# Family Law Advisory Commission Report on Maine Probate Code Parental Rights Provisions to the Maine Legislature Joint Standing Committee on Judiciary Pursuant to Resolve 2016, c. 73, section 3

January 15, 2017

## I. INTRODUCTION

The Family Law Advisory Commission ("FLAC") submits this report pursuant to Resolve 2016, c. 73, section 3 of the 127th Legislature. Specifically, the Resolve directed FLAC to "oversee a comprehensive review of the laws and procedures concerning minor guardianship and adoption and other provisions implicating parental rights throughout the [Maine] Probate Code, including, but not limited to, an evaluation of the extent to which such laws, procedures and provisions are consistent with family law policy as set forth elsewhere in the Maine Revised Statutes." The Resolve further directed FLAC to ensure the involvement of interested parties and to make recommendations, including any proposed legislation, in a report to the Joint Standing Committee on Judiciary no later than January 15, 2017.

FLAC has completed its comprehensive review, and it provides here its key findings and a summary of recommendations based on those findings. The proposed legislation for consideration by the 128th Maine Legislature is set forth in the Appendices to this Report.[1] FLAC respectfully urges the Maine Legislature to enact these much-needed amendments.

As described below, FLAC's review consisted of interviews with dozens of stakeholders as well as extensive research of statutes and court opinions from Maine and other states. Based on the information gathered, FLAC identified several aspects of Maine's minor guardianship and adoption laws in need of substantive revision. FLAC recommends specific amendments to the

[1] FLAC wishes to thank Professor Deirdre M. Smith, University of Maine School of Law, for her exceptional work in leading the stakeholder interviews, research, drafting of proposed statutory amendments, and preparation of this Report.

guardianship and adoption provisions of the Maine Uniform Probate Code (MUPC) to ensure that the MUPC's parental rights provisions: (1) reflect current Maine practice or national best practices; (2) are in line with recent developments in constitutional law regarding the extent to which courts can infringe on the fundamental rights of parents to care for their children; and (3) are consistent with other statutes and core policy goals of Maine family law including the best interests of children.

## II. DESCRIPTION OF REVIEW PROCESS

Pursuant to the Resolve, FLAC formed in April 2016 a Working Group (WG) of practitioners and jurists to undertake the primary work on the review.[2] The WG identified and interviewed stakeholders during the spring and summer. More than 50 individuals from around Maine provided information for the review including Probate Judges and Registers, Maine District Court Judges and Magistrates, Guardians ad litem, practitioners, state agency representatives, and litigants. The stakeholders were enthusiastic about FLAC's review and the opportunity to provide feedback and suggestions about Maine's minor guardianship and adoption laws. The input from stakeholders was invaluable for informing and prioritizing the WG's work. Legal research comprised an additional important component of the WG's work. WG members, assisted by law students, conducted research on Maine statutory and case law, scholarly writing on adoption and guardianship, and case law and statutes from other jurisdictions. The WG developed an initial set of findings and proposed recommendations, which it submitted to FLAC in the form of a Preliminary Report on September 6, 2016.

[2] The Working Group members are: Family Law Magistrate Lindsay Cadwallader (sitting in York and Cumberland Counties); Ed David, Esq., Farmington; Androscoggin County Probate Judge Michael Dubois; Richard Dubois, Esq., Caribou; Christopher Leddy, Esq., S. Portland; Maine District Court Judge Barbara Raimondi (sitting primarily in Lincoln County); Professor Deirdre M. Smith, University of Maine School of Law; and Debby Willis, Office of the Attorney General, Chief of the Child Support Division. Their work was assisted by University of Maine School of Law students Mckenzie Smith and Ashley Perry.

