# Maine Family Law Advisory Commission Report on Certain Questions Regarding Adoption, Termination of Parental Rights, and Minor Guardianship to the 129th Maine Legislature Joint Standing Committee on Judiciary Pursuant to P.L. 2018, ch. 417, section A-111

December 1, 2019

## I. INTRODUCTION AND EXECUTIVE SUMMARY

The Family Law Advisory Commission ("FLAC") submits this report pursuant to Public Law 2019, ch. 417, Section A-111 of the 129th Legislature, "An Act To Correct Errors and Inconsistencies Related to the Maine Uniform Probate Code and To Make Other Substantive Changes." Specifically, Section A-111 directed:

> The Family Law Advisory Commission shall study and provide recommendations on the following matters related to the Maine Uniform Probate Code: petitions for termination of parental rights in the context of adoption; competing adoption petitions; and rights of contact between a minor and the former guardian when the guardianship is terminated.

The Act further directed FLAC to "review relevant decisions of the Maine Supreme Judicial Court and the United States Supreme Court, as well as relevant court cases and legislative action in other jurisdictions, and work with stakeholders to explore policy options and develop recommendations." Finally, the Act required FLAC to "submit a report, including specific recommendations for amendments to the Maine Uniform Probate Code and other family law statutes, to the Joint Standing Committee on Judiciary by December 1, 2019."

FLAC has completed its study, and it provides here its key findings and a summary of recommendations based on those findings. Proposed legislation for consideration by the 129th Maine Legislature, Second Regular Session, is set forth in the Appendix to this Report. The recommendations include:

- Clarifying and revising the procedures and standards to be applied to a court's review of the withholding of consent by the agency with custody of a child to the child's adoption;
- Lowering the age of a minor's consent in all adoptions to 12;
- Clarifying that courts must consider the background and qualities of a prospective adoptive parent before terminating a parent's rights in the context of an adoption;
- Enhancing the rights of siblings to maintain contact after their separation by adoption;
- Consolidating the requirements for all adoptions, including those from permanency guardianship, in the Maine Adoption Act; and
- Granting courts, under limited circumstances, the authority to award former guardians and minors rights of contact after a guardianship has been terminated by the court.

As noted in Section III.B. below, FLAC will supplement this Report and Appendix in January 2020 to set forth additional recommendations pertaining to the termination of parental rights. FLAC

respectfully urges the Maine Legislature to enact the recommendations included in the Appendix and its forthcoming Supplemental Report.

## II. THE CONTEXT FOR AND SCOPE OF FLAC'S STUDY

The 128th Legislature enacted Public Law 2017, Chapter 402 "An Act to Revise and Recodify the Maine Probate Code," which made several revisions to the minor guardianship provisions (Maine Uniform Probate Code (MUPC), Title 18-C, Article 5, Part 2) and the Maine Adoption Act (MUPC, Title 18-C, Article 9) based in part on FLAC recommendations. The MUPC became effective on September 1, 2019.

FLAC informed the Judiciary Committee during the First Session of the 129th Legislature that it would like the opportunity to study and provide recommendations on three questions concerning minor guardianship and adoption. Two of the questions concern the Adoption Act as it applies in two contexts: private termination of parental rights and competing adoption petitions arising out of child protection cases. Such matters have been the subject of recent Maine Supreme Judicial Court opinions, and FLAC sought an opportunity to develop specific recommendations for consideration by the Legislature in the Second Regular Session to address concerns raised in recent cases.

In addition, FLAC wished to study a difficult question that Maine Probate and District Courts occasionally face: what options should be available to a court when terminating a guardianship of minor where there is a particularly strong relationship between the minor and former guardian and where, absent post-guardianship rights of contact, there is a likelihood of harm to the minor.

The Maine Legislature included the above-mentioned directive to FLAC to study and make recommendations on these matters in Section A-111 of c. 417. FLAC has addressed these matters in the findings and recommendations set forth below.

As part of its study, FLAC identified certain related questions concerning termination of parental rights and adoption, which are also discussed in this report. First is whether Maine should revise the minimum age for minors to consent to their adoption under the Adoption Act. The second question concerns when a court may terminate a parent's rights outside of the child protection or adoption context. The Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), has ruled that a parent may bring a petition to terminate the parental rights of another parent. However, Maine statutes do not provide guidance to courts or litigants about the standards or procedures to be applied in such cases. Third, FLAC examined developments in other states regarding agreements to provide post-adoption contact between siblings who are separated during a child protection matter and considered whether Maine courts should have a role in reviewing, modifying, and enforcing such agreements. Finally, FLAC considered whether Maine law should continue to have a separate statute, located in the Child and Family Services and Child Protection Act ("Child Protection Act") in Title 22, governing adoption petitions brought by permanency guardians, or whether all adoptions should be governed by the Maine Adoption Act.

## III. FINDINGS AND RECOMMENDATIONS

### *A. Agency Consent and Minor's Consent to Adoption*

As a result of the enactment of the so-called Home Court Act, P.L. 2015, c. 460, the District Court has exclusive jurisdiction over adoptions where there is a pending matter concerning the child. Most commonly, this jurisdiction is exercised in an adoption petition arising from a child protection matter brought by the Department of Health and Human Services under Title 22 in which both parents' rights were terminated, and the permanency plan approved by the District Court for the child is adoption. The approved plan may refer to a prospective adoption petitioner, often the person with whom the child has been placed, such as a foster parent or kinship caregiver, but it does not address as a matter of law who may adopt the child.

