Parental Rights Disputes in Probate Court: Questions, Conflicts, and Strategies

This panel will consider the current role of Maine's probate courts in parental rights disputes, particularly in the guardianship and adoption context. The panel will explain the current state of probate court jurisdiction and potential intersections with state court jurisdiction, discuss best practices for judges and practitioners where there are related state court proceedings, and consider how the dual court jurisdiction may be adjusted to better serve Maine families.

The Honorable Wayne R. Douglas, Maine District Court judge and chair of the Family Law Advisory Commission.

Janet K. Kantz, Partner in the Portland law firm of Vincent, Kantz, Pittman & Thompson, LLC.

The Honorable Joseph Mazziotti, Judge of Probate for Cumberland County since 2004.

Barbara Raimondi, Partner in the Auburn law firm of Trafton and Matzen, LLP.

Deirdre M. Smith (moderator), Professor of Law and Director of the Cumberland Legal Aid Clinic at the University of Maine School of Law.

List of Materials:

4 MRS § 251 (Jurisdiction of Probate Court)
18-A MRS §§ 5-101, 5-102 (Definitions applicable to guardianship and jurisdiction)
18-A MRS § 5-201 – 5-213 (Guardianship and child support)
18-A MRS §§ 9-102, 9-103 (Definitions applicable to adoptions and jurisdiction)
18-A MRS §§ 9-201 – 9-205 (Establishment and termination of parental rights in Probate Court)
18-A MRS § 9-302 (Consent for adoption)
19-A MRS § 652(8) (Marriage licenses for persons under 16)
19-A MRS §§ 1652, 1653 (Support obligation and parental rights and responsibilities)
19-A MRS § 1654 (Parenting and support when parents live apart)
22 MRS §§ 4002, 4003 (Definitions applicable in child protection cases and statutory purposes)
22 MRS § 4031 (Jurisdiction in child protection cases)
22 MRS § 4038E (Adoption from permanency guardianship)
Marin v. Marin, 797 A.2d 1265 (Me. 2002)
In re Austin T., 2006 ME 28
Philbrook v. Theriault, 2008 ME 152
In re Guardianship of Jewel, 2010 ME 80
In re L.E., 2012 ME 127

§251 PDF
§251 MS-Word
STATUTE SEARCH
CH. 7 CONTENTS
TITLE 4 CONTENTS
LIST OF TITLES
DISCLAIMER
MAINE LAW
REVISOR'S OFFICE
MAINE LEGISLATURE

§251. General jurisdiction

Each judge may take the probate of wills and grant letters testamentary or of administration on the estates of all deceased persons who, at the time of their death, where inhabitants or residents of his county or who, not being residents of the State, died leaving estate to be administered in his county, or whose estate is afterwards found therein; and has jurisdiction of all matters relating to the settlement of such estates. He may grant leave to adopt children, change the names of persons, appoint guardians for minors and others according to law, and has jurisdiction as to persons under guardianship, and as to whatever else is conferred on him by law.

Data for this page extracted on 12/03/2013 11:49:25.

The Revisor's Office cannot provide legal advice or interpretation of Maine law to the public.
If you need legal advice, please consult a qualified attorney.

Office of the Revisor of Statutes
7 State House Station
State House Room 108
Augusta, Maine 04333-0007

E. The Attorney General, or the Attorney General's designee.

2. Terms. A member is appointed for a term of 3 years and may be reappointed.

3. Vacancies. In the event of the death or resignation of a member, the appointing authority under subsection 1 shall appoint a qualified person for the remainder of the term.

2009, c. 262, § 2.

§ 1–802. Consultants; experts

Whenever it considers appropriate, the commission shall seek the advice of consultants or experts, including representatives of the legislative and executive branches, in fields related to the commission's duties.

2009, c. 262, § 2.

§ 1–803. Duties

1. Examine, evaluate and recommend. The commission shall:

A. Examine this Title and Title 18–B and draft amendments that the commission considers advisable;

B. Evaluate the operation of this Title and Title 18–B and recommend amendments based on the evaluation;

C. Examine current laws pertaining to probate and trust laws and recommend changes based on the examination; and

D. Examine any other aspects of the State's probate and trust laws, including substantive, procedural and administrative matters, that the commission considers relevant.

2. Propose changes. The commission may propose to the Legislature, at the start of each session, changes in the probate and trust laws and in related provisions that the commission considers appropriate.

2009, c. 262, § 2.

§ 1–804. Organization

The Chief Justice of the Supreme Judicial Court shall notify all members of the commission of the time and place of the first meeting of the commission. At that time the commission shall organize, elect a chair, vice-chair and secretary-treasurer from its membership and adopt rules governing the administration of the commission and its affairs. The commission shall maintain financial records as required by the State Auditor.

2009, c. 262, § 2.

§ 1–805. Federal funds

The commission may accept federal funds on behalf of the State.

2009, c. 262, § 2.

ARTICLE V

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

PART 1

GENERAL PROVISIONS

Section

§ 5–101. Definitions and use of terms

Unless otherwise apparent from the context, in this Code:

(1) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person;

(1–A) The "best interest of the child" is determined according to this subsection.

(a) In determining the best interest of the child the court shall consider the following factors:

(1) The wishes of the party or parties as to custody;

(2) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference;

(3) The child's primary caregiver;

(4) The bonding and attachment between each party and the child;

(5) The interaction and interrelationship of the child with a party or parties, siblings and any other person who may significantly affect the child's best interest;

(6) The child's adjustment to home, school and community;

(7) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(8) The permanence, as a family unit, of the existing or proposed home;

(9) The mental and physical health of all individuals involved;

(10) The child's cultural background;

(11) The capacity and disposition of the parties to give the child love, affection and

guidance and to continue educating and raising the child in the child's culture and religion or creed, if any;

(12) The effect on the child of the actions of an abuser if related to domestic violence that has occurred between the parents or other parties; and

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

(b) The court may not consider any one of the factors set out in paragraph (a) to the exclusion of all others;

(1–B) "De facto guardian" means an individual with whom, within the 24 months immediately preceding the filing of a petition under section 5–204, subsection (d), a child has resided for the following applicable period and during which period there has been a demonstrated lack of consistent participation by the parent or legal custodian:

(a) If the child at the time of filing the petition is under 3 years of age, 6 months or more, which need not be consecutive; or

(b) If the child at the time of filing the petition is at least 3 years of age, 12 months or more, which need not be consecutive.

"De facto guardian" does not include an individual who has a guardian's powers delegated to the individual by a parent or guardian of a child under section 5–104, adopts a child under Article 9 [1] or has a child placed in the individual's care under Title 22, chapter 1071 [2];

(1–C) "Demonstrated lack of consistent participation" means refusal or failure to comply with the duties imposed upon a parent by the parent-child relationship, including but not limited to providing the child necessary food, clothing, shelter, health care, education, a nurturing and consistent relationship and other care and control necessary for the child's physical, mental and emotional health and development.

In determining whether there has been a demonstrated lack of consistent participation in the child's life by the parent or legal custodian, the court shall consider at least the following factors:

(a) The intent of the parent, parents or legal custodian in placing the child with the person petitioning as a de facto guardian;

(b) The amount of involvement the parent, parents or legal custodian had with the child during the parent's, parents' or legal custodian's absence;

(c) The facts and circumstances of the parent's, parents' or legal custodian's absence;

(d) The parent's, parents' or legal custodian's refusal to comply with conditions for retaining custody set forth in any previous court orders; and

(e) Whether the nonconsenting parent, parents or legal custodian was previously prevented from participating in the child's life as a result of domestic violence or child abuse or neglect.

Serving as a member of the United States Armed Forces may not be considered demonstration of lack of consistent participation;

(2) A "protective proceeding" is a proceeding under the provisions of section 5–401 to determine that a person cannot effectively manage or apply his estate to necessary ends, either because he lacks the ability or is otherwise inconvenienced, or because he is a minor, and to secure administration of his estate by a conservator or other appropriate relief;

(3) A "protected person" is a minor or other person for whom a conservator has been appointed or other protective order has been made;

(4) A "ward" is a person for whom a guardian has been appointed. A "minor ward" is a minor for whom a guardian has been appointed solely because of minority.

1979, c. 540, § 1, eff. Jan. 1, 1981; 2005, c. 371, § 1.

1 18–A M.R.S.A. § 9–101 et seq.
2 22 M.R.S.A. § 4001 et seq.

§ 5–102. Jurisdiction of subject matter; consolidation of proceedings

(a) The court has exclusive jurisdiction over guardianship proceedings and has jurisdiction over protective proceedings to the extent provided in section 5–402.

(b) When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

1979, c. 540, § 1, eff. Jan. 1, 1981.

§ 5–103. Facility of payment or delivery

Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding $5,000 per year, by paying or delivering the money or property to (1) the minor, if married; (2) any person having the care and custody of the minor with whom the minor resides; (3) a guardian of the minor; or (4) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor. This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending. Persons who pay or deliver money or property in accordance with the provisions of this section are not responsible for actions taken by another after payment or delivery. The persons, other than the minor or any financial institution under (4) above, receiving money or property for a minor, are obligated to apply the money to the support and education of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. Any

excess sums must be preserved for future support of the minor and any balance not so used and any property received for the minor must be turned over to the minor when the minor attains majority. Prior to distribution, the custodian of the money or property shall account to the court and the minor.

1979, c. 540, § 1, eff. Jan. 1, 1981; 1991, c. 641, § 1.

§ 5–104. Delegation of powers by parent or guardian

(a) A parent or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding 12 months, any of that parent's or guardian's powers regarding care, custody or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward. A delegation by a court-appointed guardian becomes effective only when the power of attorney is filed with the court.

(b) Notwithstanding subsection (a), unless otherwise stated in the power of attorney, if the parent or guardian is a member of the National Guard or Reserves of the United States Armed Forces under an order to active duty for a period of more than 30 days, a power of attorney that would otherwise expire is automatically extended until 30 days after the parent or guardian is no longer under those active duty orders or until an order of the court so provides.

This subsection applies only if the parent or guardian's service is in support of:

(1) An operational mission for which members of the reserve components have been ordered to active duty without their consent; or

(2) Forces activated during a period of war declared by Congress or a period of national emergency declared by the President or Congress.

1979, c. 540, § 1, eff. Jan. 1, 1981; 1979, c. 690, § 17, eff. Jan. 1, 1981; 1997, c. 455, § 7; 2003, c. 583, § 2; 2011, c. 43, § 1.

§ 5–105. Limited guardianships

In any case in which a guardian can be appointed by the court, the judge may appoint a limited guardian with fewer than all of the legal powers and duties of a guardian. The specific duties and powers of a limited guardian shall be enumerated in the decree or court order. A person for whom a limited guardian has been appointed retains all legal and civil rights except those which have been suspended by the decree or order.

1979, c. 540, § 1, eff. Jan. 1, 1981.

PART 2

GUARDIANS OF MINORS

Section

§ 5–201. Status of guardian of minor; general

A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward. This section does not apply to permanency guardians appointed in District Court child protective proceedings. If a minor has a permanency guardian, the court may not appoint another guardian without leave of the District Court in which the child protective proceeding is pending.

1979, c. 540, § 1, eff. Jan. 1, 1981; 2005, c. 372, § 1.

§ 5–202. Testamentary appointment of guardian of minor

The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under section 5–203, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated, if before acceptance, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority. This State recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile. Upon acceptance of appointment, written notice of acceptance must be given by the guardian to the minor and to the person having his care, or to his nearest adult relation.

1979, c. 540, § 1, eff. Jan. 1, 1981.

§ 5–203. Objection by minor of 14 or older to testamentary appointment

A minor of 14 or more years may prevent an appointment of his testamentary guardian from becoming effective, or may cause a previously accepted appointment to terminate, by filing with the court in which the will is probated a written objection to the appointment before it is accepted or within 30 days after notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment by

the court in a proper proceeding of the testamentary nominee, or any other suitable person.
1979, c. 540, § 1, eff. Jan. 1, 1981.

§ 5–204. Court appointment of guardian of minor; conditions for appointment

The court may appoint a guardian or coguardians for an unmarried minor if:

(a) All parental rights of custody have been terminated or suspended by circumstance or prior court order;

(b) Each living parent whose parental rights and responsibilities have not been terminated or the person who is the legal custodian of the unmarried minor consents to the guardianship and the court finds that the consent creates a condition that is in the best interest of the child;

(c) The person or persons whose consent is required under subsection (b) do not consent, but the court finds by clear and convincing evidence that the person or persons have failed to respond to proper notice or a living situation has been created that is at least temporarily intolerable for the child even though the living situation does not rise to the level of jeopardy required for the final termination of parental rights, and that the proposed guardian will provide a living situation that is in the best interest of the child; or

(d) The person or persons whose consent is required under subsection (b) do not consent, but the court finds by a preponderance of the evidence that there is a de facto guardian and a demonstrated lack of consistent participation by the nonconsenting parent or legal custodian of the unmarried minor. The court may appoint the de facto guardian as guardian if the appointment is in the best interest of the child.

A guardian appointed by will as provided in section 5–202 whose appointment has not been prevented or nullified under section 5–203 has priority over any guardian who may be appointed by the court but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

If a proceeding is brought under subsection (c) or subsection (d), the nonconsenting parent or legal custodian is entitled to court-appointed legal counsel if indigent. In a contested action, the court may also appoint counsel for any indigent de facto guardian, guardian or petitioner when a parent or legal custodian has counsel.