Throughout the months that followed receipt of the Preliminary Report, FLAC members reviewed and revised proposed statutory language. FLAC's final recommendations—summarized in the Addendum below—are set forth in Appendix A (minor guardianship) and Appendix B (adoption) to this Report. These recommendations reflect a combination of current practice, Maine family law policy as reflected in case law and other statutes, the perspectives of those involved with adoption and guardianship matters (judges, attorneys, guardians ad litem, and litigants), and good examples from other states. FLAC also gave due consideration to the Legislature's determinations (past and recent) that Maine should be a Uniform Probate Code (UPC) state and to the Maine Probate and Trust Law Advisory Commission's (PATLAC) recommendations for changes to specific UPC provisions to reflect Maine law and practice. Finally, a few of the proposed changes are necessitated by the fact that some guardianship and adoption proceedings will occur in Maine District Court when that court has a pending proceeding involving the child. P.L. 2016, ch. 460 "An Act To Ensure a Continuing Home Court for Cases Involving Children."

The statutory text included in the Appendices—with FLAC's recommendations shown in underlining and strikethrough—is the proposed recodification and revision of the current Maine Probate Code (Title 18-A or "MPC") prepared by the Maine Legislature's Office of Policy and Legal Analysis and the Office of the Revisor of Statutes under the supervision of PATLAC pursuant to Resolve 2016, c. 73, § 1. The recodification and revision, proposed as Title 18-C or MUPC, reflects the substantive proposals made by PATLAC pursuant to Resolve 2013, c. 5 to "conduct a review of the current Probate Code and the latest UPC and develop legislative recommendations based on the review" and set forth in PATLAC's December 6, 2014, Report to the Legislature, which was updated on November 20, 2015. The statutes noted in brackets in the

Appendices and in the Addendum refer to the current location of language in the MPC that addresses that issue.

## III. REASONS FOR AMENDING MAINE'S PROBATE CODE

Maine's minor guardianship and adoption laws are often applied in difficult cases involving complex and important considerations of protecting parents' rights while addressing children's needs for safety, security, and permanency. The language and application of these laws can have a significant impact on family relationships and the lives of those individuals directly involved in these matters. Several specific recurring themes and comments emerged from stakeholders. These include the following:

- Stakeholders emphasized the need for this study. Attorneys and judges noted that the case law for both adoptions and minor guardianships is now at significant variance from the statutory text in certain respects, which makes practice very difficult. Also, some attorneys noted that the laws have not kept up with the times. For example, one practitioner referred to Maine's adoption laws as "archaic."
- Practitioners noted that the broad or vague language in several Maine statutes lead to judges taking a range of approaches to applying the laws, which causes uncertainty and inconsistency and requires clarification from the Maine Supreme Judicial Court on important questions. Many also noted inconsistencies between MPC provisions and other family law statutes, such as the flexible and child-centered approach in the parental rights and responsibilities provisions in Title 19-A.
- The reforms needed to the MPC should address multiple policy goals. The constitutional rights of parents can be in tension with children's need for permanency and stability. Those who are (or represent those) caring for children through guardianship or kinship placements

remarked that protracted and recurring litigation can be stressful or even traumatic on children, as are failed efforts at reunification. Some stakeholders noted that some parents desperately want "to be a parent" or to protect their rights but are not always equipped to make the necessary commitment to parent consistently and appropriately, which can cause anxiety and disappointment for the children at the center of the cases.

- Several stakeholders noted that while the circumstances giving rise to a guardianship petition (or even an adoption) may be temporary (e.g. a parent's addiction, untreated mental illness, homelessness, or incarceration), the parent-child relationship is one that society expects to be maintained for a lifetime, even if there are periods of estrangement, separation, or disability. However, adoptions are permanent and guardianships are difficult to terminate once in place, especially in the absence of a reunification plan or provision of services. The "high stakes" of these cases can make them particularly contentious, expensive, and emotional for the parties involved.
- The problem of limited access to qualified attorneys is a concern in both guardianship and adoption proceedings. The process can be confusing and difficult to navigate effectively without an attorney, particularly in contested or complex cases. Even in the narrow range of cases where persons with low incomes are entitled to court-appointed counsel pursuant to statute, there can be shortfalls in those litigants' access to justice.

In addition, legal research revealed that several key provisions of the MPC need substantial revision to reflect important developments in Maine case law, particularly regarding the constitutional rights of parents, and changes in Maine family policy, such as the Maine Parentage Act, P.L. 2015, ch. 296. In certain respects, the MPC's parental rights provisions have also not

kept up with approaches taken by other states based on contemporary understanding of "best practices" in these difficult cases.

