

Sections 7 and 11 permit the Department to assist in the establishment and modification of child support and require that Maine's financial institutions honor out-of-state orders to withhold as required by federal statute. See 42 USC §666(a)(10)(A) and (c)(1)(6)(ii).

The administrative process to establish and enforce child support obligations is addressed in sections 9 and 10. Section 9 resolves the issue of the jurisdictional reach of administrative proceedings when a court order has established only ongoing child support with no mention of child support debt. Section 10 codifies the current practice of confining the initial review of administrative establishment or modification decisions to the record at the administrative hearing below.

The Law Court decision in Bartlett v. Anderson, 2005 ME 10, is the impetus for the proposed legislative revisions found in sections 4 and 5. Under Bartlett, an undifferentiated child support order is not self-executing and does not automatically reduce child support when a child turns eighteen and graduates from high school. Bartlett requires that in a multiple child support order that is undifferentiated as to the children, the parties must return to court upon a child reaching 18 and graduating or age 19 to modify the child support order. Sections 4 and 5 of LD 1589 seek to eliminate the application of Bartlett to child support orders entered before the date of that decision. Without this legislation, the Bartlett decision could result in previously closed child support cases with no apparent debt - being recalculated to now have a substantial debt.

Conclusion

FLAC supports the enactment of LD 1589.

Dated: May 3, 2005

Respectfully submitted:

Maine Family Law Advisory Commission

Hon. Joyce A. Wheeler, Chair
Jo-Ann Cook, Vice Chair
Steven R. Davis, Esquire
Hon. Joseph Jabar
Hon. James E. Mitchell
Michael J. Levey, Esquire
Susan R. Kominsky, Esquire
Mary Dionne
Juliet Holmes-Smith, Esquire

Consultants:
Nancy D. Carlson, Case Management Hearing Officer
Diane E. Kenty, Esquire, CADRES Director

MAINE FAMILY LAW ADVISORY COMMISSION

Report to Maine Legislature
Joint Standing Committee on Judiciary

Date: February 2, 2006

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 1812, a statute entitled, "An Act To Correct Deficiencies in the Divorce Laws". For the reasons stated in this report, FLAC supports the first two features of the bill with some suggestions for change.

Discussion

LD 1812 has three features. First, it adds a ground for divorce, the permanent mental incompetence of a party. Second, it attempts to clarify the law of spousal support to make a change in spousal support available, even if an action between the parties is pending on appeal to the Law Court. Third, it modifies a portion of LD 1589 (from a previous legislative session) to change the language of the recently enacted 19-A MRSA 2006.8.G

Maine has a ground for divorce, based upon mental illness. It is archaic and has not been used at any time in the memory of the Family Law Advisory Commission Membership. It is 19-A MRSA 902.1. I, which states the following as a ground for divorce: "Mental illness requiring confinement in a mental institution for at least seven consecutive years prior to the commencement of the action." This absence of the use of this provision proves its uselessness. If mental incapacity is to be a ground for divorce separate and apart from other grounds for divorce, then the enactment of a better drafted ground is appropriate.

FLAC recommends that section 902.1. I be repealed. FLAC further recommends consideration of the following language, instead of that which is proposed by LD 1812: "A party is an incapacitated person as defined in 18-A MRSA 5-101.(1)." This language would establish a mental illness grounds for divorce which utilizes the current definition of incapacity contained within the probate code, a definition which has been law for a substantial period of time, and which would allow the parties and the court to have a standard by which to measure whether the ground had been satisfied.

FLAC further recommends that the addition of such ground be accompanied by a requirement of the appointment of a guardian ad litem in a case where this ground is alleged, so that persons who may be incompetent will have needed assistance while in the midst of divorce proceedings. Such a requirement is consistent with probate law, when incapacity is determined.

The second feature of LD 1812 appears to address a present state of uncertainty in the law regarding spousal support. The Rules of Civil Procedure, Rule 62 (a), and the Rules of Appellate Procedure, Rule 3, assure that spousal support, under an order entered by the trial court, continues even though an appeal is pending. The law is less clear on whether spousal support can be modified while an appeal is pending. There may be cases where, due to substantial changes in circumstances, a party to a spousal support order may be legally entitled to a change. The pendency of an appeal should not be a barrier to obtaining a just change. The addition of specific language authorizing the modification of spousal support pending appeal will address this possible need. FLAC supports this concept.

The third feature of LD 1812 was very recently added. 19-A MRSA 2006.8.G was fairly recently enacted in light of the Law Court decision in the Bartlett case. In that case the law court determined that an undifferentiated support order did not automatically reduce when an older child "aged out", but rather continued on in its stated amount until modified by the court. The statute modified the holding in Bartlett, to be consistent with pre-Bartlett practice by DHHS Child Support enforcement, which automatically reduced those undifferentiated orders when a child "aged out." The statute permitted those pre-Bartlett automatic reductions to remain in effect, thereby eliminating possible claims that those automatic reductions were incorrect. When the statute was originally enacted, FLAC supported it.

In addition, the statute required DHHS to do a study, with input from FLAC, on the subject of the propriety of some kind of automatic reduction in child support when a child aged out. FLAC wrote the DHHS in December, 2005 with our input. We reported, in summary, the following to DHHS: (1) We discussed the possible repeal of that portion of the statute which disallowed claims which may exist because of the pre-Bartlett practice of reducing orders automatically (a position contrary to FLAC's original position); (2) We discussed the possibility that future automatic reductions be done, but only in those orders where there was child 16 or older in the case at the time the order was entered. In that situation, the court could make a prospective order for a specific change in the amount of the order when the said child "aged out". Such a process is parallel to the process presently used in child support

orders, when a child is ten or older, and child support changes when the child reaches the age of 12; (3) Finally, we suggested that language be added to the form child support order which would caution the parties that orders do not automatically change when a child "ages out", unless the order specifically provides for such change.