If a proceeding is brought under subsection (b), subsection (c) or subsection (d), the court may order a parent to pay child support in accordance with Title 19–A, Part 3. When the Department of Health and Human Services provides child support enforcement services, the Commissioner of Health and Human Services may designate employees of the department who are not attorneys to represent the department in court if a hearing is held. The commissioner shall ensure that appropriate training is provided to all employees who are designated to represent the department under this paragraph.

If the court appoints a limited guardian, the court shall specify the duties and powers of the guardian, as required in section 5–105, and the parental rights and responsibilities retained by the parent of the minor.
1979, c. 540, § 1, eff. Jan. 1, 1981; 1995, c. 623, § 1; 1999, c. 46, § 1; 2001, c. 554, § 2, eff. March 25, 2002; 2005, c. 371, § 2.

§ 5–205. Court appointment of guardian of minor; venue

The venue for guardianship proceedings for a minor is in the place where the minor resides or is present.
1979, c. 540, § 1, eff. Jan. 1, 1981.

§ 5–206. Court appointment of guardian of minor; qualifications; priority of minor's nominee

The court may appoint as guardian any person, or as coguardians more than one person, whose appointment is in the best interest of the minor. The court shall set forth in the order of appointment the basis for determining that the appointment is in the best interest of the minor. The court shall appoint a person nominated by the minor, if the minor is 14 years of age or older, unless the court finds the appointment contrary to the best interest of the minor. The court may not appoint a guardian for a minor child who will be removed from this State for the purpose of adoption.
1979, c. 540, § 1, eff. Jan. 1, 1981; 1993, c. 686, § 2; 2005, c. 371, § 3.

§ 5–207. Court appointment of guardian of minor; procedure

(a) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner in the manner prescribed by court rule under section 1–401 to:

(1) The minor, if he is 14 or more years of age;

(2) The person who has had the principal care and custody of the minor during the 60 days preceding the date of the petition; and

(3) Any living parent of the minor.

(b) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 5–204 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will best serve the interest of the minor.

(c) If necessary, the court may appoint a temporary guardian, with the status of an ordinary guardian of a minor, but the authority of a temporary guardian may

not last longer than 6 months, except as provided in subsection (c–1).

Notice of hearing on the petition for the appointment of a temporary guardian must be served as provided under subsection (a), except that the notice must be given at least 5 days before the hearing, and notice need not be given to any person whose address and present whereabouts are unknown and can not be ascertained by due diligence. Upon a showing of good cause, the court may waive service of the notice of hearing on any person, other than the minor, if the minor is at least 14 years of age.

(c–1) If one of the parents of a minor is a member of the National Guard or the Reserves of the United States Armed Forces under an order to active duty for a period of more than 30 days, a temporary guardianship that would otherwise expire is automatically extended until 30 days after the parent is no longer under those active duty orders or until an order of the court so provides. This subsection applies only if the parent's service is in support of:

(1) An operational mission for which members of the reserve components have been ordered to active duty without their consent; or

(2) Forces activated during a period of war declared by Congress or a period of national emergency declared by the President or Congress.

(d) If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is fourteen years of age or older.

1979, c. 540, § 1, eff. Jan. 1, 1981; 1999, c. 303, § 1; 2003, c. 583, §§ 3, 4.

§ 5–208. Consent to service by acceptance of appointment; notice

By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian, or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner. Letters of guardianship must indicate whether the guardian was appointed by will or by court order.

1979, c. 540, § 1, eff. Jan. 1, 1981.

§ 5–209. Powers and duties of guardian of minor

A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of a minor and unemancipated child, except that a guardian is not legally obligated to provide from the guardian's own funds for the ward and is not liable to 3rd persons by reason of the parental relationship for acts of the ward. In particular, and without qualifying the foregoing, a guardian has the following powers and duties.

(a) The guardian must take reasonable care of the ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.

(b) The guardian may receive money payable for the support of the ward to the ward's parent, guardian or custodian under the terms of any statutory benefit or insurance system, or any private contract, devise, trust, conservatorship or custodianship. The guardian also may receive money or property of the ward paid or delivered by virtue of section 5–103. Any sums so received must be applied to the ward's current needs for support, care and education. The guardian must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case excess must be paid over at least annually to the conservator. Sums so received by the guardian may not be used for compensation for the guardian's services except as approved by order of court or as determined by a duly appointed conservator other than the guardian. If there is no conservator, the excess funds must be turned over to the minor when the minor attains majority. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

(c) The guardian is empowered to facilitate the ward's education, social or other activities and to give or withhold consents or approvals related to medical, health or other professional care, counsel, treatment or service for the ward. The guardian is empowered to withhold or withdraw life-sustaining treatment as set forth in section 5–312, subsection (a), paragraph (3). A guardian is not liable by reason of such giving or withholding of consent for injury to the ward resulting from the negligence or acts of 3rd persons unless it would have been illegal for a parent to have so given or withheld consent. A guardian may consent to the marriage or adoption of the ward.

(d) A guardian must report the condition of the ward and of the ward's estate that has been subject to that guardian's possession or control, as ordered by court on petition of any person interested in the minor's welfare or as required by court rule. If the guardian has received any funds pursuant to section 5–103, the guardian shall account to the court and the minor regarding how the funds were expended prior to the termination of that person's responsibilities as guardian.

1979, c. 540, § 1, eff. Jan. 1, 1981; 1991, c. 641, §§ 2, 3; 1991, c. 719, § 1; 1993, c. 349, §§ 40, 41, eff. June 16, 1993; 1995, c. 378, § B–1.

§ 5–210. Termination of appointment of guardian; general

A guardian's authority and responsibility terminates upon the death, resignation or removal of the guardian

or upon the minor's death, adoption, marriage or attainment of majority, but termination does not affect his liability for prior acts, nor his obligation to account for funds and assets of his ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

1979, c. 540, § 1, eff. Jan. 1, 1981.

§ 5–211. Proceedings subsequent to appointment; venue

(a) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever is in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian must be sent to the court in which acceptance of appointment is filed.

1979, c. 540, § 1, eff. Jan. 1, 1981; 2005, c. 371, § 4.

§ 5–212. Resignation or removal proceedings

(a) Any person interested in the welfare of a ward, or the ward, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

(b) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(c) If, at any time in the proceeding, the court determines that the interests of the ward are, or may be, inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years of age.

(d) The court may not terminate the guardianship in the absence of the guardian's consent unless the court finds by a preponderance of the evidence that the termination is in the best interest of the ward. The petitioner has the burden of showing by a preponderance of the evidence that termination of the guardianship is in the best interest of the ward. If the court does not terminate the guardianship, the court may dismiss subsequent petitions for termination of the guardianship unless there has been a substantial change of circumstances.

(e) In a contested action, the court may appoint counsel for any indigent guardian or petitioner.

1979, c. 540, § 1, eff. Jan. 1, 1981; 1995, c. 623, § 2; 2005, c. 371, §§ 5, 6.

§ 5–213. Transitional arrangements for minors

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 child. Orders providing for transitional arrangements may include, but are not limited to, rights of contact, housing, counseling or rehabilitation.

2011, c. 43, § 2.

PART 3

GUARDIANS OF INCAPACITATED PERSONS

Section

§ 5–301. Testamentary appointment of guardian for incapacitated person

(a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given 7 days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is formally or informally probated, if prior thereto both parents are dead or the surviving parent is judged incapacitated, and if the incapacitated person is not under the care of his spouse. If both parents are dead, an effective appointment by the parent who died later has priority unless it is

SUBPART 4

MISCELLANEOUS PROVISIONS

§ 5–961. Uniformity of application and construction

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

2009, c. 292, § 2, eff. July 1, 2010.

§ 5–962. Relation to Electronic Signatures in Global and National Commerce Act

This Part modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 United States Code, Section 7001 et seq., but does not modify, limit or supersede 15 United States Code, Section 7001(c), or authorize electronic delivery of any of the notices described in 15 United States Code, Section 7003(b).

2009, c. 292, § 2, eff. July 1, 2010.

§ 5–963. Effect on existing powers of attorney

Except as otherwise provided in this Part, on July 1, 2010:

(a). This Part applies to a power of attorney created before, on or after July 1, 2010;

(b). This Part applies to a judicial proceeding concerning a power of attorney commenced on or after July 1, 2010; and

(c). This Part applies to a judicial proceeding concerning a power of attorney commenced before July 1, 2010, unless the court finds that application of a provision of this Part would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies.

An Act done before July 1, 2010 is not affected by this Part.

2009, c. 292, § 2, eff. July 1, 2010.

§ 5–964. Effective date

This Part takes effect July 1, 2010.

2009, c. 292, § 2, eff. July 1, 2010.

ARTICLE IX

ADOPTION

PART 1

GENERAL PROVISIONS

§ 9–101. Short title

This article may be known and cited as "The Adoption Act."

1995, c. 694, § C–7, eff. Oct. 1, 1997.

§ 9–102. Definitions

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

(a) "Adoptee" means a person who will be or who has been adopted, regardless of whether the person is a child or an adult.

(b) "Adoption services" means services related to adoptions, including but not limited to adoptive home studies, search services and adoption counseling services.

(c) "Adult" means a person who is 18 years of age or older.

(d) "Child" means a person who is under 18 years of age.

(e) "Consent," used as a noun, means a voluntary agreement to an adoption by a specific petitioner that is executed by a parent or custodian of the adoptee.

(f) "Department" means the Department of Health and Human Services.

(g) "Licensed child-placing agency" means an agency, person, group of persons, organization, association or society licensed to operate in this State pursuant to Title 22, chapter 1671.[1]

(h) "Parent" means the legal parent or the legal guardian when no legal parent exists.

(i) "Petitioner" means a person filing a petition to adopt an adult or child, and includes both petitioners under a joint petition, except as otherwise provided.

(j) "Putative father" means a man who is the alleged biological father of a child but whose paternity has not been legally established.

(k) "Surrender and release," used as a noun, means a voluntary relinquishment of all parental rights to a child to the department or a licensed child-placing agency for the purpose of placement for adoption.

1995, c. 694, § C–7, eff. Oct. 1, 1997.

1 22 M.R.S.A. § 8201 et seq.

§ 9–103. Jurisdiction

(a) The Probate Court has exclusive jurisdiction over the following:

(1) Petitions for adoption;

(2) Consents and reviews of withholdings of consent by persons other than a parent;

(3) Surrenders and releases;

(4) Termination of parental rights proceedings brought pursuant to section 9–204;

(5) Proceedings to determine the rights of putative fathers of children whose adoptions or surrenders and releases are pending before the Probate Court; and

(6) Reviews conducted pursuant to section 9–205.

(b) The District Court has jurisdiction to conduct hearings pursuant to section 9–205.

1995, c. 694, § C–7, eff. Oct. 1, 1997.

§ 9–104. Venue; transfer

(a) If the adoptee is placed by a licensed child-placing agency or the department, the petition for adoption must be filed in the court in the county where:

(1) The petitioner resides;

(2) The adoptee resides or was born; or

(3) An office of the agency that placed the adoptee for adoption is located.

(b) If the adoptee is not placed by a licensed child-placing agency or the department, the petition for adoption must be filed in the county where the adoptee resides or where the petitioners reside.

(c) If, in the interests of justice or for the convenience of the parties, the court finds that the matter should be heard in another probate court, the court may transfer, stay or dismiss the proceeding, subject to any further conditions imposed by the court.

1995, c. 694, § C–7, eff. Oct. 1, 1997; 1997, c. 239, § 1, eff. Oct. 1, 1997.

§ 9–105. Rights of adopted persons

Except as otherwise provided by law, an adopted person has all the same rights, including inheritance rights, that a child born to the adoptive parents would have. An adoptee also retains the right to inherit from the adoptee's biological parents if the adoption decree so provides, as specified in section 2–109, subsection (1).

1995, c. 694, § C–7, eff. Oct. 1, 1997.

§ 9–106. Legal representation

(a) The biological parents are entitled to an attorney for any hearing held pursuant to this article. If the biological mother or the biological or putative father wants an attorney but is unable to afford one, the biological mother or the biological or putative father may request the court to appoint an attorney. If the court finds either or both of them indigent, the court shall appoint and pay the reasonable costs and expenses of the attorney of the indigent party. The attorney may not be the attorney for the adoptive parents.

(b) When the adoptee is unrelated to the petitioner, the court shall appoint an attorney who is not the attorney for the adoptive parents to represent a minor indigent biological parent at every stage of the proceedings unless the minor biological parent refuses representation or the court determines that representation is unnecessary.

1995, c. 694, § C–7, eff. Oct. 1, 1997.

§ 9–107. Indian Child Welfare Act

The Indian Child Welfare Act, United States Code, Title 25, Section 1901 et seq.[1] governs all proceedings under this article that pertain to an Indian child as defined in that Act.

1995, c. 694, § C–7, eff. Oct. 1, 1997.

1 25 U.S.C.A. § 1901 et seq.

§ 9–108. Application of prior laws

The laws in effect on July 31, 1994 apply to proceedings for which any of the following occurred before August 1, 1994:

(a) The filing of a consent;

(b) The filing of a surrender and release;

(c) The filing of a waiver of notice by a father or putative father under former Title 19, section 532–C;

(d) The issuance of an order terminating parental rights; or

(e) The filing of an adoption petition.