Rather, the determination of who may adopt the child is made in a separate proceeding under the Adoption Act. The person identified in the permanency plan as the proposed adoptive parent must file a petition to adopt pursuant to 18-C M.R.S.A. § 9-301. If someone else wishes to adopt the child–such as a family member not named in the permanency plan–they may also file a petition to adopt. The Adoption Act sets no standing requirement for filing a petition to adopt, and there is no limitation on how many petitioners may pursue adoption of the same child. Some adoption cases, therefore, involve multiple competing adoption petitions in a single consolidated proceeding before the District Court.

A central question in these competing adoption proceedings arising after a child protection matter concerns the role of the Department of Health and Human Services ("the Department"). The Adoption Act at 18-C M.R.S.A. § 9-302(1)(C) provides that a petition to adopt a child in agency custody may be granted only if the agency, such as the Department, consents to the adoption, or, where the agency does not consent, if the court finds by a preponderance of the evidence that the "agency acted unreasonably" in withholding its consent. The court must consider four specific factors when determining whether the agency unreasonable withheld consent.

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

FLAC agrees that the Adoption Act could provide more guidance to the Court in competing adoption matters. In addition, the Legislature enacted the agency consent language in the Adoption Act prior to the current requirements in the Child Protection Act regarding permanency outcomes for children in the Department's custody. The District Court is now required to "conduct a

permanency planning hearing and [] determine a permanency plan" that spells out the specific outcome for the child, such as reunification with a parent, adoption, or permanency guardianship. 22 M.R.S.A. § 4038-B.

FLAC proposes several amendments to 18-C M.R.S.A. § 9-302 regarding required consents to adoption. First, the statute should make clear that courts are to take a bifurcated approach to the adoption proceeding if a petitioner is challenging the lack of consent from the agency. This change would ensure that a court resolves the question of whether the agency or custodian unreasonably withheld its consent before the court makes findings regarding the requirements for the adoption itself, such as those set out in 18-C M.R.S.A. § 9-308. Currently, some District Courts address both questions in a consolidated hearing and order. A few other states' appeals courts have held that the issue of agency consent should be resolved as an initial and distinct matter. *See, e.g., In re Adoption of Missy M.*, 133 P.3d 645, 650 (Alaska 2006) (holding that agency consent must be considered separately from the best interest analysis for the adoption so that the consent question is not rendered "extraneous."); *Matter of Adoption of H.A.*, 422 P.3d 642, 656 (Haw. Ct. App. 2017) (holding that "the unreasonableness of [the agency's] withholding of consent [must] be established independently of the best interest of the child analysis, to avoid rendering that part of the statute superfluous").

FLAC also proposes changes to clarify that a court may alter the order of presentation of evidence if the agency has "important facts" that the petitioner would need to prove their contention that the agency unreasonably withheld its consent. The proposed language enables a court to require the agency to present its reasons for withholding consent and the facts supporting the decision before the petitioner presents their evidence while the petitioner retains the burden of proof on the question of the agency's alleged unreasonableness at all times.

FLAC recommends amending the factors a court must consider when reviewing the reasonableness of an agency's withholding of consent to include a new factor: whether the agency granted consent to another petitioner who was previously approved by the agency or the court as the child's permanency placement. This factor requires a court to weigh the role of any pre-adoption agreement process and the permanency plan in the agency's decision-making process for consent. The agency's actions and permanency judge's decision can still be revisited by the adoption judge, who can permit the adoption to proceed without the agency's consent if the petitioner meets their burden on the question of unreasonableness.

FLAC recommends that the statute be amended to eliminate the ambiguity in the statute regarding whether an agency may consent to more than one petitioner. In his concurrence in *Parker J.*, Justice Jabar described a "deficiency" in section 9-302 as follows: "The statute as written fails to set forth a procedure for the Department to follow in those cases where, like this case, more than one suitable petitioner seeks to adopt a child. Although section 9-302(a)(3)(ii) contemplates a situation in which other 'prospective families' might exist, no part of the statute clarifies whether the Department may, or may not, grant consent to more than one prospective suitable family." *Id.* at ¶ 31 (Jabar, J., concurring). Citing *Paisley*, he also noted: "Because the Department and the court have distinct roles in adoption proceedings, the Department should not have to decide which of several suitable parties should be given consent to the exclusion of the others; it is for the court to decide which petitioner would serve the child's best interest."

After consulting with stakeholders and extensive discussion, FLAC recommends that the statute be amended to permit an agency to consent to more than one petitioner if the agency concludes that multiples petitioners could each provide a suitable adoptive home for the child. However, FLAC believes that there is potential value of the agency weighing in on the competing petitions prior to the adoption judge's final determination, even if the agency consents to more than one. In such cases, the court should have the authority to require the agency to provide information and to make recommendations regarding the petitioners.