The DHHS, in accordance with the mandate in the statute, sent the Joint Standing Committee on Judiciary its report on the subject of automatic reductions on December 30, 2005. That report included, but did not ultimately recommend all the items discussed by FLAC.

The newest development in this subject is the very recent addition to LD 1812, another amendment dealing with this same subject. This amendment appears to adopt the same substantive concept of 19-A MRSA 2006.8.G, by preserving, for past cases, the pre-Bartlett practice of automatic reductions when a child "ages out."

This recent addition to LD 1812 has occurred so recently, that FLAC has not had an opportunity to meet and discuss it. FLAC's comments therefore, can only reflect back to our discussion which was included in the DHHS report of December 30, 2005, and to point out that some members of FLAC had concerns about preserving the pre-Bartlett practice of automatic reductions for those older cases, and suggested consideration of repeal, rather than modification of the statute.

Conclusion

For these reasons, The Family Law Advisory Commission supports the first two features of LD 1812, in accordance with the above discussion. FLAC offers, as to the third feature of 1812, its input in the December 30, 2005 report from DHHS to you.

DATED: February 2, 2006

Respectfully submitted:

Maine Family Law Advisory Commission

Honorable Andrew M. Horton, Chair (Maine District Court)

Honorable Joseph Jabar (Maine Superior Court)
Honorable James E. Mitchell (Kennebec County Probate Court)
Nancy D. Carlson (Magistrate, Maine District Court)
Diane E. Kenty, Esq. (CADRES Director, Judicial Department)
Juliet Holmes-Smith, Esq.
Mary Dionne (public)
Michael J. Levey, Esq. (Maine State Bar Association)
Susan R. Kominsky, Esq. (Maine State Bar Association)
Tara Jacobi, Esq. (Maine DHHS)

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RE: L.R. 3150 (not printed)

MAINE FAMILY LAW ADVISORY COMMISSION

Report to Maine Legislature
Joint Standing Committee on Judiciary

Date: March 7, 2006

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LR 3150, a statute entitled, " An Act Concerning Automatic Modification of Child Support". For the reasons stated in this report, FLAC is not entirely in favor of enactment of the statutory language as proposed by the Family Law Section and suggests the following.

Discussion

The Family Law Section's draft proposes that 19-A MRSA §2006, sub-§8, para-G be revised and that 19-A MRSA §2006, sub-§8, para-H be added. FLAC recommends that 19-A MRSA §2006, sub-§8, para-G not be revised as proposed but the following three points be added to the statute.

(1) First, FLAC supports the proposed language as stated in 19-A MRSA §2006, sub-§8, para-H: "A child support order must include a statement that advises the parties the order will remain in effect until it expires under the terms set forth in the order, or until a court or hearing officer issues an order modifying the child support order." Such a provision will assure that the parties to a child support order are on notice that the order remains in effect until it expires by its terms or unless it is modified.

(2) Second, FLAC recommends a limited additional automatic adjustment of support when there are multiple children subject to an order and an older child is16 or 17 years of age at the time of the order. We do not recommend further automatic adjustments for the reasons stated in our February 2, 2006 report on LD 1812 and in the December 30, 2005 report of the Department of Health and Human Services report on automatic modification. What FLAC recommends would require a prospective child support award to address what the support obligation will be when a child aged 16 or 17 at the time of the order is no longer eligible for child support. Such a prospective award mirrors current law, 19-A MRSA § 2006, sub-§6, which requires an initial order for a child age 10 or 11 to also establish an award for the child when he or she turns

age 12. In fact, the current statutory language and child support order provisions for children 10 or 11 years old can be adapted as follows:

> An order establishing a child support award for a child who is at least 16 years of age must also establish an award for any other children included in the order when support is no longer required by law for that child. The prospective award becomes effective when support for that child is no longer required, without further order or decision of the court or hearing officer, and the order establishing or modifying the prospective award must state this fact.

(3)

Third, after much discussion, FLAC supports a limited modification of 19-A MRSA §2006, sub-§8, para-G, although not as suggested in LR 3150. In its current form, subsection G preserves, as legal, the long standing practice of DHHS, in the collection of child support, concerning children "aged out" with other children still being subject to the order. That longstanding practice was to recalculate the order automatically when a child "aged out". The 2005 holding in Bartlett v. Anderson, 2005 ME 10, which was contrary to that longstanding practice, created a need to codify the pre-Bartlett practice to avoid re-opening DHHS collection cases closed long ago.

The modification that FLAC recommends to current subsection G is to create a two-year window for claims to be asserted by payees of child support who may have been financially harmed by the pre-Bartlett practice. FLAC has concluded that there should be an opportunity for those cases to have their day in court, with payees and payors being able to raise all claims and defenses to which they may be entitled. FLAC therefore suggests that there be a two year claim period in which an aggrieved payee may bring an action, and not be barred by the language of subsection G. Once that claim period is over, then subsection G will operate as to all pre-Bartlett claims, quieting them, forever. Our recommendation would accomplish two things: it would first afford a remedy in cases justifying one, and it also would put to rest any constitutional question about the extinguishment of claims affected by current subsection G.

FLAC does not agree with proposed procedure in LR 3150 to excuse payors from liability for arrearages that have come to light as a result of the Bartlett ruling. The proposal favors payors without recognizing that payees may also have relied to their detriment on the Department's former practice of adjusting support downward without a modification of the order when a child became ineligible for support.

FLAC sees the two-year window as a fairer balance of the interests of payors, payees and children. The language we have recommended below would

set a two-year bar date on claims for the difference between the amount due under a child support order and the amount collected by the Department pursuant to the Department's former practice, provided that the arrearage had not previously been finally adjudicated. Our language does not limit such claims, however, to those resulting from the Department's former practice, because there may be similar reductions in cases in which the Department was not involved. Our suggested language is as follows:

> To the extent that any child support arrearage is solely attributable to a reduction of support for remaining children when another child becomes ineligible to be included in a child support order, claims for that portion of an arrearage must be filed in the Maine District Court, Family Division, within two years of the effective date of this act, or be barred. This paragraph does not apply to any initial or modified child support order entered on or after January 18, 2005 and does not apply to any arrearage that has at any time been the subject of a final administrative or judicial adjudication.