1995, c. 694, § C–7, eff. Oct. 1, 1997.

PART 2

ESTABLISHMENT OF PATERNAL RIGHTS AND TERMINATION OF PATERNAL RIGHTS

Section

Section
9–203. Duties and responsibilities subsequent to surrender and release.
9–204. Termination of parental rights.
9–205. Review.

§ 9–201. Establishment of paternity

(a) When the biological mother of a child born out of wedlock wishes to consent to the adoption of the child or to execute a surrender and release for the purpose of adoption of the child and the putative father has not consented to the adoption of the child or joined in a surrender and release for the purpose of adoption of the child or waived his right to notice, the biological mother must file an affidavit of paternity with the judge of probate so that the judge may determine how to give notice of the proceedings to the putative father of the child.

(b) If the judge finds from the affidavit of the biological mother that the putative father's whereabouts are known, the judge shall order that notice of the mother's intent to consent to adoption or to execute a surrender and release, or the mother's actual consent or surrender and release, for the purpose of adoption of the child, be served upon the putative father of the child. If the judge finds that the putative father's whereabouts are unknown, then the court shall order notice by publication in accordance with the Maine Rules of Probate Procedure. If the biological mother does not know or refuses to tell the court who the biological father is, the court may order publication in accordance with the Maine Rules of Probate Procedure in a newspaper of general circulation in the area where the petition is filed, where the biological mother became pregnant or where the putative father is most likely to be located. The notice must specify the names of the biological mother and the child.

(c) A putative father or a legal father who is not the biological father may waive his right to notice in a document acknowledged before a notary public or a judge of probate. The notary public may not be an attorney who represents either the mother or any person who is likely to become the legal guardian, custodian or parent of the child.

(1) The waiver of notice must indicate that the putative father or legal father understands that the waiver of notice operates as a consent to adoption or a surrender and release for the purposes of adoption for any adoption of the child, and that by signing the waiver of notice the putative father or legal father voluntarily gives up any rights to the named child.

(2) The waiver of notice may state that the putative father or legal father neither admits nor denies paternity.

(3) The legal father shall attach to the waiver of notice an affidavit stating that, although he is the legal father, he is not the biological father.

(d) If, after notice, the putative father of the child wishes to establish parental rights to the child, he must, within 20 days after notice has been given or within a longer period of time as ordered by the judge, petition the judge of probate to grant to him parental rights. The petition must include an allegation that the putative father is in fact the biological father of the child.

(e) Upon receipt of a petition under subsection (d), the judge shall fix a date for a hearing to determine the putative father's parental rights to the child.

(f) The court shall appoint an attorney who is not the attorney for the putative father, the biological mother or the potential transferee agency or a potential adoptive parent to represent the child and to protect the child's interests.

(g) Notice of the hearing must be given to the putative father, the biological mother, the attorney for the child and any other parties the judge determines appropriate. Notice need not be given to a putative father or a legal father who is not the biological father and who has waived his right to notice as provided in subsection (c).

(h) Upon order of the court, the department or licensed child-placing agency shall furnish studies and reports relevant to the proceedings.

(i) If, after a hearing, the judge finds that the putative father is the biological father, that he is willing and able to protect the child from jeopardy and has not abandoned the child, that he is willing and able to take responsibility for the child and that it is in the best interests of the child, then the judge shall declare the putative father the child's parent with all the attendant rights and responsibilities.

(j) If the judge of probate finds that the putative father of the child has not petitioned or appeared within the period required by this section or has not met the requirements of subsection (i), the judge shall rule that the putative father has no parental rights and that only the biological mother of the child need consent to adoption or a surrender and release.

1995, c. 694, § C–7, eff. Oct. 1, 1997.

§ 9–202. Surrender and release; consent

(a) With the approval of the judge of probate of any county within the State and after a determination by the judge that a surrender and release or a consent is in the best interest of the child, the parents or surviving parent of a child may at any time after the child's birth:

(1) Surrender and release all parental rights to the child and the custody and control of the child to a licensed child-placing agency or the department to enable the licensed child-placing agency or the department to have the child adopted by a suitable person; or

(2) Consent to have the child adopted by a specified petitioner.

The parents or the surviving parent must execute the surrender and release or the consent in the presence of the judge. The adoptee, if 14 years of age or older, must execute the consent in the presence of the judge. The waiver of notice by the legal father who is not the biological father or putative father is governed by section 9–201, subsection (c).

(b) The court may approve a consent or a surrender and release only if the following conditions are met.

(1) A licensed child-placing agency or the department certifies to the court that counseling was provided or was offered and refused. This requirement does not apply if:

(i) One of the petitioners is a blood relative; or

(ii) The adoptee is an adult.

(2) The court has explained the individual's parental rights and responsibilities, the effects of the consent or the surrender and release, that in all but specific situations the individual has the right to revoke the consent or surrender and release within 3 days and the existence of the adoption registry and the services available under Title 22, section 2706–A. The individual does not have the right to revoke the consent when the individual is a consenting party and also a petitioner.

(3) The court determines that the consent or the surrender and release has been duly executed and was given freely after the parent was informed of the parent's rights.

(4) Except when a consenting party is also a petitioner, at least 3 days have elapsed since the parents or parent executed the surrender and release or the consent and the parents or parent did not withdraw or revoke the consent or surrender and release before the judge or, if the judge was not available, before the register.

(c) The original consent or surrender and release must be filed in the Probate Court where the consent or the surrender and release is executed. An attested copy of the consent or surrender and release must be filed in the Probate Court in which the petition is filed. The court in which the consent or the surrender and release is executed shall provide an attested copy to each consenting or surrendering party and an attested copy to the transferring agency. The copy given to the consenting or surrendering party must contain a statement explaining the importance of keeping the court informed of a current name and address.

(d) A consent or a surrender and release is not valid until 3 days after it has been executed, except that consent by a parent petitioning to adopt that parent's own child with that parent's spouse is valid upon signature.

(e) Consent may be acknowledged before a notary public who is not an attorney for the adopting parents or a partner, associate or employee of an attorney for the adopting parents when consent is given by:

(1) The department or a licensed child-placing agency; or

(2) A public agency or a duly licensed private agency to which parental rights have been transferred under the law of another state or country.

(f) Except as provided in subsection (g) and section 9–205, subsection (b), a consent or a surrender and release is final and irrevocable when duly executed.

(g) A consent is final only for the adoption consented to, and, if that adoption petition is withdrawn or dismissed or if the adoption is not finalized within 18 months of the execution of the consent, a review must be held pursuant to section 9–205.

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

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

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

The court shall accept a waiver of notice by a putative father or a legal father who is not the biological father that meets the requirements of section 9–201, subsection (c).

1995, c. 694, § C–7, eff. Oct. 1, 1997; 1997, c. 239, §§ 2, 3, eff. Oct. 1, 1997.

§ 9–203. Duties and responsibilities subsequent to surrender and release

Without notice to the parent or parents, the surrender and release authorized pursuant to section 9–202 may be transferred together with all rights under section 9–202 from the transferee agency to the department or from the department as original transferee to any licensed child-placing agency. If the licensed child-placing agency or the department is unable to find a suitable adoptive home for a child surrendered and released by a parent or parents, then the licensed child-placing agency or the department to whom custody and control of that child have been surrendered and released or transferred shall request a review pursuant to section 9–205.

1995, c. 694, § C–7, eff. Oct. 1, 1997.

§ 9–204. Termination of parental rights

(a) A petition for termination of parental rights may be brought in Probate Court in which an adoption petition is properly filed as part of that adoption

petition except when a child protection proceeding is pending or is subject to review by the District Court.

(b) Except as otherwise provided by this section, a termination of parental rights petition is subject to the provisions of Title 22, chapter 1071, subchapter VI.[1]

(c) The court may appoint a guardian ad litem for the child. The appointment must be made as soon as possible after the petition for termination of parental rights is initiated.

(1) The court shall pay reasonable costs and expenses for the guardian ad litem.

(2) The guardian ad litem must be given access to all reports and records relevant to the case. In general, the guardian ad litem shall represent the child. The guardian ad litem may conduct an investigation to ascertain the facts that includes:

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

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

(iii) Interviewing, subpoenaing, examining and cross-examining witnesses; and

(iv) Making recommendations to the court.

1995, c. 694, § C–7, eff. Oct. 1, 1997; 1997, c. 683, § A–8, eff. April 3, 1998.

1 22 M.R.S.A. § 4050 et seq.

§ 9–205. Review

(a) The court shall conduct a judicial review if:

(1) A child is not adopted within 18 months of execution of a surrender and release;

(2) The adoption is not finalized within 18 months of the consent to an adoption by a parent or parents; or

(3) An adoption petition is not finalized within 18 months.

(b) If the court determines that adoption is still a viable plan for the child, the court shall schedule another judicial review within 2 years. If the court determines that adoption is no longer a viable plan, the court shall attempt to notify the biological parents, who must be given an opportunity to present an acceptable plan for the child. If either or both parents are able and willing to assume physical custody of the child, then the court shall declare the consent or the surrender and release void.

If the biological parents are not notified or are unable or unwilling to assume physical custody of the child or if the court determines that placement of the child with the biological parents would constitute jeopardy as defined by Title 22, section 4002, subsection 6, then the case must be transferred to the District Court for a hearing pursuant to Title 22, section 4038–A.

1995, c. 694, § C–7, eff. Oct. 1, 1997.

PART 3

ADOPTION PROCEDURES

Section

§ 9–301. Petition for adoption and change of name; filing fee

A husband and wife jointly or an unmarried person, resident or nonresident of the State, may petition the Probate Court to adopt a person, regardless of age, and to change that person's name. The fee for filing the petition is $65 plus:

(a) The fee for a national criminal history record check for noncriminal justice purposes set by the Federal Bureau of Investigation for each prospective adoptive parent who is not the biological parent of the child; and

(b) The fee for a state criminal history record check for noncriminal justice purposes established pursuant to Title 25, section 1541, subsection 6 for each prospective adoptive parent who is not the biological parent of the child.

1995, c. 694, § C–7, eff. Oct. 1, 1997; 1997, c. 18, § 3, eff. Oct. 1, 1997; 2001, c. 52, § 1; 2005, c. 654, § 4.

§ 9–302. Consent for adoption

(a) Before an adoption is granted, written consent to the adoption must be given by:

(1) The adoptee, if the adoptee is 14 years of age or older;

(2) Each of the adoptee's living parents, except as provided in subsection (b);

(3) The person or agency having legal custody or guardianship of the 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 judge of probate, may be overruled by the judge. In order for the judge 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 may hold a pretrial conference to determine who

will proceed. The court may determine that even though the burden of proof is on the petitioner, the person or agency should proceed if the person or agency has important facts necessary to the petitioner in presenting the petitioner's case. The judge shall consider the following:

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

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

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

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

(v) 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

(4) 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.

(b) Consent to adoption is not required of:

(1) A putative father or a legal father who is not the biological father if he:

(i) Received notice and failed to respond to the notice within the prescribed time period;

(ii) Waived his right to notice under section 9-201, subsection (c);

(iii) Failed to meet the standards of section 9-201, subsection (i); or

(iv) Holds no parental rights regarding the adoptee under the laws of the foreign jurisdiction in which the adoptee was born;

(2) A parent whose parental rights have been terminated under Title 22, chapter 1071, subchapter VI;[1]

(3) A parent who has executed a surrender and release pursuant to section 9-202;

(4) A parent whose parental rights have been voluntarily or judicially terminated and transferred to a public agency or a duly licensed private agency pursuant to the laws of another state or country; or

(5) The parent of an adoptee who is 18 years of age or older.

(c) 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.

1995, c. 694, § C-7, eff. Oct. 1, 1997; 1997, c. 239, § 4, eff. Oct. 1, 1997; 1997, c. 715, § C-1; 1999, c. 790, § G-1, eff. May 18, 2000.

1 22 M.R.S.A. § 4050 et seq.

§ 9-303. Petition

(a) A petition for adoption must be sworn to by the petitioner and must include:

(1) The full name, age and place of residence of the petitioner and, if married, the place and date of marriage;

(2) The date and place of birth of the adoptee, if known;

(3) The birth name of the adoptee, any other names by which the adoptee has been known and the adoptee's proposed new name, if any;

(4) The residence of the adoptee at the time of the filing of the petition;

(5) The petitioner's intention to establish a parent and child relationship between the petitioner and the adoptee and a statement that the petitioner is a fit and proper person able to care and provide for the adoptee's welfare;

(6) The names and addresses of all persons or agencies known to the petitioner that affect the custody, visitation or access to the adoptee;

(7) The relationship, if any, of the petitioner to the adoptee;

(8) The names and addresses of the department and the licensed child-placing agency, if any; and

(9) The names and addresses of all persons known to the petitioner at the time of filing from whom consent to the adoption is required.

(b) A petitioner shall indicate to the court what information the petitioner is willing to share with the biological parents and under what circumstances and shall provide a mechanism for updating that information.

(c) The caption of a petition for adoption may be styled "In the Matter of the Adoption Petition of (name of adoptee)." The petitioner must also be designated in the caption.

1995, c. 694, § C-7, eff. Oct. 1, 1997.