### A. Guardianship – Maine Probate Code Article 5

The role of minor guardianship law in Maine has transformed during the past 20 years due to a combination of changes to the guardianship statute, national and Maine case law developments, and an overburdened child welfare system. At one time, minor guardianship was an infrequently used tool, reserved for addressing the needs of children who had been orphaned or abandoned. It was intended to ensure that the child was in the care of an adult with legal responsibility for their welfare and education. Starting in 1995, the Maine Legislature enacted a series of amendments that expanded the grounds for the appointment of a guardian to grant courts authority to appoint a guardian with a parent's consent as well as to make an appointment over a parent's objection due to parental unfitness. The Maine Department of Health and Human Services (DHHS) and others recognized the value of guardianship as a mechanism to place a child at risk for abuse or neglect in a stable home—usually that of a family member— without requiring removal of the child through a child protection action and placement in foster care. As a result, the number of petitions for appointment of a guardian for a child has increased sharply in the past two decades, making these actions a key component of Maine family law today.

While this use of guardianship as a private child protection tool has been beneficial for addressing short-term crises facing many families, it brings some complications as well. First, the remaining guardianship statutory provisions do not reflect this use, and therefore there is little guidance for courts and litigants to tailor proceedings and orders to best address the specific (and changing) needs of the child and family and to facilitate reunification. Courts and practitioners have had to make do and develop a range of practices and work-arounds (not

always consistently across courts) that are not based on—but are also not generally precluded by—the statutory text. Second, the Maine Supreme Judicial Court has issued a series of important opinions regarding the minor guardianship statute during the past ten years. As a result of these combined factors, practitioners, litigants, and judges today need additional guidance in statutes about the standards and procedures that a court will follow in a guardianship matter.

There is no uniformity among states' approaches to minor guardianship law. The approximately 20 states adopting the Uniform Probate Code have enacted variations to the minor guardianship provisions, and only some UPC states have adopted features of the 2010 UPC update that serve as the foundation for PATLAC's proposed revision. Vermont recently studied its minor guardianship law and overhauled its statute pursuant to the recommendations of the 2012 report to the Vermont Legislature. Vermont Act 170, "An Act Relating to the Guardianship of Minors," 14 V.S.A. chapter 111, subchapter 2, article 1. Although Vermont is not a UPC state, the WG reviewed the Vermont report and the resulting statute and found some aspects of it to be useful guidance for its work. Vermont and Maine are both primarily rural Northern New England states facing significant problems with opioid addiction among residents and an overwhelmed, under-resourced child welfare system. Many of the findings of the Vermont study were consistent with the observations of stakeholders in the present study. Therefore, FLAC has considered the Vermont law as a resource for its evaluation of potential reforms to Maine's minor guardianship statute.

### B. Adoption – Maine Probate Code Article 9

Adoption involves many important, complex, and sensitive issues regarding not only legal relationships between individuals but also personal connections and identity. While most adoptions result in perhaps the happiest outcome that any court can provide to litigants—the

creation of a new and sought-after family connection—and most proceedings can be characterized as uncontested and non-adversarial, this is not always the case. Disputes that arise in adoptions can implicate highly emotional issues. The creation of a parent-child relationship can be enormously joyful; the dissolution of such a relationship can be wrenching. Petitioners and children involved are hopeful for a positive outcome, and when complications delay or ultimately impede that result, the disappointment can be devastating.

In addition, adoptions can arise in a wide range of circumstances. In many cases, the adoption petition is filed after the child has been the subject of a child protection proceeding, perhaps for a number of years, and adoption was found to be the permanency plan that would serve the child's best interests. In those cases, DHHS has been closely involved with the child and their family and has a role in the adoption proceeding as well. Other contexts can include: a young unmarried mother who decides prior to a child's birth to allow others to adopt her child; a child from another country who is adopted through a private adoption agency or private arrangements; and a parent and their new partner jointly petition for adoption so that both parents have rights and responsibilities of the child. In some cases, one of the child's parents may object to the adoption. Because Maine law provides that granting the adoption operates to terminate any remaining parental rights of the child's parents, constitutional considerations must be addressed as well.