Conclusion

For these reasons, the Family Law Advisory Commission supports LR 3150 in accordance with the above discussion and suggestions.

DATED: March 7, 2006

Respectfully submitted:

Maine Family Law Advisory Commission

Honorable Andrew M. Horton, Chair (Maine District Court)
Honorable Joseph Jabar (Maine Superior Court)
Honorable James E. Mitchell (Kennebec County Probate Court)
Nancy D. Carlson (Magistrate, Maine District Court)
Diane E. Kenty, Esq. (CADRES Director, Judicial Department)
Juliet Holmes-Smith, Esq.
Mary Dionne (public)
Michael J. Levey, Esq. (Maine State Bar Association)
Susan R. Kominsky, Esq. (Maine State Bar Association)
Tara Jacobi, Esq. (Maine DHHS)

MAINE FAMILY LAW ADVISORY COMMISSION

Report to Maine Legislature
Joint Standing Committee on Judiciary
On LD 390
"An Act To Allow the District Court To Adjudicate Parentage in Child Protective Custody Cases"

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 390, a bill entitled, "An Act To Allow the District Court To Adjudicate Parentage in Child Protective Custody Cases." For the reasons stated in this report, FLAC recommends in favor of enactment of LD 390, with a modification to the bill text.

Discussion

LD 390 would change existing law by authorizing District Court judges to determine parentage in child protective proceedings, and providing that such determinations shall be given effect in all other proceedings, including title 19-A paternity and parental rights cases. Present law is silent on whether such authority exists, and most judges and practitioners assume that it does not, or at least that title 22 parentage determinations are not necessarily dispositive in other proceedings.

FLAC understands that LD 390 is submitted on behalf of the Maine Department of Health and Human Services. Although FLAC is not aware of the specific reasons underlying the bill, we assume they include considerations of judicial efficiency—the bill would avoid the situation in which parentage is litigated in a title 22 child protective case, and then litigated all over again in a title 19-A family law case.

FLAC's only concern about LD 390 is with the second paragraph of the bill text, which reads: "A determination pursuant to this section that a person is or is not a child's father operates as a determination of parentage for all purposes inside and outside of the child protection proceedings, including but not limited to proceedings pursuant to Title 19-A, chapters 51 to 69." Read literally, this provision could bar someone who was not a party to the title 22 case from seeking to be adjudicated as the child's father in a title 19-A parental rights and responsibilities case. Such an outcome would be unfair and likely violative of the person's constitutional due process rights to notice and opportunity to be heard.

FLAC questions the need for the language in question and recommends that the provision be deleted. The doctrine of *res judicata* applies to title 22 child protective orders and judgments as they do other court orders and judgments.[1] Under the rules of *res judicata*, a party to a title 22 case could be precluded from re-litigating the issue of parentage in another forum. FLAC suggests that these rules should govern the determinative effect of a parentage adjudication, rather than a provision of doubtful validity.[2] To the extent title 22 orders and judgments are confidential, it may be appropriate for the legislation to indicate that they are admissible for the limited purpose of determining whether *res judicata* applies.

Conclusion

For these reasons, the Maine Family Law Advisory Commission recommends in favor of enactment of LD 390 with the modification proposed.

DATED: April 6, 2007

Respectfully submitted:

Maine Family Law Advisory Commission

Justice Andrew M. Horton, Chair *pro tem*, Maine Superior Court
Justice Joyce A. Wheeler, Maine Superior Court
Judge James E. Mitchell, Kennebec County Probate Court
Magistrate Nancy D. Carlson, Maine District Court
Diane E. Kenty, Esq., CADRES Director, Judicial Branch
Juliet Holmes-Smith, Esq., Pine Tree Legal Assistance, Inc.
Mary Dionne, Public Member

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[1] The Maine Law Court has said, "The doctrine of res judicata is a court-made collection of rules designed to ensure that the same matter will not be litigated more than once. The doctrine has developed two separate components, issue preclusion and claim preclusion. Issue preclusion, also referred to as collateral estoppel, prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and . . . the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding. Claim preclusion bars relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131, 138-39.

Michael J. Levey, Esq., Maine State Bar Association)
Susan R. Kominsky, Esq., Maine State Bar Association
Tara Jacobi, Esq., Counsel to Maine DHHS
Careyleah MacLeod, Public Member

MAINE FAMILY LAW ADVISORY COMMISSION

Report to Maine Legislature
Joint Standing Committee on Judiciary
On LD 389
"An Act To Allow the District Court To Enter Parental Rights and Responsibilities Orders in Child Protection Proceedings"
Date: April 10, 2007

Introduction

The Maine Family Law Advisory Commission hereby reports to the Maine Legislature, Joint Standing Committee on Judiciary, on LD 389, a bill entitled, "An Act To Allow the District Court To Enter Parental Rights and Responsibilities Orders in Child Protection Proceedings". For the reasons stated in this report, FLAC supports the concept underlying LD 389 but recommends against enactment of LD 389 in its present form.

Discussion

LD 389 would change existing law by authorizing District Court judges to enter parental rights and responsibilities orders (PRR order) in child protective proceedings. Present law is silent on whether such authority exists, and most judges and practitioners assume that it does not. Under this view, before a parental rights and responsibilities order can be entered with respect to a child, a separate family case (either a divorce action if the parents are married or a parental rights and responsibilities order if they are not) needs to be initiated.

FLAC understands that LD 389 is submitted on behalf of the Maine Department of Health and Human Services. FLAC understands that the objectives underlying the bill are to achieve permanency faster; to reduce the resources spent on review, and to give parents who do not pose jeopardy to the child enforceable rights as to the parent who does present a risk to the child.