§ 9-304. Investigation; guardian ad litem; registry

(a) **Repealed.** Laws 2001, c. 52, § 2.

(a-1) Upon the filing of a petition for adoption of a minor child, the court shall request a background check and shall direct the department or a licensed child-placing agency to conduct a study and make a report to the court.

(1) The study must include an investigation of the conditions and antecedents of the child to determine whether the child is a proper subject for adoption and whether the proposed home is suit-

fixed in a place within this State and to which that person, whenever temporarily absent, has the intention to return. A person is a resident of a municipality if the place of habitation is within that particular municipality. The clerk of a municipality shall consider a person who qualifies as a resident under Title 21–A, section 112 for voting purposes a resident for the purposes of this chapter.

1995, c. 694, § B–2, eff. Oct. 1, 1997; 1997, c. 537, § 12, eff. Oct. 1, 1997; 2001, c. 574, § 2; 2011, c. 511, § 1.

§ 652. Issuance of marriage license

1. Marriage license issued. After the filing of notice of intentions of marriage, except as otherwise provided, the clerk shall deliver to the parties a marriage license specifying the time when the intentions were recorded.

2. Repealed. Laws 2001, c. 574, § 4.

3. Void after 90 days. The license is void if not used within 90 days from the day the intentions were filed in the offices of the municipal clerks as specified in section 651.

4. Repealed. Laws 2001, c. 574, § 4.

5. Informational brochure. A marriage license may not be issued until a brochure prepared by the Department of Behavioral and Developmental Services concerning the effects of alcohol and drugs on fetuses has been given to both parties. The department is responsible for making the brochures available to municipal clerks for distribution.

6. Related parties. A marriage license may not be issued to parties related as described in section 701, subsection 2, unless the clerk has received from the parties the physician's certificate of genetic counseling required by section 651.

7. Parties under 18 years of age. A marriage license may not be issued to persons under 18 years of age without the written consent of their parents, guardians or persons to whom a court has given custody. In the absence of persons qualified to give consent, the judge of probate in the county where each minor resides may grant consent after notice and opportunity for hearing. When 2 licenses are required and when either or both applicants for a marriage license are under the ages specified in this section, the written consent must be given for the issuance of both licenses in the presence of the clerk issuing the licenses or by acknowledgment under seal filed with that clerk.

8. Parties under 16 years of age. The clerk may not issue a marriage license to a person under 16 years of age without:

A. The written consent of that minor's parents, guardians or persons to whom a court has given custody;

B. Notifying the judge of probate in the county in which the minor resides of the filing of this intention; and

C. Receipt of that judge of probate's written consent to issue the license. The judge of probate shall base a decision on whether to issue consent on the best interest of the parties under 16 years of age and shall consider the age of both parties and any criminal record of a party who is 18 years of age or older. The judge of probate, in the interest of public welfare, may order, after notice and opportunity for hearing, that a license not be issued. The judge of probate shall issue a decision within 30 days of receiving the notification under paragraph B.

1995, c. 694, § B–2, eff. Oct. 1, 1997; 1997, c. 507, § 1, eff. Oct. 1, 1997; 1997, c. 683, § E–5, eff. April 3, 1998; 2001, c. 574, §§ 3, 4.

§ 653. Filing of cautions

1. Filing; enter notice. A person who believes that parties are about to contract marriage when either of them can not lawfully do so may file a caution and the reasons for the caution in the office of the clerk where notice of their intentions is required to be filed. If either party applies to enter notice of their intentions, the clerk shall withhold the license until the judge of probate from the county involved approves the marriage.

2. Procedure. Before the judge of probate may approve a marriage, the court must give due notice and an opportunity to be heard to all concerned parties. The judge of probate shall determine whether the parties may lawfully contract marriage within 7 days unless the judge of probate certifies that further time is necessary for that purpose. In that case, a license must be withheld until the expiration of the certified time. The clerk shall deliver or withhold the license in accordance with the final decision of the judge of probate.

3. Judgment for costs. If the judge of probate determines that the parties may lawfully contract marriage, the judge shall enter judgment against the person filing the caution for costs and issue execution for costs.

1995, c. 694, § B–2, eff. Oct. 1, 1997.

§ 654. Record of marriages

1. Copy. Every person authorized to unite persons in marriage shall make and keep a record of every marriage solemnized by that person in conformity with the forms and instructions prescribed by the State Registrar of Vital Statistics pursuant to Title 22, section 2701.

2. Return of marriage license. The person who solemnized the marriage shall return the marriage license to the clerk who issued the license within 7 working days following the date on which the marriage is solemnized by that person. The clerk and the State Registrar of Vital Statistics each shall retain a copy of the license.

not required to file an additional denial of paternity. He may assert any defense, in law or fact. Any defense must be asserted within 25 days after the mailing by ordinary mail of a notice to the alleged father that the record has been filed in court. The notice must contain the substance of this section.

1995, c. 694, § B–2, eff. Oct. 1, 1997.

§ 1614. Acknowledgment of paternity

If, prior to the filing in a court, the alleged father executes and delivers to the department an acknowledgment of paternity of the child in accordance with the laws of the state in which the child was born, and if the department does not require the alleged father to participate in blood or tissue-typing tests, the proceeding must be terminated and the department may proceed against the father under chapter 65, subchapter II, article 3 [1] with respect to any remedy provided under that article.

1995, c. 694, § B–2, eff. Oct. 1, 1997; 2001, c. 554, § 6, eff. March 25, 2002.

[1] 19–A M.R.S.A. § 2251 et seq.

§ 1615. Representation of department

The commissioner may designate employees of the department who are not attorneys to file the record of proceedings commenced under this subchapter in District Court and to represent the department in court in both those proceedings and proceedings filed by other parties. The commissioner shall ensure that appropriate training is provided to all employees designated to represent the department under this subchapter.

1997, c. 466, § 3, eff. Oct. 1, 1997; 2005, c. 352, § 2.

§ 1616. Voluntary acknowledgment of paternity

1. Legal finding of paternity. A signed voluntary acknowledgment of paternity is a legal finding of paternity, subject to the right of a signatory to rescind the acknowledgment within the earlier of 60 days or the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party. After the right to rescind ends, the acknowledgment may be challenged in court only on the basis of fraud, duress or material mistake of fact with the burden of proof on the challenger and under which the legal responsibilities of a signatory arising from the acknowledgment, including child support obligations, may not be suspended during the challenge except for good cause shown.

2. Notice. Before a mother and putative father may sign an acknowledgment of paternity, the mother and the putative father must be given oral and written notice of the alternatives to, the legal consequences of and the rights and responsibilities that arise from signing the acknowledgment.

3. Full faith and credit. The State shall give full faith and credit to an acknowledgment of paternity signed in any other state according to that state's procedures.

4. Bar on acknowledgment ratification proceedings. Legal proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity.

1997, c. 537, § 21, eff. Oct. 1, 1997; R.R.1997, c. 1, § 15.

CHAPTER 55

RIGHTS AND RESPONSIBILITIES

Section

§ 1651. Parents joint natural guardians of children

The father and mother are the joint natural guardians of their minor children and are jointly entitled to the care, custody, control, services and earnings of their children. Neither parent has any rights paramount to the rights of the other with reference to any matter affecting their children.

1995, c. 694, § B–2, eff. Oct. 1, 1997.

§ 1652. Spouse's or parent's obligation to support

1. Petition. If a parent, spouse or child resides in this State, a parent, a spouse, a guardian or a state providing maintenance may petition the District Court or Probate Court to order a nonsupporting parent or spouse to contribute to the support of the nonsupporting person's spouse or child. The petition may be brought in the court in the district or county where the parent, spouse or child resides or in the district or county in which the nonsupporting person may be found.

2. Court action. If the court finds that the nonsupporting person is of sufficient ability or is able to labor and provide for that person's children or spouse, and that the person has willfully and without reasonable cause refused or neglected to so provide, then the court may order the person to contribute to the support of that person's children or spouse in regular amounts that it determines reasonable and just. Child support must be determined or modified in accordance with chapter 63.[1]

3. Order pending petition. Pending petition, and after notice and an opportunity for a hearing, the court may order a nonsupporting person to pay to the court

for the nonsupporting person's spouse or child sufficient money for the prosecution of the petition.

4. Enforcement. The court may enforce an order as provided in chapter 65.[2]

5. Appeals. A party aggrieved by an order may appeal in the same manner as provided for appeals from that court in other causes. Continuance of an appeal may not be allowed without consent of the appellant or a showing of legal cause for the continuance to the court to which the order has been appealed.

6. Order during pending appeal. Pending the determination of an appeal, the order appealed from remains in force and obedience to it may be enforced as if no appeal had been taken.

1995, c. 694, § B–2, eff. Oct. 1, 1997; 1999, c. 731, § ZZZ–33, eff. Jan. 1, 2001; 2001, c. 554, § 7, eff. March 25, 2002.

1 19–A M.R.S.A. § 2001 et seq.
2 19–A M.R.S.A. § 2101 et seq.

§ 1653. Parental rights and responsibilities

1. Legislative findings and purpose. The Legislature makes the following findings concerning relationships among family members in determining what is in the best interest of children.

A. The Legislature finds and declares as public policy that encouraging mediated resolutions of disputes between parents is in the best interest of minor children.

B. The Legislature finds that domestic abuse is a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development.

C. The Legislature finds and declares that, except when a court determines that the best interest of a child would not be served, it is the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

2. Parental rights and responsibilities; order. This subsection governs parental rights and responsibilities and court orders for parental rights and responsibilities.

A. When the parents have agreed to an award of shared parental rights and responsibilities or so agree in open court, the court shall make that award unless there is substantial evidence that it should not be ordered. The court shall state in its decision the reasons for not ordering a shared parental rights and responsibilities award agreed to by the parents.

B. The court may award reasonable rights of contact with a minor child to a 3rd person.

C. The court may award parental rights and responsibilities with respect to the child to a 3rd person, a suitable society or institution for the care and protection of children or the department, upon a finding that awarding parental rights and responsibilities to either or both parents will place the child in jeopardy as defined in Title 22, section 4002, subsection 6.

D. The order of the court awarding parental rights and responsibilities must include the following:

(1) Allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities, according to the best interest of the child as provided in subsection 3. An award of shared parental rights and responsibilities may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent, or a sharing of the child's primary residential care by both parents. If either or both parents request an award of shared primary residential care and the court does not award shared primary residential care of the child, the court shall state in its decision the reasons why shared primary residential care is not in the best interest of the child;

(2) Conditions of parent-child contact in cases involving domestic abuse as provided in subsection 6;

(3) A provision for child support as provided in subsection 8 or a statement of the reasons for not ordering child support;

(4) A statement that each parent must have access to records and information pertaining to a minor child, including, but not limited to, medical, dental and school records and other information on school activities, whether or not the child resides with the parent, unless that access is found not to be in the best interest of the child or that access is found to be sought for the purpose of causing detriment to the other parent. If that access is not ordered, the court shall state in the order its reasons for denying that access;

(5) A statement that violation of the order may result in a finding of contempt and imposition of sanctions as provided in subsection 7;

(6) A statement of the definition of shared parental rights and responsibilities contained in section 1501, subsection 5, if the order of the court awards shared parental rights and responsibilities; and

(7) If the court appoints a parenting coordinator pursuant to section 1659, a parenting plan defining areas of parental rights and responsi-

bilities within the scope of the parenting coordinator's authority.

An order modifying a previous order is not required to include provisions of the previous order that are not modified.

E. The order of the court may not include a requirement that the State pay for the defendant to attend a batterers' intervention program unless the program is certified under section 4014.

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

A. The age of the child;

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

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

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

E. The stability of any proposed living arrangements for the child;

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

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

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

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

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

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

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

(1) The child emotionally;

(2) The safety of the child; and

(3) The other factors listed in this subsection, which must be considered in light of the presence of past or current domestic abuse;

M. The existence of any history of child abuse by a parent;

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

O. A parent's prior willful misuse of the protection from abuse process in chapter 101 [1] in order to gain tactical advantage in a proceeding involving the determination of parental rights and responsibilities of a minor child. Such willful misuse may only be considered if established by clear and convincing evidence, and if it is further found by clear and convincing evidence that in the particular circumstances of the parents and child, that willful misuse tends to show that the acting parent will in the future have a lessened ability and willingness to cooperate and work with the other parent in their shared responsibilities for the child. The court shall articulate findings of fact whenever relying upon this factor as part of its determination of a child's best interest. The voluntary dismissal of a protection from abuse petition may not, taken alone, be treated as evidence of the willful misuse of the protection from abuse process;

P. If the child is under one year of age, whether the child is being breast-fed;

Q. The existence of a parent's conviction for a sex offense or a sexually violent offense as those terms are defined in Title 34–A, section 11203;

R. If there is a person residing with a parent, whether that person:

(1) Has been convicted of a crime under Title 17–A, chapter 11 or 12 [2] or a comparable crime in another jurisdiction;

(2) Has been adjudicated of a juvenile offense that, if the person had been an adult at the time of the offense, would have been a violation of Title 17–A, chapter 11 or 12; or

(3) Has been adjudicated in a proceeding, in which the person was a party, under Title 22, chapter 1071 [3] as having committed a sexual offense; and

S. Whether allocation of some or all parental rights and responsibilities would best support the child's safety and well-being.