Finally, FLAC recommends that the age of a minor's consent to their adoption be lowered from 14 to 12. Currently, a child 12 and older must consent to their adoption by a permanency guardian. 22 M.R.S.A. § 4038-E(8)(A). That age requirement has apparently not presented problems since its enactment in 2011, and there is no good reason to have inconsistent provisions for these different routes to adoption. Indeed, as noted below, FLAC recommends that the Maine Adoption Act govern all adoption, and it would be appropriate to preserve the current age of consent for those children in Title 18-C. As of 2011, just over half of the 47 states that require children of a certain age consent to their adoption have set the age of consent at 12 or lower. Jennifer Fairfax, *Adoption Law Handbook: Practice, Resources, and Forms for Family Law Professionals* 133 (2011).

### *B. Termination of Parental Rights by a Parent or Guardian Outside of the Adoption Context*

In *In re Austin T.,* 2006 ME 28, ¶¶ 10-12, the Law Court held that the District Court has jurisdiction to hear a petition for termination of parental rights (TPR) brought by mother against father outside of the adoption or child protection context, such as in a post-judgment proceeding in a family matter. While there is a specific provision for one parent to file to terminate the parental rights of the other parent in cases of conception from sexual assault, 19-A M.R.S.A. § 1658, Title 19-A is otherwise silent on this option.

In the 13 years since the *Austin T.* opinion, District Court judges have been uncertain how to proceed when a parent files a petition to TPR another parent. Many of these matters arise in post-judgment petitions to modify parental rights and responsibilities or divorce judgments. Increasingly, however, courts are seeing petitions seeking a TPR order as part of an initial filing. Some of these cases may arise as a precursor to a step-parent adoption matter in Probate Court, while, in other cases, a parent is seeking to eliminate the parental rights of another parent for alleged conduct to foreclose any chance that the parent could seek or exercise parental rights in the future.

FLAC recommends that the Legislature amend Title 19-A to provide clarity and guidance to District Court judges and litigants on the question of termination of parental rights outside of the child protection, adoption, or conception from sexual assault contexts. FLAC has not yet finalized its recommendations for the specific statutory language, but it believes that the best approach is to amend 19-A M.R.S.A. § 1658 to preserve current law regarding private termination of parental rights in cases of conception from sexual assault while permitting petitions seeking TPR on other bases only in a very narrow set of circumstances. FLAC will supplement this Report in January 2020 to provide specific recommendations.

### *C. Termination of Parental Rights in the Context of Adoption*

The Maine Adoption Act permits an adoption petitioner to file a petition to terminate the parental rights of the child's parent if that parent does not consent to the adoption or join the petition. 18-C M.R.S.A. § 9-204. These TPR petitions generally arise in one of the following contexts: a putative father is initially identified during the adoption proceedings; a child's guardian wishes to adopt the child; or a child's parent co-petitions for adoption with a new spouse or partner, commonly referred to as "step-parent" adoptions.

FLAC examined this provision as part of its 2016 study of the parental rights and responsibilities provisions pursuant to Resolve 2015, c. 73, section 3. FLAC recommended—and the 128th Legislature adopted in the MUPC—a revised standard for termination of parental rights in the context of adoptions. Specifically, the TPR standard in section 9-204(3) is consistent with the Title 22 standard used in child protection cases, except that it does not include the language set forth at 22 M.R.S.A. § 4055(1)(B)(2)(c) regarding the parent's failure to make a good faith effort to follow a reunification plan. Such plans are features of child protection matters but not adoption proceedings. The MUPC instead permits 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." 18-C M.R.S.A. §9-204(3)(B). This language permits a more appropriate and context-specific finding regarding the parent's opportunities and efforts to reunify with the child.

This change to the TPR standard, however, does not entirely address the concerns about private TPR noted by the Law Court in the *Adoption of Isabelle T*., 2017 ME 220, a step-parent adoption case in which a child's mother and step-father successfully petitioned to terminate the parental rights of the child's father. The Law Court vacated the TPR order there in part because the record lacked "background information and documentation" regarding the child's step-father, whose parental rights to two of his three children were terminated previously. *Id*. at ¶ 48. The Law Court emphasized the importance of considering the merits of the adoption petitioner who would be added as a parent as part of the "best interests" determination when ruling on a petition to terminate parental rights. *Id*. at ¶ 49.

To address those concerns, FLAC suggests the following amendments to 18-C M.R.S.A. § 9-204. First, FLAC recommends including language expressly requiring courts terminating parental rights to make specific written findings. In *Isabelle T.*, the Court noted that specific findings are helpful for appellate review. *Id*. at ¶ 52. The Law Court has emphasized the importance of specific findings of fact in termination of parental rights orders in the child protection context, *In re Child of Amanda H*., 2019 ME 39, ¶ 4, as well as the adoption context, *In re Kenneth H*., 1997 ME 48, ¶ 5.

FLAC also recommends that section 9-204 be amended to require such findings to address the "background and qualities of the prospective adoptive parent," *see Isabelle T.* at ¶ 10. In addition, the recommended changes would require a court to consider the parent's attempts to reunify or maintain a relationship with a child as part of its analysis of the parent's alleged unfitness. *See Isabelle T.* at ¶¶ 39- 44; *Adoption of Riahleigh M*., 2019 ME 24, ¶¶ 24-25.

Finally, FLAC recommends that the consent to termination provision be revised to make clear that a judge's explanation of the effects of a termination order must be provided to the parent prior to the parent's execution of the consent.