FLAC recommends several revisions to the Adoption Act that are essential to ensure that it is consistent with the Maine Parentage Act (MPA), which became effective on July 1, 2016. The current Adoption Act reflects a far more limited view of parentage than is now embodied in Maine family law. The proposed revisions include cross-references to the MPA's definition of

"parent" and routes to establishing parentage set forth at Title 19-A, chapter 61, as well as the use of gender-neutral language.

As a final note, although Maine's adoption provisions are located in the Maine Probate Code, adoption law is not part of the Uniform Probate Code. The Maine Adoption Act was moved in 1995 from 19 M.R.S. § 1101 et seq.—where it was located with other family and parentage laws—to Article IX of the MPC. P.L. 1995, ch. 694, § C-7. For this reason, PATLAC did not include the adoption provisions in its recent update of the MPC to reflect changes in the UPC. FLAC recommends that the Legislature also evaluate whether to relocate the Adoption Act to Title 19-A with the rest of Maine's family law statutes.

Dated: January 15, 2017

Respectfully submitted:
Maine Family Law Advisory Commission

Hon. Bruce Jordan, District Court Judge (Chair)
Hon. Wayne Douglas, Superior Court Justice
Hon. Steven Chandler, Family Law Magistrate
Hon. Jarrod S. Crockett, Oxford County Probate Judge
Franklin L. Brooks, Ph.D., LCSW
Nicolle Carbone, Esq., MFT, Kids First Center
Edward S. David, Esq.
Diane E. Kenty, Esq., Maine Judicial Branch, CADRES
Margaret C. Lavoie, Esq.
Melissa Martin, Esq., Pine Tree Legal Assistance
Kevin Wells, Esq., Maine Dept. of Health and Human Services

(The late Hon. James Mitchell, Kennebec County Probate Judge, participated in this review until his death on September 9, 2016)

# Addendum – Summary of Recommendations

## Maine Uniform Probate Code - Article 5
## Uniform Guardianship and Protective Proceedings Act

### Part 1: General Provisions

§5-102. Definitions [18-A §5-101]

There are three recommended changes to this "Definitions" section, which applies to all of Article 5. First, the definition of "court" should be changed to reflect District Court jurisdiction over some minor guardianships pursuant to P.L. 2016, Chapter 460 (known informally as the Home Court Act). Second, the term "suitable" (which is a proposed requirement for all guardians who are appointed under language recommended for section 5-204(2)) is defined in section 5-102(12).

§5-104. Delegation of power by parent or guardian [18-A §5-104]

FLAC proposes new language expressly recognizing a parent's or guardian's right to revoke or amend the delegation of rights prior to the expiration.

§5-106. Transfer of jurisdiction [18-A §5-313]

The word "division" has been added to reflect the District Court's concurrent jurisdiction.

§5-107. Venue [18-A §5-205]

The proposed language reflects that some cases will proceed in District Court, and it also expands venue to the county or division where another proceeding concerning custody or other parental rights of the child is pending to provide courts flexibility in determining the best venue for the guardianship proceeding. FLAC also suggests a few changes to subsection (4) because the scenario of courts asserting "exclusive rights" over a case would only occur between probate courts.

§5-110. Termination of or change in guardian's or conservator's appointment [18-A §5-210; §5-212)]

The proposed change to this section would add a cross-reference to the comprehensive termination of guardianship provision proposed for Part 2 (section 5-210), which would apply only to minor guardianships. The circumstances leading to and implications of a potential termination of guardianships of minors and adults are quite different. Although there may be some overlapping applicability of certain language, it is potentially confusing to have the two kinds of proceedings addressed in a single termination provision, such as that in the current UPC language reflected in PATLAC's proposal. To ensure that all applicable termination provisions relating to minor guardianships are set forth only in section 5-210, FLAC recommends removing the minor-specific language elsewhere in section 5-110.