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

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

5–A. Effect of protective order. Although the court shall consider the fact that a protective order was issued under chapter 101, the court shall determine the proper award of parental rights and responsibilities and award of rights of contact de novo and may not use as precedent the award of parental rights and responsibilities and rights of contact included in the protective order.

6. Conditions of parent-child contact in cases involving domestic abuse. The court shall establish conditions of parent-child contact in cases involving domestic abuse as follows.

A. A court may award primary residence of a minor child or parent-child contact with a minor child to a parent who has committed domestic abuse only if the court finds that contact between the parent and child is in the best interest of the child and that adequate provision for the safety of the child and the parent who is a victim of domestic abuse can be made.

B. In an order of parental rights and responsibilities, a court may:

(1) Order an exchange of a child to occur in a protected setting;

(2) Order contact to be supervised by another person or agency;

(3) Order the parent who has committed domestic abuse to attend and complete to the satisfaction of the court a domestic abuse intervention program or other designated counseling as a condition of the contact;

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

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

(6) Prohibit overnight parent-child contact; and

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

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

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

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

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

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

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

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

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

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

6–A. Custody and contact limited; convictions for sexual offenses. The award of primary residence and parent-child contact with a person who has been convicted of a child-related sexual offense is governed by this subsection.

A. For the purposes of this section, "child-related sexual offense" means the following sexual offenses if, at the time of the commission of the offense, the victim was under 18 years of age:

(1) Sexual exploitation of a minor, under Title 17–A, section 282;

(2) Gross sexual assault, under Title 17–A, section 253;

(3) Sexual abuse of a minor, under Title 17–A, section 254;

(4) Unlawful sexual contact, under Title 17–A, section 255–A or former section 255;

(5) Visual sexual aggression against a child, under Title 17–A, section 256;

(6) Sexual misconduct with a child under 14 years of age, under Title 17–A, section 258;

(6–A) Solicitation of a child to commit a prohibited act, under Title 17–A, section 259–A; or

(7) An offense in another jurisdiction that involves conduct that is substantially similar to that contained in subparagraph (1), (2), (3), (4), (5), (6) or (6–A). For purposes of this subparagraph, "another jurisdiction" means the Federal Government, the United States military, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa and each of the several states except Maine. "Another jurisdiction" also means the Passamaquoddy Tribe when that tribe has acted pursuant to Title 30, section 6209–A, subsection 1, paragraph A or B and the Penobscot Nation when that tribe has acted

pursuant to Title 30, section 6209–B, subsection 1, paragraph A or B.

B. A court may award primary residence of a minor child or parent-child contact with a minor child to a parent who has been convicted of a child-related sexual offense only if the court finds that contact between the parent and child is in the best interest of the child and that adequate provision for the safety of the child can be made.

C. In an order of parental rights and responsibilities, a court may require that parent-child contact between a minor child and a person convicted of a child-related sexual offense may occur only if there is another person or agency present to supervise the contact. If the court allows a family or household member to supervise parent-child contact, the court shall establish conditions to be followed during that contact. Conditions include, but are not limited to, those that:

(1) Minimize circumstances when the family of the parent who is a sex offender or sexually violent predator would be supervising visits;

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

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

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

6–B. Conviction or adjudication for certain sex offenses; presumption. There is a rebuttable presumption that the petitioner would create a situation of jeopardy for the child if any contact were to be permitted and that any contact is not in the best interests of the child if the court finds that the person seeking primary residence or contact with the child:

A. Has been convicted of an offense listed in subsection 6–A, paragraph A in which the victim was a minor at the time of the offense and the person was at least 5 years older than the minor at the time of the offense except that, if the offense was gross sexual assault under Title 17–A, section 253, subsection 1, paragraph B or C, or an offense in another jurisdiction that involves conduct that is substantially similar to that contained in Title 17–A, section 253, subsection 1, paragraph B or C, and the minor victim submitted as a result of compulsion, the presumption applies regardless of the ages of the person and the minor victim at the time of the offense; or

B. Has been adjudicated in an action under Title 22, chapter 1071 of sexually abusing a person who was a minor at the time of the abuse.

The person seeking primary residence or contact with the child may present evidence to rebut the presumption.

7. Violation of order concerning parental rights and responsibilities and contact. Either parent may petition the court for a hearing on the issue of noncompliance with the order issued under subsection 2. If the court finds that a parent has violated a part of the order, the court may find that parent in contempt and may:

A. Require additional or more specific terms and conditions consistent with the order;

B. Order that additional visitation be provided for a parent to take the place of visitation that was wrongfully denied; or

C. Order a parent found in contempt to pay a forfeiture of at least $100.

8. Child support order. The court may order conditions of child support as follows.

A. Either parent of a minor child shall contribute reasonable and just sums as child support payable weekly, biweekly, monthly or quarterly. In an action filed under section 1654, the court may require the child's nonprimary care provider to pay past support. Availability of public welfare benefits to the family may not affect the decision of the court as to the responsibility of a parent to provide child support. The court shall inquire of the parties concerning the existence of a child support order entered pursuant to chapter 65, subchapter 2, article 3.[4] If an order exists, the court shall consider its terms in establishing a child support obligation. A determination or modification of child support under this section and a determination of past support must comply with chapter 63.[5]

B. After January 1, 1990, if the court orders either parent to provide child support, the court order must require that the child support be provided beyond the child's 18th birthday if the child is attending secondary school as defined in Title 20–A, section 1, until the child graduates, withdraws or is expelled from secondary school or attains the age of 19, whichever occurs first.

C. The court may require the payment of part or all of the medical expenses, hospital expenses and other health care expenses of the child. The court order must include a provision requiring at least one parent to obtain and maintain private health insurance for the child, if private health insurance for the child is available at reasonable cost. The court order must also require the parent providing insurance to furnish proof of coverage to the other parent within 15 days of receipt of a copy of the court order. If private health insurance for the child is not available at reasonable cost at the time of the hearing, the court order must include a provision requiring at least one parent to obtain and maintain private health insurance for the child that must be effective immediately upon private health insurance for the child being available at reasonable cost.

When the department provides support enforcement services, the support order must include a provision that

requires the responsible parent to keep the department informed of changes in that parent's current address, the name and address of that parent's current employer and whether the responsible parent has access to reasonable cost health insurance coverage and, if so, the health insurance policy information and any subsequent changes.

9. Enforcement of child support order. The court may enforce a child support order as provided in chapter 65.[6]

10. Modification or termination. Upon the petition of one or both of the parents, an order for parental rights and responsibilities with respect to a minor child may be modified or terminated as circumstances require.

A. Modification and termination of child support orders are governed by section 2009.

B. Modification of and termination orders for parental rights and responsibilities other than child support are governed by section 1657.

11. Mediation. Prior to a contested hearing under this chapter relating to initial or modified orders, the court shall refer the parties to mediation as provided in chapter 3.[7]

12. Termination of order. A court order requiring the payment of child support remains in force as to each child until the order is altered by the court or until that child:

A. Attains 18 years of age. For orders issued after January 1, 1990, if the child attains 18 years of age while attending secondary school as defined in Title 20–A, section 1, the order remains in force until the child graduates, withdraws or is expelled from secondary school or attains 19 years of age, whichever occurs first;

B. Becomes married; or

C. Becomes a member of the armed services.

13. Automatic adjustments. The order of the court or hearing officer may include automatic adjustments to the amount of money paid for the support of a child when the child attains 12 or 18 years of age; or when the child graduates, withdraws or is expelled from secondary school, attains 19 years of age or is otherwise emancipated, whichever occurs first.

14. Notice of relocation. The order must require notice of the intended relocation of a child by a parent awarded shared parental rights and responsibilities or allocated parental rights and responsibilities. At least 30 days before the intended relocation of a child by a parent, the parent shall provide notice to the other parent of the intended relocation. If the relocation must occur in fewer than 30 days, the parent who is relocating shall provide notice as soon as possible to the other parent. If the parent who is relocating believes notifying the other parent will cause danger to the relocating parent or the child, the relocating parent shall notify the court of the intended relocation, and the court shall provide appropriate notice to the other parent in a manner determined to provide safety to the relocating parent and child.

1995, c. 694, § B–2, eff. Oct. 1, 1997; 1997, c. 187, §§ 2, 3, eff. Oct. 1, 1997; 1997, c. 403, § 1, eff. Oct. 1, 1997; 1997, c. 415, § 3, eff. Oct. 1, 1997; 1999, c. 702, §§ 1 to 3; 2001, c. 273, § 1; 2001, c. 329, §§ 1, 2; 2001, c. 665, §§ 1 to 4; 2003, c. 711, § C–1; 2005, c. 323, § 12; 2005, c. 366, §§ 2, 3; 2005, c. 567, §§ 1 to 3; 2007, c. 142, § 1; 2007, c. 513, §§ 2, 3; 2009, c. 290, § 6; 2009, c. 345, § 1; 2009, c. 593, §§ 1 to 5; 2011, c. 597, § 4, eff. April 6, 2012.

1 19–A M.R.S.A. § 4001 et seq.
2 17–A M.R.S.A. § 251 et seq. or § 281 et seq.
3 22 M.R.S.A. § 4001 et seq.
4 19–A M.R.S.A. § 2251 et seq.
5 19–A M.R.S.A. § 2001 et seq.
6 19–A M.R.S.A. § 2101 et seq.
7 19–A M.R.S.A. § 251 et seq.

§ 1654. Parenting and support when parents live apart

If the father and mother of a minor child are living apart, the Probate Court or District Court in the county or division where either resides, upon complaint of either and after notice to the other as the court may order, may make an order awarding parental rights and responsibilities with respect to the child in accordance with this chapter.

The jurisdiction granted by this section is limited by the Uniform Child Custody Jurisdiction Act,[1] if another state may have jurisdiction as provided in that Act.

1995, c. 694, § B–2, eff. Oct. 1, 1997; 1999, c. 731, § ZZZ–34, eff. Jan. 1, 2001.

1 19–A M.R.S.A. § 1701 et seq.

§ 1655. Support and maintenance when parental rights and responsibilities or contact awarded to agency or person other than parent

1. Department granted parental rights and responsibilities or contact awarded. When the department has been granted parental rights and responsibilities for a child under this chapter, Title 22, chapter 1071[1] applies regarding subsequent reviews and governs further rights and responsibilities of the department, the parents, the child and any other party.

2. Modification of orders. Upon the motion of an agency or person who has been granted parental rights and responsibilities or contact with respect to a child under this chapter, the court may alter its order concerning parental rights and responsibilities or contact with respect to a minor child as circumstances require in accordance with section 1657.

3. Support of child committed to agency. When a child under 17 years of age is committed by the District Court, or the District Court acting as a Juvenile Court, to custody other than that of the child's parent, that commitment is subject to Title 22, sections 4038, 4061 and 4063. The court may, after giving a parent a reasonable opportunity to be heard, adjudge that the parent shall pay, in a manner as the court may direct, a sum that covers in whole or in part the support of that

§ 4001. Title

This chapter may be cited as the "Child and Family Services and Child Protection Act."

1979, c. 733, § 18.

§ 4002. Definitions

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

1. Abuse or neglect. "Abuse or neglect" means a threat to a child's health or welfare by physical, mental or emotional injury or impairment, sexual abuse or exploitation, deprivation of essential needs or lack of protection from these or failure to ensure compliance with school attendance requirements under Title 20–A, section 3272, subsection 2, paragraph B or section 5051–A, subsection 1, paragraph C, by a person responsible for the child.

1–A. Abandonment. "Abandonment" means any conduct on the part of the parent showing an intent to forego parental duties or relinquish parental claims. The intent may be evidenced by:

A. Failure, for a period of at least 6 months, to communicate meaningfully with the child;

B. Failure, for a period of at least 6 months, to maintain regular visitation with the child;

C. Failure to participate in any plan or program designed to reunite the parent with the child;

D. Deserting the child without affording means of identifying the child and his parent or custodian;

E. Failure to respond to notice of child protective proceedings; or

F. Any other conduct indicating an intent to forego parental duties or relinquish parental claims.

1–B. Aggravating factor. "Aggravating factor" means any of the following circumstances with regard to the parent.

A. The parent has subjected any child for whom the parent was responsible to aggravated circumstances, including, but not limited to, the following:

(1) Rape, gross sexual misconduct, gross sexual assault, sexual abuse, incest, aggravated assault, kidnapping, promotion of prostitution, abandonment, torture, chronic abuse or any other treatment that is heinous or abhorrent to society.

(2) Deleted. Laws 2001, c. 696, § 10.

A–1. The parent refused for 6 months to comply with treatment required in a reunification plan with regard to the child.

B. The parent has been convicted of any of the following crimes and the victim of the crime was a child for whom the parent was responsible or the victim was a child who was a member of a household lived in or frequented by the parent:

(1) Murder;

(2) Felony murder;

(3) Manslaughter;

(4) Aiding, conspiring or soliciting murder or manslaughter;

(5) Felony assault that results in serious bodily injury; or

(6) Any comparable crime in another jurisdiction.

C. The parental rights of the parent to a sibling have been terminated involuntarily.

D. The parent has abandoned the child.

2. Child. "Child" means any person who is less than 18 years of age.

3. Child protection proceeding. "Child protection proceeding" means a proceeding on a child protection petition under subchapter IV,[1] a subsequent proceeding to review or modify a case disposition under section 4038, an appeal under section 4006, a proceeding on a termination petition under subchapter VI,[2] or a proceeding on a medical treatment petition under subchapter VIII.[3]

3–A. Repealed. Laws 2001, c. 439, § X–1.