As noted above in Section III.B., FLAC is currently developing specific recommendation for statutory language permitting the private termination of parental rights by a parent or other custodian of a child under limited circumstances. Certain aspects of these recommendations may be appropriate for termination of parental rights proceedings brought under the Adoption Act as well. If so, FLAC will address any proposed amendments to 18-C M.R.S.A. § 9-204 in the supplemental report it submits in January.

### *D. Post-Adoption Contact Rights for Siblings Separated by Adoption*

FLAC recommends that the Legislature amend 22 M.R.S.A. § 4068, which gives certain contact rights to siblings separated as a part of a child protection proceeding, to permit courts to approve post-adoption contact agreements between the families who provide care for such siblings. Several states have enacted sibling post-adoption contact laws, and scholars have noted the importance of maintaining sibling ties to children separated by foster care and adoption. *See* Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. Rev. 1, 50-51 (2011). Maine has a "Youth in Care Bill of Rights," and Maine is a signatory to the New England Youth Coalition "Sibling Bill of Rights," both of which, although not based in a statutory requirement, emphasize the value to children of maintaining contact with their siblings when separated as a result of foster care or adoption.

Maine law at section 4068 currently allows a court to order sibling visitation when at least one of the siblings is not in foster care because it refers to siblings who are in the custody of a "party" (which could be a parent, adoptive or not). The statute also permits the Department to enter into "agreements with prospective adoptive parents that provide for reasonable contact between an adoptive child and the child's siblings." However, that provision grants near full discretion to the Department and provides no role for the court, including reviewing or enforcing agreements. It also has no applicability once the Department is no longer the child's custodian, such as after the adoption.

FLAC recommends that the Legislature amend section 4068 to enhance siblings' opportunities for post-adoption contact. First, the statute should authorize the court to approve an agreement for post-adoption contact based on a finding of the siblings' best interest if all siblings' parents, guardians, or custodians consent and the siblings also consent, if they are age 12 or older. In the case of younger children, the court should determine the preference of the child regarding contact, if the child is old enough to express a meaningful presence. These court-approved agreements would be enforceable so long as the court finds that such enforcement is in the best interest of the siblings. Such provision should clarify that a person's failure to follow an agreement does not permit a party to seek revocation of the adoption itself.

FLAC further recommends that the statute not only permit a child separated from a sibling in a child protection matter to request visitation, as it does now, but also require a court to ask a child whether the child would like visitation, communication, or contact with a sibling. The statute should permit a court to make such inquiry with the assistance of a guardian ad litem and to appoint

counsel for a child seeking sibling contact. The Child Protection Act should be amended to include a definition of "sibling" that extends these rights to children who share at least one parent.

FLAC also recommends certain amendments to the Adoption Act to effectuate these enhanced rights to post-adoption contact between siblings. First, the Department should be required to provide notice of an adoption to any sibling of the child who has visitation or contact with the child pursuant to section 4068. Further, the adoption court should reference in and attach to the adoption decree any post-adoption sibling contact agreements unless it finds that such agreement is no longer in the adoptee's best interest. The court may modify the agreement before referencing and attaching it to the decree.

Finally, FLAC recommends amending the Adoption Act to authorize an adoption court to order post-adoption sibling contact for adoptees who lived with a sibling for two or more years if such contact would be in the adoptee's and sibling's best interests and each sibling's parent, guardian, or custodian have consented to the order. This language permits certain rights in section 4068 to be extended potentially to any child separated from siblings by adoption, not only those in the child protection system.

### *E. Adoptions from Permanency Guardianship*

As noted above, Maine's permanency guardianship statute was amended in 2011 to include a specific provision, 22 M.R.S.A. § 4038-E, for a permanency guardian to adopt the minor child. This section, which largely parallels the requirements in the Adoption Act, was enacted in Title 22 to ensure that the District Court appointing the permanency guardian could retain jurisdiction over the parties through the adoption process. With the enactment of the Home Court Act, all adoptions arising from child protection matters now remain in District Court. FLAC studied the question of whether a separate statute was still necessary, and it has determined that the Adoption Act would adequately address nearly all of the requirements for adoption petitions filed by permanency guardians.

FLAC proposes that section 4038-E retain the parental consent requirement that is now in 22 M.R.S.A. § 4038-E(8)(B) but otherwise be amended to provide that the adoption petition be filed and adjudicated in accordance the Adoption Act. That section should also clarify that a permanency guardian may not seek an order terminating the parental rights of a parent as part of a petition to adopt the child. Thus, if a parent whose rights have not been terminated does not consent to the adoption, the adoption cannot proceed so long as the permanency guardianship is in place.

FLAC noted that the permanency guardianship statute, unlike the minor guardianship provision in Title 18-C, does not clearly state that the appointment terminates when the child attains majority. Such clarification would be particularly useful if a former permanency guardian decides to proceed with an adoption after the termination of the appointment, at which time the prospective adoptee's parents' consent would no longer be required for the adoption. The language proposed by FLAC for 22 M.R.S.A. § 4038-C(2) would make clear that the appointment automatically ends when the child is no longer a minor or upon the minor's death or adoption. This language is nearly identical to that in the MUPC regarding other guardianships, 18-C M.R.S.A. § 5-210(2), except that there is no provision for automatic termination on the minor's marriage or emancipation.

### *F. Post-Guardianship Contact Rights for Former Guardians and Minors*

Finally, FLAC reviewed the question of what options should be available under Maine law to a District Court or Probate Court to order rights of contact between a former guardian of a minor and the minor when terminating the guardianship, such as when a parent resumes custody of the minor.