§5-113. Guardian ad litem [18-A §1-112]

The recommended change here is a cross-reference to the new provision regarding the appointment of guardians ad litem in minor guardianship proceedings in proposed section 5-212.

## Part 2: Guardianship of Minor

§5-201. Appointment and status of guardian [18-A §5-201]

The recommendations for this section would add findings and purposes language to this first section of Part 2, which addresses minor guardianships. Maine law presently includes similar statements in the parental rights and responsibilities statute (19-A M.R.S. § 1653) and child protection statute (22 M.R.S. § 4003), but there are none in the MUPC's minor guardianship provisions. However, the Maine Supreme Judicial Court, sitting as the Law Court, has set out detailed policy considerations regarding minor guardianship in its opinions, which could be useful to include in the statute. In addition, some other states, including Vermont, include policy statements in their minor guardianship statutes. FLAC's list of recommended findings and purposes is based on the Vermont guardianship statute (14 Vt. Stat. Ann. §2621) and Maine case law (*Guardianship of Aubrey Thayer*, 2016 ME 52, ¶ 52; *Guardianship of Chamberlain*, 2015 ME 76, ¶ 18; *Pitts v Moore*, 2014 ME 59, ¶ 12; and *Guardianship of Jewel M*., 2010 ME 80, ¶ 6).

§5-203. Objection by minor or others to parental appointment [18-A §5-203]

The recommended changes here reflect the proposed revision in section 5-204 to replace temporary guardians with "interim" guardians and clarify that a minor's objection to the proposed appointment of a guardian does not preclude judicial appointment of that guardian if all other statutory requirements have been met. If the other parent objects to the appointment of the guardian, that objection could defeat the appointment unless there is a finding of unfitness; such clarification is needed to ensure that the provision is constitutional and consistent with section 5-204.

§5-204. Judicial appointment of guardian; conditions for appointment [18-A §5-204; §5-207(c); §5-207(c)(1)]

Section 5-204 is the core provision setting forth the standards courts must apply when appointing a guardian of a minor. The proposed recommendations here address several aspects of those standards. First, language has been added to subsection (2) to clarify that any guardian appointed must be "suitable" for such appointment, as defined in section 5-102. Next, PATLAC's proposed re-write of the standard for appointment over a parent's objection in subsection (2)(C) has been revised to reflect Maine Supreme Judicial Court case law regarding the constitutional requirements for a determination of parental unfitness.

Third, the UPC language regarding "emergency" guardianships, with some revisions and alternatives, is proposed to replace the "temporary guardianship" provision in (4), which was

problematic in terms of both its inflexible length and lenient notice requirements. The proposed language regarding emergency guardianships should be read in conjunction with new provisions proposed for section 5-205 regarding the term or length of the order.

Fourth, FLAC proposes relocating to section 5-205, which addresses procedural aspects of the appointment of a guardian, the language regarding the extension of a guardianship when a parent is under an order of active duty in subsection (5) and the right to counsel for nonconsenting parents and certain petitioners in subsection (6).

Fifth, FLAC recommends modification of the language granting courts authority to issue child support orders in subsection (7) (proposed as (5) due to relocation of other provisions) to require the order to indicate whether any support order regarding the child is already in effect and the effect of the new order on such existing order. FLAC's proposed language also authorizes the court to reserve the issue of child support or decline to make an award, and it provides that a guardian shall be treated as a "caretaker relative" for purposes of calculating child support under Title 19-A.

Finally, the language regarding limited guardians in (8) can be removed because the concept of a limited guardianship would be replaced by the language FLAC proposes for section 5-206, Terms of Order Appointing Guardian.