4. Custodial parent. "Custodial parent" means a parent with custody.

5. Custodian. "Custodian" means the person who has legal custody and power over the person of a child.

5–A. Foster parent. "Foster parent" means a person whose home is licensed by the department as a family foster home as defined in section 8101, subsection 3 and with whom the child lives pursuant to a court order or agreement with the department.

6. Jeopardy to health or welfare or jeopardy. "Jeopardy to health or welfare" or "jeopardy" means serious abuse or neglect, as evidenced by:

A. Serious harm or threat of serious harm;

B. Deprivation of adequate food, clothing, shelter, supervision or care or education when the child is at least 7 years of age and has not completed grade 6;

B-1. Deprivation of necessary health care when the deprivation places the child in danger of serious harm;

C. Abandonment of the child or absence of any person responsible for the child, which creates a threat of serious harm; or

D. The end of voluntary placement, when the imminent return of the child to his custodian causes a threat of serious harm.

6-A. Licensed mental health professional. "Licensed mental health professional" means a psychiatrist, licensed psychologist, licensed clinical social worker or certified social worker.

7. Parent. "Parent" means a natural or adoptive parent, unless parental rights have been terminated.

7-A. Repealed. Laws 2005, c. 372, § 2.

8. Person. "Person" means an individual, corporation, facility, institution or agency, public or private.

9. Person responsible for the child. "Person responsible for the child" means a person with responsibility for a child's health or welfare, whether in the child's home or another home or a facility which, as part of its function, provides for care of the child. It includes the child's custodian.

9-A. Preadoptive parent. "Preadoptive parent" means a person who has entered into a preadoption agreement with the department with respect to the child.

9-B. Relative. "Relative" means the biological or adoptive parent of the child's biological or adoptive parent, or the biological or adoptive sister, brother, aunt, uncle or cousin of the child.

9-C. Removal of the child from home. "Removal of the child from home" means that the department or a court has taken a child out of the home of the parent, legal guardian or custodian without the permission of the parent or legal guardian.

9-D. Resource family. "Resource family" means a person or persons who provide care to a child in the child welfare system and who are foster parents, permanency guardians, adoptive parents or members of the child's extended birth family.

10. Serious harm. "Serious harm" means:

A. Serious injury;

B. Serious mental or emotional injury or impairment which now or in the future is likely to be evidenced by serious mental, behavioral or personality disorder, including severe anxiety, depression or withdrawal, untoward aggressive behavior, seriously delayed development or similar serious dysfunctional behavior; or

C. Sexual abuse or exploitation.

11. Serious injury. "Serious injury" means serious physical injury or impairment.

12. Suspicious child death. "Suspicious child death" means the death of a child under circumstances in which there is reasonable cause to suspect that abuse or neglect was a cause of or factor contributing to the child's death.

1979, c. 733, § 18; 1983, c. 184, §§ 1, 2; 1985, c. 495, § 16; 1985, c. 739, §§ 1 to 3, eff. April 18, 1986; 1987, c. 511, § A, 2, eff. July 1, 1987; 1987, c. 769, § A, 77, eff. April 26, 1988; 1995, c. 481, § 1; 1997, c. 715, §§ B-1 to B-3; 2001, c. 439, § X-1; 2001, c. 696, §§ 10, 11; 2005, c. 372, § 2; 2005, c. 373, §§ 4, 5; 2007, c. 304, §§ 10, 11; 2007, c. 371, § 1; 2007, c. 586, § 1; 2011, c. 402, § 1.

1 22 M.R.S.A. § 4031 et seq.
2 22 M.R.S.A. § 4050 et seq.
3 22 M.R.S.A. § 4071 et seq.

§ 4003. Purposes

Recognizing that the health and safety of children must be of paramount concern and that the right to family integrity is limited by the right of children to be protected from abuse and neglect and recognizing also that uncertainty and instability are possible in extended foster home or institutional living, it is the intent of the Legislature that this chapter:

1. Authorization. Authorize the department to protect and assist abused and neglected children, children in circumstances which present a substantial risk of abuse and neglect, and their families;

2. Removal from parental custody. Provide that children will be taken from the custody of their parents only where failure to do so would jeopardize their health or welfare;

3. Reunification as a priority. Give family rehabilitation and reunification priority as a means for protecting the welfare of children, but prevent needless delay for permanent plans for children when rehabilitation and reunification is not possible;

3-A. Kinship placement. Place children who are taken from the custody of their parents with an adult relative when possible;

4. Permanent plans for care and custody. Promote the early establishment of permanent plans for the care and custody of children who cannot be returned to their family. It is the intent of the Legislature that the department reduce the number of children receiving assistance under the United States Social Security Act, Title IV-E,[1] who have been in foster care more than 24 months, by 10% each year beginning with the federal fiscal year that starts on October 1, 1983; and

5. Report. Require the department to report monthly to the joint standing committees of the Legislature having jurisdiction over appropriations and financial affairs and health and human services matters, beginning in July 2000, on the status of children served by the Bureau of Child and Family Services. The report must include, at a minimum, information on the department's caseload, the location of the children in the department's custody and the number of cases of abuse and neglect that were not opened for assessment. This information must be identified by program and funding source.

1979, c. 733, § 18; 1981, c. 369, § 9, eff. May 29, 1981; 1981, c. 698, § 96, eff. April 16, 1982; 1985, c. 739, § 4, eff. April 18, 1986; 1997, c. 715, § B–4; 1999, c. 731, §§ AA–3 to AA–5; 2005, c. 374, § 1.

1 42 U.S.C.A. § 670 et seq.

§ 4004. Authorizations

1. General. The department may take appropriate action, consistent with available funding, that will help prevent child abuse and neglect and achieve the goals of section 4003 and subchapter XI–A, [1] including:

A. Developing and providing services which:

(1) Support and reinforce parental care of children;

(2) Supplement that care; and

(3) When necessary, substitute for parental care of children;

B. Encouraging the voluntary use of these and other services by families and children who may need them;

C. Cooperating and coordinating with other agencies, facilities or persons providing related services to families and children;

D. Establishing and maintaining a Child Protective Services Contingency Fund to provide temporary assistance to families to help them provide proper care for their children;

E. Establishing a child death and serious injury review panel for reviewing deaths and serious injuries to children. The panel consists of the following members: the Chief Medical Examiner, a pediatrician, a public health nurse, forensic and community mental health clinicians, law enforcement officers, departmental child welfare staff, district attorneys and criminal or civil assistant attorneys general.

The purpose of the panel is to recommend to state and local agencies methods of improving the child protection system, including modifications of statutes, rules, policies and procedures; and

F. Investigating suspicious child deaths. An investigation under this paragraph is subject to and may not interfere with the authority and responsibility of the Attorney General to investigate and prosecute homicides pursuant to Title 5, section 200–A.

2. Duties. The department shall act to protect abused and neglected children and children in circumstances that present a substantial risk of abuse and neglect, to prevent further abuse and neglect, to enhance the welfare of these children and their families and to preserve family life wherever possible. The department shall:

A. Receive reports of abuse and neglect and suspicious child deaths;

B. Promptly investigate all abuse and neglect cases and suspicious child deaths coming to its attention or, in the case of out-of-home abuse and neglect investigations, the department shall act in accordance with subchapter 11–A;[1]

C. Repealed. Laws 2009, c. 558, § 1.

C–1. Determine in each case investigated under paragraph B whether or not a child has been harmed and the degree of harm or threatened harm by a person responsible for the care of that child by deciding whether allegations are unsubstantiated, indicated or substantiated. Each allegation must be considered separately and may result in a combination of findings.

The department shall adopt rules that define "unsubstantiated," "indicated" and "substantiated" findings for the purposes of this paragraph and that specify an individual's rights to appeal the department's findings. Rules adopted pursuant to this paragraph are routine technical rules as defined by Title 5, chapter 375, subchapter 2–A;

D. Deleted. Laws 2001, c. 559, § CC–1.

E. If, after investigation, the department does not file a petition under section 4032 but does open a case to provide services to the family to alleviate child abuse and neglect in the home, assign a caseworker, who shall:

(1) Provide information about rehabilitation and other services that may be available to assist the family; and

(2) Develop with the family a written child and family plan.

The child and family plan must identify the problems in the family and the services needed to address those problems; must describe responsibilities for completing the services, including, but not limited to, payment for services, transportation and child care services and responsibilities for seeking out and participating in services; and must state the names, addresses and telephone numbers of any relatives or family friends known to the department or parent to be available as resources to the family.

The child and family plan must be reviewed every 6 months, or sooner if requested by the family or the department;

F. File a petition under section 4032 if, after investigation, the department determines that a

E. In a situation in which the child has lost both parents as a result of a homicide or has lost one parent and the other parent has been arrested, detained or sentenced and committed to a state correctional facility, state mental health institute or county jail for an offense related to the homicide.

3. Consent to treatment. The department may give consent for the child to receive necessary emergency medical treatment while receiving short-term emergency services. When the department has given its consent, a physician or health care provider shall be immune from civil liability for providing emergency medical treatment without the informed consent of the child or the child's parents or custodian.

4. Contacting parents. The following procedures shall apply.

A. Prior to or on initiating short-term emergency services, the department or agency shall take reasonable steps to notify a custodian that the child will receive or is receiving the services. Notwithstanding this subsection, shelters for homeless children, as defined in section 8101, subsection 4–A, are governed by the parental notification requirements contained in the Department of Health and Human Services rules for the licensure of shelters for homeless children.

B. Short-term emergency services, except for medical treatment, shall not be provided to a child who expresses a clear desire not to receive them.

C. If a parent or custodian objects to medical treatment, it shall be discontinued within 6 hours of receiving the objection.

5. Time limit. Short-term emergency services shall not exceed 72 hours from the time of the department's assumption of responsibility for the child. Notwithstanding this subsection, shelters for homeless children, as defined in section 8101, subsection 4–A, are governed by the time-limit requirements contained in the Department of Health and Human Services rules for the licensure of shelters for homeless children.

6. Parent's obligations. Providing short-term emergency services to a child shall not affect a parent's obligation for the support of the child.

7. Reimbursement. The department may, by agreement or court order, obtain reimbursement from a parent for the support of a child who receives short-term emergency services. An agency may also obtain reimbursement from a parent subject to its contract or written agreement with the department.

8. Emergency assessment. In the event of a homicide as described in subsection 2, paragraph E, the department shall perform an emergency assessment for the purposes of temporary placement with a relative or other responsible person. The department shall provide a copy of the assessment performed under this subsection to the law enforcement personnel involved with the family of the child.

1979, c. 733, § 18; 1983, c. 354, § 5; 1989, c. 270, §§ 8 to 10; 1989, c. 819, §§ 3, 4; 2003, c. 626, §§ 1 to 4; 2003, c. 689, § B–6, eff. July 1, 2004.

§ 4024. Department responsible for required services

If the department requires that a child receive mental health services or other medical services as an alternative to the initiation of a child protection proceeding, the department shall inform the person responsible for the child that the services must be approved by the department. If the person responsible for the child's medical expenses is unable to pay for the services required, the department shall inform the person responsible for the child that the department will pay for the services if the services are approved by the department.

1991, c. 623.

SUBCHAPTER 4

PROTECTION ORDERS

Section

§ 4031. Jurisdiction; venue

1. Jurisdiction. The following provisions govern jurisdiction.

A. The District Court has jurisdiction over child protection proceedings and jurisdiction over petitions for adoption from permanency guardianship filed by the department.

B. The Probate Court and the Superior Court have concurrent jurisdiction to act on requests for preliminary child protection orders under section 4034. As soon as the action is taken by the Probate Court or the Superior Court, the matter must be transferred to the District Court.

C. **Repealed.** Laws 1989, c. 270, § 12.

D. The District Court has jurisdiction over judicial reviews transferred to the District Court pursuant to Title 18–A, section 9–205.

2. Venue.

A. Petitions shall be brought in the district where the child legally resides or where the child is present. When a child is in voluntary placement with the department or an agency, the petition may be brought only in the district where he legally resides.

B. The court, for the convenience of the parties or in the interests of justice, may transfer the petitions to another district or division.

C. A judge from another district, division or county may hear a petition and make a preliminary or final protection order if no judge is available in the district and division in which the petition is filed.

3. Scope of authority. The court shall consider and act on child protection petitions regardless of other decrees regarding a child's care and custody. The requirements and provisions of Title 19–A, chapter 58 [1] do not apply to child protection proceedings. If custody is an issue in another pending proceeding, the proceedings may be consolidated in the District Court with respect to the custody issue. In any event, the court shall make an order on the child protection petition in accordance with this chapter. That order takes precedence over any prior order regarding the child's care and custody.

1979, c. 733, § 18; 1985, c. 547, eff. Feb. 28, 1986; 1989, c. 270, §§ 11, 12; 1991, c. 548, § A–19, eff. July 10, 1991; 1993, c. 686, § 9; 1995, c. 694, §§ D–40, D–41, eff. Oct. 1, 1997; R.R.1999, c. 1, § 29, eff. Oct. 1, 1999; 2011, c. 402, § 3.