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

When the circumstances giving rise to the initial appointment of a guardian—such as a parent's illness, absence, incarceration, or housing instability—change, a parent may seek to resume care and custody of the child. Most guardians are appointed with the consent of the parent, and in many instances, the parent and guardian (most often a child's close relative) also agree when the parent may resume care or the parties decide to undertake an informal co-parenting arrangement. It is unusual in such cases for the parties to return to court to ask the court to terminate the order; most likely, they simply disregard the guardianship order. In those situations, the minor continues to have contact with the guardian after returning to the parent's home.

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

> that the parent seeking to terminate the guardianship is currently unfit to regain custody of the child. If the party opposing termination of the guardianship fails to meet its burden of proof on this issue, the guardianship must terminate for failure to prove an essential element to maintain the guardianship. This rule applies whether the guardianship was initially established with the parents' consent… or otherwise.

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

In a high-conflict termination case where a parent is fit and able to resume care of the child, that parent may decide to disallow contact between the former guardian and the child once the guardianship ends. If the guardianship appointment was in place for an extended time, there may be

a risk that the child will suffer harm or trauma if their contact with a former guardian and caretaker is severed wholly and abruptly.

There are some tools available to courts under the MUPC to structure a guardianship termination to minimize adverse impact on the child. Section 5-210(7) permits a court to make "any further order that may be appropriate." More specifically, section § 5-211 authorizes a court to order transitional arrangements, such as "rights of contact, housing, counseling or rehabilitation," if the court determines that such arrangements "will assist the minor with a transition of custody and are in the best interest of the minor." A court may consider the child's "relationship with the guardian and need for stability" when evaluating a child's best interest in the context of ordering transitional arrangements for minors. To ensure that the arrangements are truly transitional, rather than set for an indefinite period of time, and to avoid infringing on the parent's rights, FLAC recommends that the statute be amended to specify that orders must be time-limited and expire after no more than 6 months from the entry of the order or the conclusion of the child's current school year, whichever occurs later.

Regarding continuing contact between the child and former guardian beyond a period of transitional arrangements, Maine law includes few provisions for affording rights of contact to non-parents. The Grandparent Visitation Act (GVA), 19-A M.R.S.A., ch. 59 (§§ 1801–1806), enables a grandparent to seek rights of contact if they have a "sufficient existing relationship" with the child, such as when a grandparent "has been a primary caregiver and custodian of the child for a significant period of time." Given that many guardians are also grandparents, a long-term guardianship could serve as a basis for a former guardian's standing to petition for such rights under the GVA. However, this would require a guardian or former guardian to bring a separate petition, and probate courts do not have jurisdiction to award rights under the GVA. The statute does not extend to non-grandparents.

The GVA strikes a balance between protecting a parent's fundamental constitutional rights and protecting a child from harm due to the severance of a particularly strong existing relationship. For this reason, FLAC recommends using that statute as a model for amendments to section 5-211 to permit a court to order post-guardianship rights of contact. The recommended language would give courts an additional tool to mitigate or avoid harm or unnecessary trauma to a child who has a strong relationship with the guardian by providing some rights of contact between the former guardian and the child after the guardianship is terminated.

Specifically, the new provision would permit a court, on timely motion of a parent or guardian, to order at the time of the termination of the guardianship or the expiration of any transitional arrangement rights of communication or contact, including overnight visitation, between a minor and the former guardian after the termination of the guardianship. The court may award such rights only if the parent and guardian consent or if the court finds by clear and convincing evidence that the order: is necessary to avoid a likelihood of harm to the minor resulting from severing the legal relationship with the former guardian; would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child; and is in the best interest of the minor due to the existing relationship between the child and the former guardian because the former guardian was a primary caregiver and custodian of the child for a significant period of time.

FLAC also recommends that the statute require a court to give due consideration to the specific objections of the parent to the entry of an order and to determine whether ordering a period of

transitional arrangements is sufficient to mitigate harm to the minor. FLAC's proposed language also makes clear that a court terminating a guardianship has jurisdiction to enter an order under this subsection, and that such court would have continuing jurisdiction unless a different court would have exclusive jurisdiction under the Home Court Act.

Dated: December 1, 2019

Respectfully submitted:
Maine Family Law Advisory Commission

Hon. E. Mary Kelly, District Court Judge (Chair)
Hon. Wayne Douglas, Superior Court Justice
Hon. Steven Chandler, Family Law Magistrate
Hon. Elizabeth Mitchell, Kennebec County Probate Judge
Franklin L. Brooks, Ph.D., LCSW
Timothy Robbins, Esq., 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

# Appendix

## Family Law Advisory Commission Recommendations for Legislation

## A. Amendments to Agency Consent and Age of Minor Consent to Adoption

**Sec. A-1. 18-C MRSA §9-302** is amended to read:

**18-C M.R.S.A. § 9-302. Consent for adoption**

**1. Written consent**. Before an adoption is granted, written consent to the adoption must be given by:

A. The adoptee, if the adoptee is ~~14~~ 12 years of age or older;

B. Each of the adoptee's living parents, except as provided in subsection 2;

C. A person or agency having legal custody or guardianship of the adoptee if the adoptee is a child or to whom the child has been surrendered and released, except that the person's or agency's lack of consent, if adjudged unreasonable by a court, may be overruled by the court. In order for the court to find that the person or agency acted unreasonably in withholding consent, the petitioner must prove, by a preponderance of the evidence, that the person or agency acted unreasonably. The court shall determine whether the person or agency acted unreasonably in withholding consent prior to any hearing on whether to grant the adoption decree.