Existing law permits a title 22 child protective action to be consolidated with a title 19-A case relating to the same child, *see* 22 M.R.S.A. § 4031(3). Often, the two types of cases are consolidated. Whether or not they are, the title 22 case is often dismissed in favor of the title 19-A case when jeopardy no longer exists. Only when neither parent is able or willing to commence a title 19-A case and have PRR orders put in place in that case in a timely way, would the need for PRR orders in the title 22 case arise.

FLAC has several concerns about LD 389.

Constitutionality Concern: FLAC is concerned that LD 389, if enacted, could result in an unconstitutional burden upon parental constitutional rights,[1] to the extent it could permit a PRR order to continue in effect after jeopardy to the child or children had ended. Any title 22 child protective case represents an intrusion upon the constitutional rights of parents that can be justified only by a compelling state interest, namely the state's interest in protecting the child or children from jeopardy. This means that DHHS's standing and the court's jurisdiction under title 22 begin and end with jeopardy to the children who are the subject of the case.

A title 22 case cannot simply "morph" into a title 19-A family law case. Parents who do not want to be in court cannot be forced to remain involved in a title 22 case if the compelling state interest no longer exists. Thus, any law that would permit the court to retain jurisdiction in a title 22 case over the parents and children by virtue of a PRR order, when jeopardy to the children no longer exists, could well be deemed an unconstitutional limitation of parental constitutional rights.

LD 389 does impose two limitations on the court's authority to enter a PRR order in a title 22 case: the court must determine both that the PRR order will protect the child from jeopardy, and that the order is in the child's best interests. A finding that the PRR order will protect the child from jeopardy presupposes that the child continues to be in jeopardy. Thus, LD 389 in effect does require that any PRR order be based on a determination that jeopardy to the child continues to exist.

What LD 389 does not do, however, is limit the duration of PRR orders to the period when jeopardy exists. Neither does LD 389 provide for the termination of PRR orders and dismissal of the title 22 case when title 22 jurisdiction no longer exists because there is no further jeopardy. Thus, LD 389 as now worded could result in DHHS having party status, and the parents being involuntarily subject to the jurisdiction of the court, at a time when the state no longer had any compelling interest in the child's welfare.

To assure LD 389's constitutionality, FLAC recommends the following be added as subsection G: "Nothing in this section shall be construed to enlarge the court's jurisdiction under this title. Any order entered under this section

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[1] The United States Supreme Court has said that "the interest of parents in the care, custody, and control of their children–is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57 (2000).

as to a child shall be terminated, on motion of any party or on the court's own motion, on proof that the child is no longer in jeopardy."

Automatic Termination of Review and Services: FLAC's second concern is with subsections E and F of LD 389, which, upon entry of a PRR order, automatically prohibit further reviews or permanency planning hearings and automatically terminate the appointments of attorneys and the guardian *ad litem.*

As noted above, the title 22 proceeding can only be maintained as long as the child continues to be in jeopardy. If the child continues to be in jeopardy from one or both parents when the PRR order is entered, FLAC questions whether there should be an automatic termination of the review and planning process and of the appointments of attorneys and the guardian, simply because the court has elected to enter a PRR order in the case. FLAC recommends that the automatic termination of authority and appointments in subsections E and F be modified to give the court the discretion to decide:

E. Notwithstanding section 4038, the court may *determine not to conduct further review of the order* and, notwithstanding section 4038-B, *may determine not to conduct* any further permanency planning hearings; and
F. The court *may terminate* the appointments of the guardian ad litem and attorneys for parents and guardians ~~terminate and~~ *in which case* the attorneys and guardian ad litem *shall* have no further responsibilities to their clients or the court.

Conclusion

For these reasons, the Maine Family Law Advisory Commission recommends against LD 389 in its present form, and that LD 389 be amended as stated above before enactment.

DATED: April 10, 2007

Respectfully submitted:

Maine Family Law Advisory Commission

Justice Andrew M. Horton, Chair *pro tem*, Maine Superior Court
Justice Joyce A. Wheeler, Maine Superior Court
Judge James E. Mitchell, Kennebec County Probate Court
Magistrate Nancy D. Carlson, Maine District Court
Diane E. Kenty, Esq., CADRES Director, Judicial Branch
Juliet Holmes-Smith, Esq., Pine Tree Legal Assistance, Inc.

Mary Dionne, Public Member
Michael J. Levey, Esq., Maine State Bar Association)
Susan R. Kominsky, Esq., Maine State Bar Association
Tara Jacobi, Esq., Counsel to Maine DHHS
Careyleah MacLeod, Public Member

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Report to Maine Legislature Joint Standing Committee on Judiciary On Review of the "Substantially Equal Care" Formula Used in Child Support Calculations

The Maine Family Law Advisory Commission submits this report to the Joint Standing Committee on Judiciary as requested in the Committee's letter of June 20, 2007.

Introduction

Following its consideration of LD 1231 in the 123rd Legislature,[1] the Judiciary Committee asked the Family Law Advisory Commission ("FLAC") for information regarding the use of the "substantially equal parenting" (or "substantially equal care") child support formula in Maine. The Committee indicated that it was interested in recommendations concerning the concept of such a formula, as well as information as to whether other states use a similar calculation and how the formula has worked in Maine. FLAC was asked to provide this information by January 2008. A similar request for information was made to the Department of Health & Human Services, and FLAC was invited to coordinate its response with the Department. Although FLAC and the

[1] LD 1231, An Act to Serve the Best Interests of Children in Divorce, was introduced, in part, to provide for an evaluation of the "substantially equal care" formula in child support calculations. The Judiciary Committee voted Ought Not to Pass on the bill with the understanding that the Family Law Advisory Commission and the Maine Department of Health & Human Services would be asked to review and report on the formula and its use.

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Department are each submitting separate responses, we have conferred and shared information.