[1] 19–A M.R.S.A. § 1731 et seq.

§ 4032. Child protection petition; petitioners; content; filing

1. Who may petition. Petitions may be brought by:

A. The department through an authorized agent;

B. A police officer or sheriff; or

C. Three or more persons.

2. Contents of petition. A petition must be sworn and include at least the following:

A. Name, date, place of birth and municipal residence, if known, of each child;

B. The name and address of the petitioner and the nature of the petitioner's relationship to the child;

C. Name and municipal residence, if known, of each parent and custodian;

D. A summary statement of the facts that the petitioner believes constitute the basis for the petition;

E. An allegation that is sufficient for court action;

F. A request for specific court action;

G. A statement that the parents and custodians are entitled to legal counsel in the proceedings and that, if they want an attorney but are unable to afford one, they should contact the court as soon as possible to request appointed counsel;

H. A statement that petition proceedings could lead to the termination of parental rights under section 4051 et seq.;

I. A statement explaining the specific reasonable efforts made to prevent the need to remove the child from the home or to resolve jeopardy;

J. The names of relatives who may be able to provide care for the child; and

K. The names of relatives who are members of an Indian tribe.

3. Hearing date. On the filing of a petition, the court shall set the earliest practicable time and date for a hearing.

1979, c. 733, § 18; 2001, c. 696, § 24.

§ 4033. Service and notice

1. Petition service. A child protection petition shall be served as follows:

A. The petition and a notice of hearing shall be served on the parents and custodians, the guardian ad litem for the child and any other party at least 10 days prior to the hearing date. A party may waive this time requirement if the waiver is written and voluntarily and knowingly executed in court before a judge. Service shall be made in accordance with the District Court Civil Rules.

B. If the department is not the petitioner, the petitioner shall serve a copy of the petition and notice of hearing on the State.

2. Notice of preliminary protection order. If there is to be a request for a preliminary protection order, the petitioner shall, by any reasonable means, attempt to notify the parents and custodians of his intent to request that order and of the time and place at which he will make the request. This notice is not required if the petitioner includes in the petition a sworn statement of his belief that:

A. The child would suffer serious harm during the time needed to notify the parents or custodians; or

B. Prior notice to the parents or custodians would increase the risk of serious harm to the child or petitioner.

3. Service of preliminary protection order. If the court makes a preliminary protection order, a copy of the order shall be served on the parents and custodians by:

A. In-hand delivery by the judge or court clerk to any parent, custodian or their counsel who is present when the order is made;

B. Service in accordance with the Maine Rules of Civil Procedure. Notwithstanding the Maine Rules of Civil Procedure, the court may waive

13. Resource family license. The department shall issue a resource family license in accordance with standards adopted by the department to a resource family that meets the requirements and standards for permanency guardianship of children in foster care under subsection 1 and for a license fee established by the department.

2005, c. 372, § 6; 2005, c. 471, § 3; 2005, c. 521, §§ 1, 2; 2005, c. 683, § A–36, eff. June 2, 2006; 2007, c. 284, § 7; 2011, c. 402, §§ 6 to 9.

1 19–A M.R.S.A. § 2001 et seq.
2 19–A M.R.S.A. §§ 2101 et seq., 2801 et. seq.

§ 4038–D. Guardianship subsidy

1. Establishment of program; use of federal funds. There is established in the department the Guardianship Subsidy Program, referred to in this section as "the program." For the purposes of this section, the department is authorized to use funds that are appropriated for child welfare services and funds provided under the United States Social Security Act, Titles IV–B and IV–E, or under any waiver that the department receives pursuant to those Titles.

2. Eligibility for guardianship subsidy payments. Subject to rules adopted to implement this section, the department may provide subsidies for a child who is placed in a permanency guardianship or in a similar status by a Native American tribe, when reasonable but unsuccessful efforts have been made to place the child without guardianship subsidies and if the child would not be placed in a permanency guardianship without the assistance of the program.

3. Repealed. Laws 2011, c. 402, § 11.

4. Amount of guardianship subsidy. The amount of a guardianship subsidy is determined according to this subsection.

A. The amount may vary depending upon the resources of the permanency guardian, the needs of the child and the availability of other resources.

B. The amount may not exceed the total cost of caring for the child if the child were to remain in the care or custody of the department, without regard to the source of the funds.

C. Deleted. Laws 2011, c. 402, § 12.

D. Subject to rules adopted by the department, expenses of up to $2,000 per child may be reimbursed. This reimbursement is for legal expenses required to complete the permanency guardianship, including attorney's fees and travel expenses.

5. Duration of guardianship subsidy. A guardianship subsidy may be provided for a period of time based on the needs of a child. The subsidy may continue until the termination of the permanency guardianship or until the permanency guardian is no longer caring for the child, at which time the guardianship subsidy ceases. If the child has need of educational benefits or has a physical, mental or emotional handicap, the guardianship subsidy may continue until the child has attained 21 years of age if the child, the parents and the department agree that the need for care and support exists.

6. Administration of program. Applications for the program may be submitted by a prospective permanency guardian. A written agreement between the permanency guardian entering into the program and the department must precede the order creating the permanency guardianship, except that an application may be filed subsequent to the creation of the permanency guardianship if there were facts relevant to the child's eligibility that were not presented at the time of placement or if the child was eligible for participation in the program at the time of placement and the permanency guardian was not apprised of the program.

7. Annual review required. If the subsidy continues for more than one year, the need for the subsidy must be reviewed annually. The subsidy continues regardless of the state in which the permanency guardian resides, or the state to which the permanency guardian moves, if the permanency guardian continues to be responsible for the child.

8. Repealed. Laws 2011, c. 402, § 14.

9. Adoption of rules. The department shall adopt rules for the program consistent with this section. Rules adopted pursuant to this subsection are routine technical rules pursuant to Title 5, chapter 375, subchapter 2–A. [1]

10. Permanency guardian's eligibility for public benefits. Except as required by federal law or regulation, the guardianship subsidy may not be counted as resources or income in the determination of the permanency guardian's eligibility for any public benefit.

11. Application to pending cases. The department may provide a guardianship subsidy pursuant to this section to a child who is the subject of a child protection proceeding pending on September 17, 2005 or to a child who is the subject of a child protection proceeding commenced on or after September 17, 2005.

2005, c. 372, § 6; 2005, c. 521, §§ 3, 4; 2011, c. 402, §§ 10 to 14.

1 5 M.R.S.A. § 8071 et seq.

§ 4038–E. Adoption from permanency guardianship

The department may petition the District Court to have a permanency guardian adopt the child in the permanency guardian's care and to change the child's name.

1. Contents of petition for adoption from permanency guardianship. The petition for adoption from permanency guardianship must be sworn and must include at least the following:

A. The name, date and place of birth, if known, of the child and the child's current residence;

B. The child's proposed new name, if any;

C. The name and residence of the permanency guardian and the relationship to the child;

D. The name and residence, if known, of each of the child's parents;

E. The name and residence of the former guardian ad litem of the child in the related child protection proceeding;

F. The names and residences of all persons known to the department that affect custody, visitation or access to the child;

G. A summary statement of the facts that the petitioner believes constitute the basis for the request for the adoption from permanency guardianship, including a statement that the permanency guardian intends to establish a parent and child relationship and that the permanency guardian is a fit and proper person able to care and provide for the child's welfare;

H. A statement of the intent of the parents to consent to the adoption;

I. A statement of the effects of a consent and adoption order; and

J. A statement that the parents are entitled to legal counsel in the adoption from permanency guardianship proceeding and that, if they want an attorney and are unable to afford one, they should contact the court as soon as possible to request appointed counsel.

2. Accompanying documents and information. The sworn petition must be accompanied by:

A. The birth certificate of the child;

B. A background check for each prospective adoptive parent, which must include:

(1) A screening of the permanency guardian for child abuse cases in the records of the department;

(2) The national criminal history record check for noncriminal justice purposes for each permanency guardian under subsection 7, paragraph A or updated check if the original was completed more than 2 years prior to the filing of the petition; and

(3) The state criminal history record check for noncriminal justice purposes for each permanency guardian under subsection 7, paragraph A or updated check if the original was completed more than 2 years prior to the filing of the petition;

C. The home study of the permanency guardian under subsection 7, paragraph B or an updated home study if the original was completed more than 2 years prior to the filing of the petition; and

D. The child's background information collected pursuant to subsection 7, paragraph B.

3. Scheduling of case management conference. On the filing of the petition, the court shall set a time and date for a case management conference.

4. Venue. A petition for adoption from permanency guardianship must be brought in the court that issued the final permanency guardianship appointment. The court, for the convenience of the parties or other good cause, may transfer the petition to another district or division.

5. Guardian ad litem; attorneys. The court shall appoint a guardian ad litem and attorneys for indigent parents and custodians, including the permanency guardians, in the same manner as guardians ad litem and attorneys are appointed under section 4005.

6. Service. The petition and the notice of the case management conference must be served on the parents and the guardian ad litem for the child at least 10 days prior to the scheduled case management conference date. Service must be in accordance with the Maine Rules of Civil Procedure or in any other manner ordered by the court.

7. Background checks for each permanency guardian seeking to adopt the child. The department may, pursuant to rules adopted by the department, at any time before the filing of the petition for adoption from permanency guardianship, conduct background checks of each permanency guardian of the child and a home study.

A. The department may, pursuant to rules adopted pursuant to Title 18–A, section 9–304, subsection (a–2), request a background check for each permanency guardian. The background check must include criminal history record information obtained from the Maine Criminal Justice Information System and the Federal Bureau of Investigation.

(1) The criminal history record information obtained from the Maine Criminal Justice Information System must include a record of Maine conviction data.

(2) The criminal history record information obtained from the Federal Bureau of Investigation must include other state and national criminal history record information.

(3) Each permanency guardian of the child shall submit to having fingerprints taken. The State Police, upon receipt of the fingerprint card, may charge the department for the expenses incurred in processing state and national criminal history record checks. The State Police shall take or cause to be taken the applicant's fingerprints and shall forward the fingerprints to the State Bureau of Identification so that the bureau can conduct state and national criminal history record checks. Except for the portion of the payment, if any, that constitutes the processing fee charged by the Federal Bureau of Investigation, all money received by the State Police for purposes of this paragraph must be paid over to the Treasurer of State. The money must be applied to the expenses of administration incurred by the Department of Public Safety.

media coverage of the escape that it would be an exercise in futility to attempt to seat a jury, was sufficient to meet the "sound judicial administration" of Rule 21(b)(3)(A).

[2] [¶ 8] Chasse argues that, notwithstanding Rule 21(b)(3)(A), the escape statute, 17–A M.R.S.A. § 755(3–A), required that his trial be held in Piscataquis County. We disagree. We interpret section 755(3–A) to require that the prosecution of a person for the offense of escape commence in the county where the institution from which the escape was made is located. Once the prosecution has commenced in that county, the place of trial can be transferred to another county upon motion of either the defendant or the State or upon the court's own motion. The escape statute does not prohibit the transfer of a case for trial when reasons of judicial administration require it and could not do so in contradiction to constitutional requirements.[4] Chasse's prosecution began with his indictment and arraignment in Piscataquis County. The venue provision of the escape statute was satisfied when the indictment and arraignment occurred in the county in which the escape took place and where Chasse was apprehended.

[3] [¶ 9] Chasse also argues that even if the escape statute and Rule 21 permitted the transfer of the place of trial, the court abused its discretion in doing so. *State v. Sproul*, 544 A.2d 743, 746 (Me.1988). In the present case, the court was justified in concluding that the overwhelming publicity would make the selection of an impartial jury in Piscataquis County impossible and a needless expense. It did not exceed the bounds of its discretion in moving the trial to Somerset County.

4. Change of venue may be required as a matter of constitutional law where pretrial publicity is so extensive and pervasive that prejudice will be presumed. *State v. Chesnel*, 1999 ME 120, ¶¶ 5–6, 734 A.2d 1131, 1134.

The entry is:

Judgment affirmed.

2002 ME 88

Kelly MARIN

v.

Michael MARIN.

Supreme Judicial Court of Maine.

Submitted on Briefs: Jan. 28, 2002.
Decided: June 4, 2002.

Divorced father moved to amend the divorce judgment to determine his parental rights and responsibilities with respect to his eldest son. The Springvale District Court, Sheldon, J., denied motion. Father appealed. The Supreme Judicial Court, Dana, J., held that: (1) res judicata did not bar divorced father from seeking to amend divorce judgment, and (2) district court was required to determine parental rights and responsibilities as between divorced parents subject to the outstanding guardianship of eldest son in his grandparents.

Vacated and remanded.

1. Child Custody ⇐532

Claim in the probate court for guardianship of couple's eldest son was not the same as claim in the district court for divorce, and thus, doctrine of res judicata did not bar divorced father from seeking to amend divorce judgment to determine his parental rights and responsibilities, in-

cluding issues of residence, child support, and visitation, even though probate court previously named grandparents as son's guardians; the probate court could only determine issues of parental rights and responsibilities as they related to the guardianship proceeding in which they arose.

2. Courts ⇐472.4(1)

District court that entered divorce judgment had jurisdiction and was required to determine parental rights and responsibilities as between divorced parents subject to the outstanding guardianship of eldest son in his grandparents; however, it lacked any authority to modify grandparents' rights as guardians, over which the probate court had exclusive jurisdiction. 18–A M.R.S.A. § 5–102; 19–A M.R.S.A. § 1654.