The court may hold a pretrial conference to determine who will proceed. The court may determine that even though the burden of proof ~~is~~ remains on the petitioner at all times, the person or agency should present its reasons for withholding consent and the facts supporting the decision before the petitioner presents its evidence ~~proceed if the person or agency has important facts necessary to the petitioner in presenting the petitioner's case~~. The court shall consider the following:

(1) Whether the person or agency determined the needs and interests of the child;

(2) Whether the person or agency determined the ability of the petitioner and other prospective families to meet the child's needs;

(3) Whether the person or agency made the decision consistent with the facts;

(4) Whether the harm of removing the child from the child's current placement outweighs any inadequacies of that placement; ~~and~~

(5) Whether an agency withholding consent to the petitioner consented to the adoption of the child by a person who is a pre-adoptive parent pursuant to Title 22, section 4002, subsection 9-A, or who was identified as an appropriate permanency placement in a court-approved permanency plan pursuant to Title 22, section 4038-B; and

(6) All other factors that have a bearing on a determination of the reasonableness of the person's or agency's decision in withholding consent; and

D. A guardian appointed by the court, if the adoptee is a child, when the child has no living parent, guardian or legal custodian who may consent

A petition for adoption must be pending before a consent is executed.

…

~~**3. Consent by department; notice.** When the department consents to the adoption of a child in its custody, the department shall immediately notify:~~

~~A. The District Court in which the action under Title 22, chapter 1071 is pending; and~~

~~B. The guardian ad litem for the child.~~

**4. Consent by department; notice**. This subsection applies when the department consents to the adoption of a child in its custody.

A. When the department consents to the adoption of a child in its custody, the department shall immediately notify:

(1) The District Court in which the action under Title 22, chapter 1071 is pending; and

(2) The guardian ad litem for the child.

B. The department may consent to more than one person petitioning to adopt a child in its custody. In such cases, the court may request that the department provide information and a recommendation regarding the petitioners.

## B. Amendments Regarding Termination of Parental Rights by a Parent or Guardian

**FLAC will provide recommendations in a Supplemental Report in January 2020.**

## C. Amendments Regarding Termination of Parental Rights in the Context of Adoption

**Sec. C-1. 18-C MRSA §9-204** is amended to read:

**18-C M.R.S.A. §9-204. Termination of parental rights**

**1. Petition for termination; adoption petition brought solely by parent.** A petition for termination of parental rights may be brought in the court in which a petition for adoption is properly filed as part of that petition for adoption. A petition for termination of parental rights may not be included as part of a petition for adoption brought solely by another parent of the child unless the adoption is sought to confirm the parentage status of the petitioning parent.

**2. Title 22, chapter 1071, subchapter 6 applies.** Except as otherwise provided by this section, a termination of parental rights petition is subject to the provisions of Title 22, chapter 1071, subchapter 6.

**3. Grounds for Termination.** The court may order termination of parental rights if:

A. The parent consents to the termination after a judge has fully explained the effects of a termination order and such consent is ~~. Consent must be~~ written and voluntarily and knowingly executed in court before a judge~~. The judge shall explain the effects of a termination order~~; or

B. The court finds, based on clear and convincing evidence, that:

(1) Termination is in the best interest of the child; and

(2) Either:

(a) The parent is unwilling or unable to protect the child from jeopardy, as defined by Title 22, section 4002, subsection 6, and these circumstances are unlikely to change within a time that is reasonably calculated to meet the child's needs;

(b) The parent has been unwilling or unable to take responsibility for the child within a time that is reasonably calculated to meet the child's needs; or

(c) The parent has abandoned the child, as described in Title 22, section 4002, subsection 1-A.

~~In making findings pursuant to this paragraph, the court may 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 nonprofit agencies.~~

**3-A. Required findings**. The court shall make specific written findings addressing the standards in subsection 3, paragraph B and the court shall consider the following:

A. With respect to subsection 3, paragraph B, subparagraph (1), the background and qualities of the prospective adoptive parent; and

B. With respect to subsection 3, paragraph B, subparagraph (2), the extent to which the parent who is the subject of the petition had opportunities to rehabilitate and to reunify with the child or to maintain a relationship 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 nonprofit agencies.

**4. Guardian ad litem for child.** The court may appoint a guardian ad litem for a child who is the subject of a petition for termination of parental rights under subsection 1. The appointment must be made as soon as possible after the petition for termination of parental rights is initiated.

A. The court shall pay reasonable costs and expenses for the guardian ad litem.

B. In general, the guardian ad litem shall act in pursuit of the best interest of the child. The guardian ad litem must be given access to all reports and records relevant to the case and investigate to ascertain the facts. The investigation must include, when possible and appropriate:

(1) Reviewing records of psychiatric, psychological or physical examinations of the child, parents or other persons having or seeking care or custody of the child;

(2) Review of relevant school records and other pertinent materials;

(3) Interviewing the child with or without other persons present; and

(4) Interviews with parents, guardians, teachers and other persons who have been involved in caring for or treating the child.