Background

Maine, like a number of other states, provides for an adjustment in a parent's child support obligation where each parent is providing "substantially equal care." States employ one of several models for calculating this adjustment. The Department will be submitting a study prepared by the Center for Policy Research that summarizes approaches taken by different states. In addition, we would direct the Committee's attention to a National Conference of State Legislatures website entitled, "Child Support and Parenting Time Adjustments" for a general overview of the various approaches to, and policies underlying, this issue. For your convenience, the website address is set out below[2] and a printed copy will be attached to a copy of this report that is being mailed to the Chairs.

A common assumption underlying most approaches to this issue is that as the non-custodial parent increases time with a child, the overall cost of raising the child increases due to duplication of child-related costs in the households of both parents. In other words, certain fixed costs (e.g. housing and related costs) will increase for the non-custodial parent and will not significantly decrease for the custodial parent. Policymakers have recognized that reducing costs based strictly on percentage of time spent with the child could unduly stress the custodial parent financially because his or her fixed

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[2] www.ncsl.org/programs/cyf/issue6-00.htm.

costs will remain relatively constant. Thus, many states, including Maine, use a "multiplier" in the formula (typically 1.5) to enhance the support obligation before finally adjusting the parents' respective support obligation based on income, time allocation, or both.

Maine's "substantially equal care" adjustment is codified at 19-A M.R.S. § 2006(5)(D-1). The concept of "substantially equal care" reflected in section 2006(5)(D-1) does not depend upon a certain threshold amount of time spent in a parent's home, nor are the number of overnights in each parent's home factored into the formula for adjusting the support obligation, as is the case in some other states. Rather, it is defined in general terms to mean that "both parents participate substantially equally in the child's total care, which may include, but is not limited to, the child's residential, educational, recreational, child care and medical, dental and mental health care needs." 19-A M.R.S. § 2001(8-A).

The policy underlying this approach was that it was neither appropriate nor in the best interests of the child to determine or adjust the level of child support obligation by "counting nights" with each parent. In other words, the primary focus for parents deciding on the extent of shared residential time with their child should not be on financial considerations. FLAC supported this approach and rationale when the statute was enacted. FLAC still supports the approach. The information we collected via an informal survey tends to support the view that this approach is sound.

Survey

The Committee asked FLAC to provide information as to how the formula has been working. Specifically, FLAC was asked to collect information from practitioners, judges and family law magistrates concerning "how often the formula is used, whether parents request a deviation from the use of the formula, and the level of satisfaction when the formula is used, if such information is available." In response to this request, we conducted an informal survey of District Court judges and family law magistrates, asking for their responses to the three questions you posed. We also elicited comments from members of the bar who practice regularly in the area of family law.

Before summarizing the information collected, a few disclaimers are necessary. Our survey was by no means scientifically conducted. The information provided is purely anecdotal. In addition, participation was not 100%, although a majority of judges and family law magistrates provided input. A sample group of family law practitioners was also polled about their level of satisfaction with the current formula. With these caveats, some general conclusions can be drawn.

<u>Use of Formula.</u> The survey asked judges and magistrates the following question: "How many times have you used the formula?" Responses reveal that the "substantially equal care" provision in section 2006(5)(D-1) appears to have had a fair amount of use. Not surprisingly, family law magistrates report more frequent use of the formula than judges. As a general matter, magistrates have significantly more frequent involvement in and exposure to

child support computations than judges. It would follow that they would have more occasions to use the formula. For example, on the whole, family law magistrates report that they have used formula "frequently." Some said they had occasion to use it "daily" at time. One estimated using it in "15% and 20% of cases." Still others said they used it at least weekly, or two to four times per month. Judges, on the other hand, reported using it far less frequently. Some could not recall using it at all, "rarely," or only a handful of times. Most judges who responded had used it fewer than eight times in total; five reported using it 10 to 12 times in total. One respondent speculated that the "low numbers" of these kinds of cases that judges are handling may be due to the fact that when the parties are able to get along sufficiently to agree on substantially equal parenting, they are also able to agree on application of (or deviation from) the formula, so most of these situations may be uncontested.

Deviations Requested. Section 2007(3)(A) expressly allows for a deviation from the formula where its application "would be unjust, inequitable or not in the child's best interest." The question we asked was: "How many times has a parent requested a deviation from use of the formula?" Responses suggest that requests for deviation are very common, and that in a significant percentage of the cases in which the formula is applied, the parties are able to reach agreement on a deviation, or a deviation is ordered. For example, it is typical that when the parties' respective incomes are close, and the obligation created by the formula would result in a low amount of child support ordered, many parties agree a zero deviation—*i.e.* that no child support is to be paid by either

parent. It is also not uncommon for deviations to be granted, by agreement or otherwise, in cases where the parties' respective incomes are not close. Overall, a majority of family law magistrates report that deviations are agreed upon and/or ordered in a significant number of cases where the formula is applied, ranging from 25% to 50%. Others reported fewer deviations. The frequency of deviations agreed upon and/or ordered reported by judges is consistent—ranging from 10% to 30% of cases in which the formula was applied.

Level of satisfaction. The question posed in the survey on this point was: "How often has a parent objected to use of the formula?" The responses indicate that few formal objections are made, however, it is not unusual for a party to express surprise or dissatisfaction with the results, at least initially. For example, one respondent noted: "Often, after the calculation is done the payor reacts; I do not have the numbers but I can generalize and indicate of all the calculations I do, the 'double-blink' is greatest to the shared formula calculation." Another respondent said that in many cases the higher income parent initially questions the rationality of the result, but "grudgingly accepts it once the law is explained." Also, from the lower income parent's perspective, it is also not uncommon that there may disagreement on whether the parties are actually providing "substantially equal care."

There is a perception that the formula produces harsher results when there is a wide disparity between the incomes of the parties. In some of these instances, the higher income parent does not believe that the formula yields a

substantial enough reduction in his or her support obligation. As mentioned, judges and family law magistrates generally expressed an inclination to enter a downward deviation in the payor-parent's support obligation in these instances if application of the formula would be unjust, inequitable or not in the child's best interest.

Finally, the group of practitioners polled generally concurred that the existence of the child support guidelines, and the fact that the financial rewards to a parent for having more time with their children are not as great as they thought, have reduced the number of contested custody cases because the parents will more easily agree to a contact schedule that is not dependent on financial considerations.