§5-205. Judicial appointment of guardian; procedure [18-A §5-207]

Several changes have been proposed by FLAC for this section, which addresses the procedure required to make an appointment. First, proposed changes to subsections (1)(A) and (4) clarify that a child who is entitled to notice of the hearing (those 14 and older) may appear through counsel, has standing in the proceeding, and is entitled to notice of subsequent proceedings and that any minor may be appointed counsel by the court. Second, the additional language proposed in (1) would grant courts the authority to order a Department of Health and Human Services child welfare caseworker to attend an appointment hearing involving a family with which the Department has previously worked. Third, the language in subsections (2) and (3) was removed to eliminate redundancy and potential inconsistency with other provisions, particularly language in section 5-204 regarding the minor's best interest and the guardian's suitability. Fourth, the right to counsel language from subsection 5-204(6) was relocated to this section at subsection (4) so that it is adjacent to the provision regarding the appointment of counsel for a minor and other procedural rights.

Fifth, a subsection (6) was added to require that, before a guardianship can be entered with a parent's consent, the parent must provide a signed statement, generally through use of a form, that the parent understands the nature of the guardianship and knowingly and voluntarily consents to the guardianship. Sixth, a new subsection (7) is recommended to address the length of the order (including language relocated from section 5-204 regarding minors with a parent under an order to active duty), and a new subsection (8) would grant courts the express authority to enter an interim order appointing a guardian where necessary to address a minor's needs. Finally, subsection (9) grants courts the express authority to require the parties to a minor guardianship proceeding to participate in mediation, and subsection (10) requires a court to seal

identifying information, including an address, of a party or minor where the health, safety or liberty of the party or minor would be jeopardized by disclosure of such information.

§5-206. Judicial appointment of guardian; priority of minor's nominee; limited guardianship [18-A §5-105, §5-204, §5-206]

FLAC recommends extensive revisions to re-frame this section to address "Terms of Order Appointing Guardian." These recommendations are aimed at providing specific statutory language that reflects the predominant current use of minor guardianships today as tools for "private child protection" and to provide courts the clear authority to craft orders that will best meet the needs of the child involved and accurately reflect the situation of the parties. FLAC recommends removing the language in subsection (1) because it is redundant of or potentially inconsistent with sections 5-204 and 5-205. The language regarding limited powers of a guardian in subsection (2) has been replaced with provisions proposed for subsection (3) requiring orders appointing guardians to specify which, if any, rights and responsibilities are retained by a minor's parent under the order. The language in the original subsection (2) regarding addressing the "interest of developing self-reliance of a ward" seems out of place in a statute aimed at addressing the needs of children for whom a guardian is required. Also, to the extent that a guardianship is "limited," the rights not awarded to a guardian are retained by the parent, not the minor child.

Subsection (2) of this re-drafted section also requires courts to refer to and address any existing orders then in effect regarding custody or other parental rights of a child (such as a divorce or parental rights judgment) in the order appointing the guardian. Finally, the new subsection (4) clarifies that a parent may serve as co-guardian of their child where the parent has consented to the guardianship (as opposed to a situation where a parent is found to be unfit).

§5-207. Duties of guardian [18-A §5-209]

The proposed recommendation for this section is to add subsection (3) which grants courts the authority to require guardians to submit written status reports to the court and, if appropriate, to the parents. The court must consider, before imposing a reporting requirement, whether such reporting would create a substantial likelihood of harm to the health, safety or liberty of the child. The proposed language sets out categories of specific information that may be requested in the report, clarifies that such report is confidential, allows a parent or other interested person to ask the court to require such report if it has not otherwise been ordered, and clarifies that the court retains authority to take other steps to supervise the guardianship. FLAC also recommends that, in this section and others, the terms "minor ward" or "ward" be replaced with "minor" to be consistent with other sections in Article 5 regarding minors.

§5-210. Termination of guardianship; other proceedings after appointment [18-A §5-210]

The recommendations to this section would ensure that one location in the statute provides guidance to courts and litigants regarding post-appointment proceedings in a minor guardianship matter. First, the language in proposed subsection (1) would grant courts the authority to modify a guardianship order on motion of a party or other interested person and includes additional

language regarding the procedure for seeking such modifications. The language previously in (1) is now in subsection (2) and addresses the full range of circumstances that lead to the termination of a guardianship. The new subsections (3), (4), (5), and (6) are similar to corresponding provisions in section 5-110 but modified to make them applicable to minor guardianship proceedings. New subsection (7) is also relocated from section 5-110 with additional language to clarify that a court may modify a guardianship order when ruling on a petition to terminate.