The guardian ad litem may subpoena, examine and cross-examine witnesses and shall make recommendations to the court.

## D. Amendments for Sibling-Specific Post-Adoption Contact

**Sec. D-1. 22 MRSA §4002, sub-§11-A** is enacted to read:

**22 M.R.S.A. § 4002. Definitions**

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings. …

**11-A. Sibling**. "Sibling" means a person with whom the child shares at least one parent.

**Sec. D-2. 18-C MRSA §9-308** is amended to read:

**18-C M.R.S.A. § 9-308. Final decree; dispositional hearing; effect of adoption; post-adoption contact with siblings**

**1. Final decree of adoption; requirements.** The court shall grant a final decree of adoption if the petitioner who filed the petition has been heard or has waived hearing and the court is satisfied from the hearing or record that:

A. All necessary consents, relinquishments or terminations of parental rights have been duly executed and filed with the court;

B. An adoption study, when required by section 9-304, has been filed with the court;

C. A list of all disbursements as required by section 9-306 has been filed with the court;

D. The petitioner is a suitable adopting parent and desires to establish a parent-child relationship with the adoptee;

E. The best interest of the adoptee, described in subsection 2, are served by the adoption;

F. The petitioner has acknowledged that the petitioner understands that the transfer of the long-term care and custody of an adoptee who is a minor child without a court order is prohibited under Title 17-A, section 553, subsection 1, paragraphs C and D; and

G. All requirements of this Article have been met.

**2. Best interest of adoptee.** In determining the best interest of an adoptee, the court shall consider and evaluate the following factors to give the adoptee a permanent home at the earliest possible date:

A. The love, affection and other emotional ties existing between the adoptee and the adopting person or persons, a parent or a putative parent;

B. The capacity and disposition of the adopting person or persons, the parent or parents or the putative parent to educate and give the adoptee love, affection and guidance and to meet the needs

of the adoptee. An adoption may not be delayed or denied because the adoptive parent and the adoptee do not share the same race, color or national origin; and

C. The capacity and disposition of the adopting person or persons, the parent or parents or the putative parent to provide the adoptee with food, clothing and other material needs, education, permanence and medical care or other remedial care recognized and permitted in place of medical care under the laws of this State.

**3. Findings; decree; confidentiality.** The court shall enter its findings in a written final decree that includes the new name of the adoptee. The final decree must further order that from the date of the decree the adoptee is the child of the petitioner and must be accorded the status set forth in section 9-105. If the court determines that it is in the best interest of the adoptee, the court may require that the names of the adoptee and of the petitioner be kept confidential.

**4. Notice to parents.** Upon completion of an adoption proceeding, the parents who consented to an adoption or who executed a surrender and release must be notified by the court of the completion by regular mail at their last known address. Notice under this subsection is not required to a parent who is also a petitioner. When the parents' rights have been terminated pursuant to Title 22, section 4055, the notice must be given to the department and the department shall notify the parents of the completion by regular mail at their last known address. Actual receipt of the notice is not a precondition of completion and does not affect the rights or responsibilities of adoptees or adoptive parents.

**5. Notice to grandparents and siblings**. The department shall notify the grandparents of a child when the child is placed for adoption if the department has received notice that the grandparents were granted reasonable rights of visitation or access under Title 19-A, chapter 59 or Title 22, section 4005-E and shall notify any siblings of the child who has visitation or other contact with the child pursuant to an agreement or order under Title 22, section 4068.

**6. Effect of adoption.** An order granting the adoption has the following effect:

A. An order granting the adoption of the child by the petitioner divests the parent and child of all legal rights, powers, privileges, immunities, duties and obligations to each other as parent and child, except an adoptee inherits from the adoptee's former parents if provided in the adoption decree.

B. An adoption order may not disentitle a child to benefits due the child from any 3rd person, agency or state or the United States and may not affect the rights and benefits that a Native American derives from descent from a member of a federally recognized Indian tribe.

**7. Post-adoption contact agreements regarding siblings; inquiry of minor adoptee**. If the adoptee is the subject of an existing agreement or order pursuant to Title 22, section 4068, such agreement or order must be referenced in and attached to the adoption decree unless the court finds that such agreement or order is no longer in the adoptee's best interest. The court may modify the existing agreement or order before referencing and attaching it to the decree. A person's failure to follow such agreement after the adoption decree has been entered may not be a basis to set aside the decree.

If a minor adoptee is or will be separated from a sibling as a result of the adoption and there is no existing agreement for postadoption contact between siblings, a court entering an adoption decree may, at such time, order the adoptive parents to provide specific postadoption communication or contact, including, but not limited to, visits, written correspondence, or calls for an adopted child who is at least 2 years of age with a sibling if:

A. The court determines that the postadoption contact would serve the best interests of the adoptee and the adoptee's sibling; and

B. Each sibling's parent, guardian or custodian has consented to the court's order for postadoption contact privileges. If the adoptee is age 12 or older, the adoptee must consent to any agreement for post-adoption contact. If the adoptee is younger than 12, the court shall determine the preference of the child, if the child is old enough to express a meaningful preference. Such determination may be made with assistance of a guardian ad litem.