Conclusion

One respondent summed up the viewpoint of those favoring the current approach as follows:

> "I think the formula has been extremely useful. If parents are earning similar amounts, the formula simply requires them to share actual costs. If they have disparate incomes, the formula makes it clear that one parent still needs assistance to care for the children adequately. It can also weed out those parents who want shared residence simply to avoid paying child support—it comes as a surprise to higher income earners that they still have a child support obligation even though they have the children half the time."

FLAC supported the adoption of the "substantially equal care" formula, and supports its continued use. The rationale underlying the formula is sound. In a substantial majority of cases, it appears to work. We recognize that there may be instances where the formula is perceived to be less than fair, particularly when there is a substantial disparity between the parties' income levels. In those instances, however, the statute provides a mechanism that allows the court to order a deviation from the formula in order to avoid a substantial hardship.

We again appreciate the opportunity to serve the Committee. If you have any questions or concerns about this matter, or if we can be of further assistance on this issue, please let us know. The Chair and other representatives of FLAC are available to discuss this report and potential legislation at your convenience. Thank you.

Respectfully submitted,

Maine Family Law Advisory Commission

Judge Wayne R. Douglas, Chair, Maine District Court
Justice Andrew M. Horton, Maine Superior Court
Judge James E. Mitchell, Kennebec County Probate Court
Magistrate Nancy D. Carlson, Maine District Court
Edward S. David, Esq., Maine State Bar Association
Mary Dionne, Public Member
Juliet Holmes-Smith, Esq., Pine Tree Legal Assistance, Inc.
Diane E. Kenty, Esq., CADRES Director, Judicial Branch
Susan R. Kominsky, Esq., Maine State Bar Association
Kevin Wells, Esq., Counsel to Maine DHHS*

Dated: December 20, 2007

* Attorney Kevin Wells is the Department of Health & Human Services designee to FLAC; his appointment is pending.

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MAINE FAMILY LAW ADVISORY COMMISSION

Report to Maine Legislature
Joint Standing Committee on Judiciary
On Resolve 2007, Chapter 69
(Introduced as LD 1771)

Legislation Authorizing the Use of Parenting Coordinators in Maine

The Maine Family Law Advisory Commission ("FLAC") hereby submits its report to the Joint Standing Committee on Judiciary as requested in LD 1771, "Resolve, Directing the Family Law Advisory Commission to Develop Legislation Authorizing the Use of Parenting Coordinators," finally passed as Resolve 2007, chapter 69.

Introduction and Background

Following its consideration of legislation to authorize the use of parenting coordinators in the First Regular Session of the 123rd Legislature, the Judiciary Committee directed FLAC to "review the use and authority governing parenting coordinators in other states and, in consultation with other interested constituencies, develop legislation to authorize the use of parenting coordinators" in Maine. FLAC was further directed to submit a report with recommendations, including possible legislation, to the Judiciary Committee by December 15, 2007.

Pursuant to the Resolve, FLAC convened a working group that met initially in June 2007. The members of the working group were: Hon. Wayne R. Douglas, FLAC Chair; Hon. Andrew M. Horton, FLAC member;

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Tracie Adamson, Manager of the Family Division, Judicial Branch; Tommie Burke, attorney and parenting coordinator; Toby Hollander, GAL Institute and parenting coordinator; Juliet Holmes-Smith, FLAC member; Diane Kenty, FLAC member; Susan R. Kominsky, FLAC member; Catherine Miller, attorney and chair of Family Law Section, Maine State Bar Association; and Gretchen Ziemer, Maine Coalition to End Domestic Violence. Peggy Reinsch kindly provided capable assistance.

The working group held five meetings to discuss the concept of parenting coordination and to develop a framework for potential draft legislation. The working group presented its recommendations to FLAC in October 2007. As FLAC developed new proposed legislation on parenting coordination, drafts were also circulated among members of the working group in October and November.

Description of Draft Legislation

As directed by the Judiciary Committee, FLAC offers a revised version of potential legislation to authorize the use of parenting coordinators in Maine (see attached). The draft addresses issues identified in our report dated April 24, 2007 on the original bill, among others. These had included definitional problems, as well as issues relating to compliance, enforcement and excessive formalities.

This draft legislation would amend Title 19-A in two ways: first, by adding a new subsection to 19-A MRSA § 1653(D) which would require the court to include in a parental rights order a "parenting plan" in cases

where a parenting coordinator is appointed; and second, by adding a new section, § 1659, which provides for appointment of parenting coordinators in certain circumstances.

1. Role of Parenting Coordinator. A parenting coordinator is a neutral third party appointed by the court to oversee and resolve disputes that arise between parties following entry of a final divorce judgment, final parental rights and responsibilities judgment or other final post-judgment order. As is discussed below, the court may consider appointing a parenting coordinator in certain cases where the parties are enmeshed in a high conflict relationship that is not serving the child(ren)'s best interest. The role of the parenting coordinator is to help the parties interpret and implement the court's order, and as a result reduce conflict and/or avoid further litigation. The parenting coordinator may make recommendations about interpretation and implementation of the court's order but may not change the order.

The attached draft contemplates that the specific duties and scope of authority of a parenting coordinator will be defined in a section of the court order known as the "parenting plan," which will outline the areas of parental rights and responsibilities within which the parenting coordinator may make recommendations (see Subsection 1 and Subsection 2 of § 1659). For example, if the parties are consistently unable to reach agreement about the schedule of parent-child(ren)

contact, or about pick-up and drop-off times, a parenting coordinator could be appointed to help monitor and resolve disputes.

2. Qualifications of Parenting Coordinators. In this proposed legislation, FLAC has suggested that the same qualifications be applied to parenting coordinators that the Maine Supreme Judicial Court has established for guardians *ad litem* ("GAL" or "GALs") (see Subsection (1)(A) of § 1659). In addition, the Maine Supreme Judicial Court could establish additional qualifications if it so elected.