§5-211. Transitional arrangement for minors [18-A §5-213]

An additional sentence is recommended for this section to allow a court to consider the child's relationship with the guardian and need for stability when the court is evaluating a child's best interest to provide for transitional arrangements for minors at the time a guardianship order is issued, modified, or terminated. Although there is already language in 19-A M.R.S. § 1653(3) that would arguably encompass such considerations, this language would provide a clear basis on which a court could address a child's needs in this respect when making a change to the respective rights and responsibilities awarded to the adults who are litigants in the guardianship matter.

§5-212. Appointment of Guardian ad litem for minor [no prior section]

This recommended new section in the minor guardianship statute would grant clear authority to courts to appoint a guardian ad litem for a child at any stage of a guardianship proceeding. The section cross-references section 1-111 of the MUPC, which addresses the requirements for such appointments where authorized elsewhere in the MUPC, as well as "other applicable law" as there are statutes outside of the MUPC that govern GALs in minor guardianship proceedings, such as 4 M.R.S. §§ 1554, 1555.

## Maine Uniform Probate Code - Article 9
## Adoption

### Part 1: General Provisions

§9-102. Definitions [18-A, §9-102]

FLAC proposes amendments here and throughout the Adoption Act to ensure that the provisions reflect the many ways—in addition to a biological connection—that one may be a legal parent of a child pursuant to the Maine Parentage Act ("MPA"), P.L. 2015, ch. 296 (codified at Title 19-A, chapter 61), which became effective on July 1, 2016, and which "applies to the determination of parentage in the State." 19-A M.R.S. § 1833(1). Specifically, the language limiting parentage to biological or genetic connections have been eliminated as the definition of "parent" under the MPA reflects that there may be other bases on which to establish parentage, such as acknowledgment, presumption, and de facto parentage. 19-A M.R.S. § 1851 ("Establishment of Parentage"). Similarly, the gender-based language regarding "mothers" and "fathers" throughout the Adoption Act has been replaced with the term "parent" as either men and woman may be in

the position of a parent or putative parent for the notice and consent requirements for adoption of a minor child.

§9-104. Venue; transfer [18-A, §9-104]

A recommended change in this section would add references to "division" as well as the county to reflect District Court jurisdiction over some adoptions. In addition, FLAC proposes language that would expand venue to the county or division where the child protective proceeding occurred, since that is likely the best venue for the adoption of that child pursuant to the District Court's Home Court jurisdiction.

§9-109. Mediation [no current statute]

FLAC recommends this new section to grant courts the express authority to refer the parties to mediation in contested matters.

## Part 2: Establishment of Paternal Rights and Termination of Parental Rights

As an initial matter, FLAC recommends renaming Part 2 of Article 9 as "Determination of Parentage and Termination of Parental Rights" to reflect recommendations made to the specific provisions in this Part, as summarized below.

§9-201. Establishment of paternity [18-A, §9-201]

This section should be retitled and revised to address "Determination of parentage." In subsection (2), the reference to rules of procedure should be revised to reflect that the Maine Rules of Civil Procedure will apply to the proceedings in District Court. FLAC also recommends revising the provisions regarding the determination of parentage and the parents' rights in the proceeding to reflect the constitutional considerations discussed in *Adoption of Tobias D.*, 2012 ME 45. Specifically, FLAC recommends deleting the references to a putative parent's burden to "establish" their parental rights and replacing it with language in subsection (4) that provides a putative parent an opportunity to petition for a determination of their parentage of the child under the MPA. If the putative parent is determined to be the child's parent and does not consent to the adoption, the language in proposed subsection (9) provides that their parental rights must be terminated under section 9-204 if the adoption is to proceed.

§9-202. Surrender and release; consent [18-A, §9-202]

The proposed changes in subsections (1), (2)(D), and (4) reflect suggestions by stakeholders that the period for surrender and release should not begin until at least 72 hours after the birth and the parent should have five working days to revoke such surrender and release.