**Sec. D-3. 22 MRSA §4068** is amended to read:

**22 M.R.S.A. § 4068. Sibling visitation; postadoption contact**

**1. Visitation.** If the court determines that it is reasonable, practicable and in the best interests of the children involved, the court shall order the custodian of the child who is the subject of the child protection proceeding and any party who is the custodian of a sibling of the child to make the children available for visitation with each other. The court may order a schedule and conditions pursuant to which the visits are to occur.

**2. Siblings separated through adoption**. ~~The~~ Before the adoption occurs, the department shall make reasonable efforts to establish agreements with prospective adoptive parents that provide for reasonable contact between an adoptive child and the child's siblings when the department believes that the contact will be in the children's best interests. These agreements may allow for communication or contact including, but not limited to, visits, written correspondence or calls between a child to be adopted and one or more the child's siblings.

The court may approve an agreement for postadoption communication or contact, including, but not limited to, visits, written correspondence or calls, between a child to be adopted and one or more of the child's siblings based on a finding that it is in the best interests of the adoptee and the adoptee's sibling and a determination that the parent, guardian or custodian of each sibling has consented to the agreement. If the child is age 12 or older, the court may not approve the agreement unless the child consents to the agreement. If the child is younger than 12, the court shall determine the preference of the child, if the child is old enough to express a meaningful preference. Such determination may be made with assistance of a guardian ad litem.

An adoptive parent is not required to make such an agreement but, if such an agreement is made and approved by the court at the time it is made, it is judicially enforceable, as long as the court finds it in the best interest of the siblings to enforce the agreement. Revocation of the adoption is not a remedy for failure to honor the agreement for post-adoption contacts.

**3. Request of child; inquiry of child; appointment of attorney for child**. In a child protection proceeding or related adoption proceeding, a child may request visitation, communication or contact rights pursuant to subsection 1 or 2 with a sibling from whom the child has been separated as a result of the ~~child protection~~ proceeding. If a child is or will be separated from a sibling as a result of a placement or permanency outcome and no order is in place pursuant to subsection 1 or no agreement is in place pursuant to subsection 2, the court shall inquire of the child whether the child would like visitation, communication or contact with the sibling. Such inquiry may be made with the assistance of a guardian ad litem. The court may appoint counsel for a child requesting visitation, communication or contact with a sibling.

## E. Amendment to Consolidate All Adoptions in Title 18-C, Maine Adoption Act

**Sec. E-1. 22 MRSA §4038-C, sub-§2** is amended to read:

**22 M.R.S.A. §4038-C. Permanency guardian**

…

**2**. **Powers and duties of permanency guardian**. A permanency guardian has all of the powers and duties of a guardian of a minor pursuant to Title 18-C, sections 5-207 and 5-208. A permanency guardianship terminates upon the minor's death, adoption or attainment of majority or as ordered by the court pursuant to this section.

…

**Sec. E-2. 22 MRSA §4038-E** is repealed and the following is enacted in its place:

**22 M.R.S.A. §4038-E. Adoption from permanency guardianship**

A permanency guardian may petition the District Court to adopt the child in the permanency guardian's care and to change the child's name upon the issuance of the adoption decree. Such petition must be filed and adjudicated in accordance with Title 18-C, Article 9, except that the adoption may not be granted unless each living parent identified in the child protection action whose rights have not been terminated have executed a consent to the adoption pursuant to Title 18-C, section 9-202 or the court finds that such consent is not required pursuant to Title 18-C, section 9-302, subsection 2. A permanency guardian may not seek an order terminating the parental rights of a parent as part of a petition to adopt the child.

## F. Amendments for Post-Guardianship Contact

**Sec. F-1. 18-C MRSA §5-211** is amended to read:

**§5-211. Transitional arrangement for minors; continued contact with former guardian after termination**

**1. Transitional arrangements.** In issuing, modifying or terminating an order of guardianship for a minor, the court may enter an order providing for transitional arrangements for the minor if the court determines that such arrangements will assist the minor with a transition of custody and are in the best interest of the minor. Orders providing for transitional arrangements may include, but are not limited to, rights of contact, housing, counseling or rehabilitation. Such orders must be time-limited and expire no later than 6 months after the entry of the order or at the conclusion of the child's current school year, whichever occurs later. In determining the best interest of the minor, a court may consider the minor's relationship with the guardian and need for stability.

**2. Continued contact with former guardian after termination.** On timely motion of a guardian or a parent, the court terminating the guardianship may enter an order at the time of such termination or the expiration of a transitional arrangement providing for communication or contact, including overnight visitation, between a minor and the former guardian after the termination of the guardianship if:

A. The parent and guardian consent to such order; or

B. The court finds by clear and convincing evidence that ordering such continued communication or contact over the objection of the minor's parent:

(1) Is necessary to avoid a likelihood of harm to the minor resulting from severing the legal relationship with the former guardian;

(2) Would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child; and

(3) Is in the best interest of the minor due to the existing relationship between the child and the former guardian because the former guardian was a primary caregiver and custodian of the child for a significant period of time.

Before ordering communication or contact pursuant to paragraph B the court must grant due consideration to the specific objections of the parent to the entry of an order and determine whether ordering a period of transitional arrangements pursuant to subsection 1 is sufficient to mitigate harm to the minor. Except as Title 4, section 152, subsection 5-A may otherwise require, the court issuing the order for post-guardianship contact has continuing jurisdiction to modify, enforce, or terminate such order and shall follow the procedure set forth in section 5-210.