This approach appealed to FLAC as appropriate, efficient and economical. It is anticipated that many of the same professionals who currently serve as GALs would want to work as parenting coordinators. The two roles are similar, yet distinct. A GAL is typically active in a case prior to judgment, and collects and provides information in the context of a judicial proceeding to assist the court in rendering a decision that furthers the best interests of the child(ren). A parenting coordinator's appointment would take effect only after entry of a final divorce judgment, final parental rights and responsibilities judgment or other final post-judgment order. Consequently, no case would ordinarily have both an active GAL and a parenting coordinator. A professional who served as a GAL in an earlier phase of the case, however, could be considered for appointment subsequently as a parenting coordinator in appropriate circumstances.

3. Appointment by Order (With Parenting Plan); Appointment of Others for Parenting Assistance. As noted, a parenting coordinator would be appointed by a judge or judicial officer. The appointment would have to be in the "best interest" of the child(ren). Further, the parties must have demonstrated a pattern of "persistent inability or unwillingness" to make parenting decisions together, comply with parenting agreements and orders, reduce their child-related conflicts, or protect their children from the effects of that conflict. A parenting coordinator could be appointed with or without the parties' consent.

Whenever a parenting coordinator is to be appointed, a "parenting plan" would be required as part of the court order. It is envisioned that the "parenting plan" would define the authority of the parenting coordinator by specifying the areas of parental rights and responsibilities in which a parenting coordinator could make recommendations. For example, a "parenting plan" in the court's order might state that the parenting coordinator is appointed to address issues arising over parent-child contact, visitation, exchange times/places and transportation. As a result, the parenting coordinator would not get involved in disputes concerning other areas of parental rights and responsibilities, such as, for example, shared parental rights, primary residence or child support.

The length of the parenting coordinator's term may also be included in the order of appointment (see Subsection 2(D) of § 1659).

The proposed legislation also expressly states that it would not preclude the appointment of other persons who do not meet the qualifications required for parenting coordinators to serve in a more limited role of assisting the parties in implementing a specifically identified issue in the court order (see Subsection 8 of § 1659). For example, the court could appoint a family member or friend who would not be a "parenting coordinator" but who still could assist the parties with an issue such as arranging a pick-up or drop-off time or location, or ensuring participation in a school or sports event. In this instance, however, both parties must consent to the appointment. Further, the appointment of such a person would have to be in the best interest of the child(ren), and any evidence of domestic abuse in the parties' relationship would have to be considered before an appointment is made.

4. Judicial Review. Though the legislation calls for a parenting coordinator to make recommendations to the court and does not permit a parenting coordinator to change an order, a process for judicial review is included (see Subsection 5 of § 1659). If a party objects to the recommendations of the parenting coordinator, the party (or the parenting coordinator) may file a motion for review. While the motion is awaiting review, the parties are expected to follow the recommendations of the parenting coordinator. If a party fails to comply with the parenting coordinator's recommendation, that behavior is admissible in a

proceeding concerning compliance with an order of the court and in a contempt proceeding (see Subsection 4 of § 1659).

5. Cases Involving Domestic Abuse. FLAC specifically considered the potential impact of domestic violence between the parties on the appropriateness of appointing a parenting coordinator. The proposed legislation requires that prior to appointing a parenting coordinator, the court must consider any evidence of domestic abuse on the parties' ability to engage in parent coordination (see Subsection 2(C) of § 1659). The court is directed to "tailor the order accordingly," which means the court could include appropriate safeguards (e.g., the parenting coordinator is not to meet with the parties together), or even decline to appoint a parenting coordinator at all.

Additionally, if the court is appointing a person to offer parenting assistance (not a parenting coordinator), the court must also consider evidence of domestic abuse. Consent of the parties is required for such an appointment, but the consent should not be coerced.

6. Payment. The order of appointment must include the fee, if any, of the parenting coordinator, and if there is a fee, how it will be apportioned between the parties (see Subsection 2(B) of § 1659).

7. Quasi-judicial Immunity. An individual appointed as a parenting coordinator acts as the court's agent and is granted quasi-judicial immunity for the acts performed within the scope of the duties of the parenting coordinator's appointment (see Subsection 7 of § 1659).

The Chair and other representatives of FLAC are available to discuss this report and potential legislation at your convenience. Thank you.

Respectfully submitted,

Maine Family Law Advisory Commission

Judge Wayne R. Douglas, Chair, Maine District Court
Justice Andrew M. Horton, Maine Superior Court
Judge James E. Mitchell, Kennebec County Probate Court
Magistrate Nancy D. Carlson, Maine District Court
Edward S. David, Esq., Maine State Bar Association
Mary Dionne, Public Member
Juliet Holmes-Smith, Esq., Pine Tree Legal Assistance, Inc.
Diane E. Kenty, Esq., CADRES Director, Judicial Branch
Susan R. Kominsky, Esq., Maine State Bar Association
Kevin Wells, Esq., Counsel to Maine DHHS*

Dated: December 17, 2007

* Attorney Kevin Wells is the Department of Health & Human Services designee to FLAC; his appointment is pending.

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DRAFT PARENTING COORDINATION PROVISIONS
12/15/07

Sec. 1. 19-A MRSA § 1653, sub-§ 2, ¶D is amended to read:

D. The order of the court awarding parental rights and responsibilities must include the following:

(1) Allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to the best interest of the child as provided in subsection 3. An award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent, or a sharing of the child's primary residential care by both parents. If either or both parents request an award of shared primary residential care and the court does not award shared primary residential care of the child, the court shall state in its decision the reasons why shared primary residential care is not in the best interest of the child;

(1-A) If the court appoints a parenting coordinator pursuant to section 1659, a parenting plan as defined in section 1659, subsection 1, paragraph B;

(2) Conditions of parent-child contact in cases involving domestic abuse as provided in subsection 6;

(3) A provision for child support as provided in subsection 8 or a statement of the reasons for not ordering child support;

(4) A statement that each parent must have access to records and information pertaining to a minor child, including, but not limited to, medical, dental and school records and other information on school activities, whether or not the child resides with the parent, unless that access is found not to be in the best interest of the child or that access is found to be sought for the purpose of causing detriment to the other parent. If that access is not ordered, the court shall state in the order its reasons for denying that access;

(6) A statement that violation of the order may result in a finding of contempt and imposition of sanctions as provided in subsection 7; and

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(7) A statement of the definition of shared parental rights and responsibilities contained in section 1501, subsection 5, if the order of the court awards shared parental rights and responsibilities.