§9-204. Termination of parental rights [18-A, §9-204]

FLAC's recommended amendments in this section address two concerns identified through its review. First, subsection (1)(B) should be revised to preclude petitions to terminate parental rights in adoption cases where the adoption is sought solely by a person who is already the legal parent of the child. The adoption would do nothing to alter the legal relationship between the petitioner-parent and child; rather, it is used as a vehicle for the petitioner-parent to seek the termination of another parent's rights (perhaps in collusion with that parent, such as to end a child support obligation). Stakeholders expressed that this is not a proper use of adoption. FLAC also suggests a narrow exception to ensure that legal parents who need to petition to adopt their children to secure their parentage status may do so when the child's other parent(s) have abandoned the child.

The second concern addressed in this section is the present law's wholesale importation of the standards for termination of parental rights from the child protection statute in Title 22; the context for such determinations in an adoption case is quite different from that in child protection litigation. FLAC recommends that the specific grounds for termination in the adoption context not refer to a 22 M.R.S.A. § 4041 reunification plan (since none was likely ordered or implemented) and instead direct the court to consider "the extent to which the parent had opportunities to rehabilitate and to reunify with the child, including actions by the child's other parent to foster or to interfere with a relationship between the parent and child or services provided by public or non-profit agencies." This language permits a more appropriate and context-specific finding regarding the parent's opportunities and efforts to reunify with the child.

## Part 3: Adoption Procedures

§9-301. Petition for adoption and change of name; filing fee [18-A, §9-301]

To reflect marriage equality, FLAC recommends replacing "husband and wife" with "spouses or unmarried persons" in the first sentence.

§9-302. Consent for adoption [18-A, §9-302]

FLAC recommends revisions to subsection (2) regarding when a putative parent's consent to the adoption is not required to revise the cross-reference to the paternity provisions in subsection (2)(A)(3) to be consistent with the recommended amendments to section 9-201 discussed above.

§9-304. Investigation; guardian ad litem; registry [18-A, §9-304]

To reflect the current practice of many courts, FLAC recommends that subsection (1)(A)(2) be revised to explicitly grant courts the discretion to waive background checks in cases of step-parent or other second-parent adoptions. FLAC also recommends revisions to subsection (3), which imposes a duty on agencies involved with adoptions to attempt to collect medical and genetic information regarding the child and the child's parents. Because a person who has established parentage of a child prior to the adoption may not have carried the child in a pregnancy or be a source of the child's genetic information (thereby making their medical

histories irrelevant), FLAC proposes that the language in this subsection be revised to require agencies to attempt to obtain information only concerning a parent who gave birth to the child or was a source of the gametes used in the child's conception. Further, because one or both of the individuals involved in the conception and gestation of the child may not be the child's parents, FLAC recommends that the statute grant agencies the discretion to seek medical and genetic information from donors or gestatational carriers, as those roles are defined under the MPA, and require agencies to attempt obtain any information about such individuals in the possession of the child's parents.

§9-308. Final decree; dispositional hearing [18-A, §9-308]

FLAC recommends adding a new subsection (6) to describe the effect of the adoption on the legal relationship between the child and the child's parent and others. This language is based on 22 M.R.S. § 4038-C(11), which addresses adoption from permanency guardianship. Maine law previously had a provision spelling out such effects for all adoptions, but it was eliminated some time ago. Based on the comments of stakeholders, FLAC concluded that such a provision would be useful in clarifying the effects of the adoption.

§9-315. Annulment of the adoption decree [18-A, §9-315]

FLAC recommends a significant narrowing of the adoption annulment provision, particularly in cases where the adoptee is still a minor. First, it recommends that there be a firm one-year limitations period for all annulment petitions. Also, an adoption decree could be challenged only on the basis of "fraud, duress, or illegal procedures." FLAC further recommends that, in annulment proceedings where the adoptee is a minor, the MUPC require courts to appoint a guardian ad litem for the adoptee and to sustain the decree unless the court makes a specific finding that the decree is not in the best interests of the adoptee. The recommended amendments would also permit the adoptee to appear through counsel.