An order modifying a previous order is not required to include provisions of the previous order that are not modified.

Sec. 2. 19-A MRSA § 1659 is enacted to read:

§ 1659. Parenting coordination and assistance

1. Definitions. For the purposes of this section, the following terms have the following meanings.

A. "Parenting coordinator" means a neutral 3rd-party appointed by the court to oversee and resolve disputes that arise between parents in interpreting and implementing the parenting plan set forth in the court's order, and who, at a minimum, meets the qualifications and requirements established by the Maine Supreme Judicial Court for guardians ad litem and any other qualifications and requirements established by the Maine Supreme Judicial Court.

B. "Parenting plan" means that part of the court's order under section 1653 that describes the areas of parental rights and responsibilities that are within the scope of the parenting coordinator's authority.

2. Appointment. A court may appoint a person to interpret and implement a parenting plan as follows.

A. In a proceeding under this chapter, on the motion of a party or on the court's own motion, the court may appoint a parenting coordinator, with or without consent of the parties, in a case in which:

(1) The parties have demonstrated a pattern of persistent inability or unwillingness to:

(a) Make parenting decisions together;

(b) Comply with parenting agreements and orders;

(c) Reduce their child-related conflicts; or

(d) Protect their children from the effects of that conflict; and

(2) Appointment of the parenting coordinator is in the best interest of the child or children involved.

B. The order of appointment must include apportionment of responsibility for payment of the parenting coordinator's fee, if any, between the parties.

C. Prior to appointing a parenting coordinator, the court shall consider any evidence of domestic abuse on the parties' ability to engage in parent coordination and shall tailor the order accordingly, including without limitation, declining to appoint a parenting coordinator.

D. The order of appointment may include the length of the term of the appointment.

3. Timing of appointment; post-judgment. The appointment of a parenting coordinator is effective upon issuance of the final divorce judgment or post-judgment motion or final parental rights and responsibilities judgment.

4. Authority; failure to comply. A parenting coordinator may make recommendations that interpret and implement the parenting plan described in section 1653, subsection 2, paragraph D, subparagraph (1-A). A party's failure to comply with the parenting coordinator's recommendations is admissible in a proceeding concerning compliance with an order of the court, including the parenting plan, and a contempt proceeding. A parenting coordinator's interpretation or implementation of the court order may not change the order.

5. Judicial review. If a party objects to the recommendations of the parenting coordinator, a party or the parenting coordinator may file a motion for review. Pending review, the parties shall follow the order as interpreted or implemented by the parenting coordinator.

6. Confidentiality. The parenting coordination process is not confidential, except that the parenting coordinator has discretion to keep any communications with children confidential.

7. Quasi-judicial immunity. An individual serving as a parenting coordinator under this section acts as the court's agent and is entitled to quasi-judicial immunity for acts performed within the scope of the duties of the parenting coordinator as set forth in the court's order.

8. Other parenting assistance. Nothing in this section limits the court's authority to appoint a person who is not qualified as a parenting coordinator to assist the parties in implementing specifically identified issues in the parenting plan as set forth in the terms of the court's judgment if:

A. The parties consent to the appointment;

B. It is in the best interests of the child or children involved; and

C. The court considers any evidence of domestic abuse in the relationship between the parties before making the appointment.

SUMMARY

This bill authorizes a court to appoint a parenting coordinator to oversee and resolve disputes that arise between parents in interpreting and implementing the final court order in a divorce judgment or a parental rights and responsibilities judgment. A parenting coordinator is a neutral 3rd-party and must meet the qualifications and requirements established for guardians ad litem, as well as any other qualifications and requirements the Supreme Judicial Court may establish for parenting coordinators. A parenting coordinator is not the same as a guardian ad litem, although basic qualifications may be the same. A guardian ad litem is appointment pre-judgment, while a parenting coordinator is serves post-judgment and assists the parties in carrying out the order.

A parenting coordinator may be appointed when the appointment is in the best interest of the child or children involved, and when the parents have demonstrated a pattern of persistent inability or unwillingness to: make parenting decisions on their own; comply with parenting agreements and orders; reduce their child-related conflicts; or protect their children from the effects of that conflict.

The court shall consider any evidence of domestic abuse of the parties' ability to engage in parenting coordination and shall tailor its order accordingly, including declining to appoint a parenting coordinator.

The parenting coordinator may make recommendations that interpret and implement the parenting plan made part of the order. A parent's failure to comply with the recommendations of the parenting coordinator is admissible in a proceeding concerning compliance with a court order, including the parenting plan, and a contempt proceeding. The parenting coordinator's recommendations interpreting and implementing the parenting plan may not change the court's order. If a party objects to the recommendations, a party or the parenting coordinator may file a motion for review by the court. Pending review, the parties shall follow the order as interpreted and implemented by the parenting coordinator.

An individual serving as a parenting coordinator acts as the court's agent and has quasi-judicial immunity for acts performed within the scope of the duties of the parenting coordinator as set forth in the court's order. This is consistent with the quasi-judicial immunity provided to guardians ad litem.

The new provisions do not limit the court's authority to appoint a person to assist the parties in implementing specifically identified issues as set forth in the terms of the court's judgment even though the person is not qualified as a parenting coordinator. The parties must consent to the appointment, the appointment must be in the best interest of the child or children involved and the court must consider any domestic abuse between the parties before making the appointment.

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