3. Courts ⇐198

The probate court is a statutory court of limited jurisdiction and its actions are void unless taken pursuant to statutory authority.

Paul Aranson, Scaccia, Lenkowski & Aranson, Sanford, for appellant.

Plaintiff did not file a brief.

Lisa M. White, Sanford, Guardian ad Litem.

Panel: SAUFLEY, C.J., and CLIFFORD, RUDMAN, DANA, ALEXANDER, and CALKINS, JJ.

DANA, J.

[¶ 1] Michael Marin appeals from the District Court's (Springvale, *Sheldon, J.*) denial of his motion to amend his divorce judgment to determine his parental rights and responsibilities with regard to his eldest son. Michael contends that the court erred in failing to exercise its jurisdiction. We agree, vacate, and remand.

I. BACKGROUND

[¶ 2] Michael and Kelly Marin, at the time of their divorce in November 2000, had three children, the eldest of whom was eleven-year-old Justin. In the month prior to the divorce, in a separate guardianship proceeding, the York County Probate Court (*Nadeau, J.*) granted coguardianship of Justin to Richard and Linda LeClair, Justin's maternal grandparents. The Probate Court stated that

> Kelly Marin concedes that Michael Marin is the more stable parent who, therefore, in the Court's view may be the more appropriate custodian when and if the Court finds, pursuant to any subsequent Petition to Terminate Co–Guardianship which any party may file at an appropriate time in the future, that the Co–Guardianship granted herein should be terminated.

[¶ 3] The District Court (Springvale, *Stavros, C.M.O.*) entered a divorce judgment that did not determine any custody or visitation issues regarding Justin, stating: "This order makes no provision as to Justin who is in the custody of Linda LeClair, by York County Probate Court order . . . ."

[¶ 4] In the Probate Court, the LeClairs moved to amend the guardianship judgment to define the terms of Justin's visits with Michael. The Probate Court denied the motion on November 14, stating that the LeClairs already had full authority to regulate Justin's contact with his parents.

[¶ 5] Michael moved to amend the divorce judgment in the District Court to determine his parental rights and responsibilities, including making his residence Justin's primary residence, determining a schedule for parental contact, and award-

ing him child support. The District Court denied Michael's motion to amend the judgment, concluding that the motion was barred by res judicata because Michael "had the opportunity to establish that his custody was in Justin's best interest because that issue was germane to the Probate Court's decision on guardianship."

II. DISCUSSION

A. Res Judicata

[¶ 6] Michael contends that the court erred in concluding that the issues raised by his motion to amend the divorce judgment were already decided by the Probate Court, and were therefore barred by the doctrine of res judicata.

[1] [¶ 7] We have recognized that there are two branches of res judicata: claim preclusion and issue preclusion. *In re Kaleb D.*, 2001 ME 55, ¶ 7, 769 A.2d 179, 183. The present claim is not barred by res judicata because the parties do not raise the same claim or issue. The initial claim in the Probate Court was a claim for guardianship, not a claim for divorce. The Probate Court could only determine issues of parental rights and responsibilities as they related to the guardianship proceeding in which they arose. The Probate Court named guardians for Justin and suggested a preference for Michael having custody if the guardianship terminated, but it did not render a judgment regarding Michael's and Kelly's parental rights and responsibilities. Thus, the District Court erred in concluding that the claim was barred by the doctrine of res judicata.

B. Jurisdiction of the District Court

[2] [¶ 8] Michael contends that the District Court should have declared the Probate Court order null and void because the Probate Court acted beyond the limits of the guardianship statute, 18–A M.R.S.A. § 5–204(c) (1998), in granting the LeClairs rights over all decisions pertaining to Justin. According to Michael, the District Court should have exercised its concurrent jurisdiction over issues regarding Justin's residence and visitation pursuant to 19–A M.R.S.A. § 1654 (1998 & Supp.2001).

[3] [¶ 9] "The Probate Court is a statutory court of limited jurisdiction and its actions are void unless taken pursuant to statutory authority." *In re Joseph B.G.*, 1997 ME 210, ¶ 5, 704 A.2d 327, 328. The Probate Court "has exclusive jurisdiction over guardianship proceedings." 18–A M.R.S.A. § 5–102 (1998). The District and Probate Courts share concurrent jurisdiction over issues of parental rights and responsibilities. 19–A M.R.S.A. § 1654.

[¶ 10] We do not accept Michael's attempt to avoid the Probate Court's guardianship decision and seek custody of Justin in a divorce proceeding to which the LeClairs cannot be parties. The District Court lacks the authority to modify the LeClairs' rights as guardians. Nonetheless, it has jurisdiction to determine parental rights and responsibilities as between Justin's parents subject to the outstanding guardianship, and it erred in failing to do so.[1]

The entry is:

Judgment vacated and remanded for the determination of the parents' rights and responsibilities with regard to Justin subject to the guardianship of the Probate Court.

1. In circumstances where the District Court and Probate Court are both exercising their concurrent jurisdiction in matters of child custody it may be advisable for the courts to confer by telephone.

MAINE SUPREME JUDICIAL COURT
Decision: 2006 ME 28
Docket: Aro-05-580
Submitted
on Briefs: February 27, 2006
Decided: March 29, 2006

Panel: CLIFFORD, DANA, ALEXANDER, CALKINS, LEVY, and SILVER, JJ.

Reporter of Decisions

In re AUSTIN T.

CALKINS, J.

[¶1] Donna R., the mother of Austin T., appeals from the judgment entered by the District Court (Presque Isle, *O'Mara, J.*) dismissing her petition to terminate the parental rights of Melvin T., Austin's father. Donna contends that the court erred in dismissing her petition for lack of subject matter jurisdiction and lack of proper venue. We agree with Donna and vacate the judgment.

I. BACKGROUND

[¶2] The following facts are taken from Donna's petition to terminate the parental rights of Melvin. Austin, who was born in 2000, lives with Donna in Presque Isle. In 2004, Melvin was sentenced to ten years incarceration to be followed by four years of probation. The sentence was imposed for convictions for several offenses, including burglary and an aggravated assault that caused life-threatening injuries to Donna. The conditions of probation include no contact

with Donna or any member of her family, and any travel by Melvin within fifty miles of Donna's residence must be preapproved by the probation officer. Melvin is presently incarcerated in a Maine correctional institution.

[¶3] In spite of court orders that required Melvin to stay away from Donna prior to his incarceration, he stalked her and invaded her home. She is in mortal fear for her safety and the safety of Austin. Donna has a court order, issued pursuant to 19-A M.R.S. § 1653 (2005), granting her sole parental rights and responsibilities of Austin. The petition alleges that the court order removed custody of Austin from Melvin. Donna further alleges in the petition that termination is in the best interest of Austin and that Melvin (1) has abandoned the child; (2) is unwilling and unable to take responsibility for the child in a time reasonably calculated to meet the child's needs; and (3) is unwilling and unable to protect the child from jeopardy and these circumstances are unlikely to change within a time reasonably calculated to meet the child's needs.

[¶4] Donna, as the custodian of Austin, filed the petition to terminate Melvin's parental rights pursuant to 22 M.R.S. § 4052(1) (2005).[1] The court appointed a guardian ad litem for the child and counsel to represent Melvin.

---

[1] Melvin contends that Donna does not qualify as a custodian because she has not been awarded custody of Austin pursuant to a child protection order. "Custodian" is defined as "the person who has legal custody and power over the person of a child." 22 M.R.S. § 4002(5) (2005). A parent who is awarded sole parental rights and responsibilities of a child pursuant to 19-A M.R.S. § 1653(2)(D)(1) (2005) has legal custody of that child. Thus, Donna is Austin's custodian or custodial parent.

Although neither the guardian nor Melvin moved to dismiss the petition, at a case management hearing attended by all counsel, the issue of whether the court had the authority to terminate Melvin's parental rights was raised. Donna submitted a memorandum to the court on the issue, arguing that a child protection order issued pursuant to 22 M.R.S. § 4035 (2005) is not a necessary prerequisite to a petition to terminate parental rights when the petitioner has been granted sole parental rights and responsibilities by an order issued pursuant to 19-A M.R.S. § 1653.

[¶5] The court dismissed the petition. Donna moved for findings of fact and conclusions of law, and the court issued a decision stating its reasons for dismissing the petition. Essentially, the court concluded that because it had not issued a final child protection order pursuant to 22 M.R.S. § 4035, it did not have subject matter jurisdiction over the petition, and that because 22 M.R.S. § 4051 (2005) requires a termination petition to be filed in the same court that issued a final protection order, venue was improper. Donna appealed, and the Department of Health and Human Services was granted leave to file an amicus brief supporting Donna's position.

II. DISCUSSION

[¶6] Although there was not a formal motion to dismiss for lack of subject matter jurisdiction, the court treated the issue as though a Rule 12(b)(6) motion had been filed. When a motion to dismiss for failure to state a claim is filed pursuant

to M.R. Civ. P. 12(b)(6), we take the material allegations of a complaint as though they were admitted. *In re Wage Payment Litig.*, 2000 ME 162, ¶ 3, 759 A.2d 217, 220. Whether the District Court has subject matter jurisdiction to decide a petition for termination of parental rights is a question of law, and we review questions of law de novo. *See Norris Family Assocs., LLC v. Town of Phippsburg*, 2005 ME 102, ¶ 8, 879 A.2d 1007, 1011. We interpret statutes to give effect to the legislative intent by viewing the plain language of the statute and considering the statutory context. *Darling's v. Ford Motor Co.*, 2003 ME 21, ¶ 7, 825 A.2d 344, 346.

[¶7] The parties do not dispute that the District Court has jurisdiction to decide petitions for the termination of parental rights. The actual dispute is whether Donna has met the statutory prerequisites to the filing of the petition. *See Landmark Realty v. Leasure*, 2004 ME 85, ¶¶ 7-8, 853 A.2d 749, 750-51.

[¶8] The statutory section entitled "Grounds for termination," 22 M.R.S. § 4055 (2005), provides that a court may issue a termination order if "[c]ustody has been removed from the parent" pursuant to 22 M.R.S. §§ 4035 or 4038, or 19-A M.R.S. §§ 1502 or 1653. 22 M.R.S. § 4055(1)(A)(1)(a), (b). In addition, unless the parent from whom custody has been removed consents to the termination, the petitioner must prove parental unfitness and that termination is in the best interest of the child. 22 M.R.S. § 4055(1)(B)(2); *In re Leona T.*, 609 A.2d 1157, 1158

(Me. 1992). Donna's petition alleges that custody was removed from Melvin pursuant to 19-A M.R.S. § 1653, that he satisfies three of the four grounds for parental unfitness, and that termination of his parental rights is in Austin's best interest.

[¶9] Melvin contends that because the termination statute contains a number of references to proceedings for child protection petitions and orders, *see, e.g.,* 22 M.R.S. §§ 4050, 4051, 4052(3)(D), 4055(1)(B)(2)(b)(i), (iv) (2005), a child protection order is a necessary prerequisite to filing a termination petition. However, if we were to infer this requirement, we would be impermissibly casting doubt on the very clear criteria for termination set forth in 22 M.R.S. § 4055(1). *See Darling's*, 2003 ME 21, ¶ 7, 825 A.2d at 346. If the father is correct that a termination petition may not be filed until there is a child protection order, then the provision in section 4055(1)(A)(1)(b) that allows a court to grant a termination order upon a finding that custody has been removed from a parent in an order issued pursuant to 19-A M.R.S. § 1653 would be meaningless and pure surplusage. A cardinal rule of statutory interpretation is that meaning and force must be given to all provisions in a statute if it is reasonable to do so. *Struck v. Hackett*, 668 A.2d 411, 417 (Me. 1995). The most reasonable construction is that provisions that refer to child protection petitions or orders, such as the venue provision in 22

M.R.S. § 4051,[2] apply only in those cases that begin with a child protection petition. In cases such as this, however, where there was no child protection petition, these provisions are not relevant and do not apply.

[¶10] The end result of a child protection petition and the jeopardy hearing that follows the petition is to determine whether the child can remain safely in the custody of a parent. In this case, the custody determination has already been made pursuant to 19-A M.R.S. § 1653. To require the filing of a child protection petition and a jeopardy hearing would needlessly delay the process. Such a delay would be inconsistent with the expressed intent of the Legislature. The provisions governing termination of parental rights emphasize stability and permanency for children. 22 M.R.S. § 4050; *see also In re Thomas H.*, 2005 ME 123, ¶ 29, 889 A.2d 297, 307. They are to "[b]e liberally construed to serve and protect the best interests of the child." 22 M.R.S. § 4050(4). Requiring these parties to go through a full child protection proceeding is not consistent with either liberal construction or the child's best interest.

---

[2] Title 22 M.R.S. § 4051 (2005) is entitled "Venue," and it states:

> A petition for termination of parental rights must be brought in the court that issued the final protection order. The court, for the convenience of the parties or other good cause, may transfer the petition to another district or division. A petition for termination of parental rights may also be brought in a Probate Court as part of an adoption proceeding as provided in Title 18-A, article IX, when a child protective proceeding has not been initiated.

[¶11] In his brief to this Court, Melvin contends that terminating his parental rights without a prior child protection order is a violation of his due process rights. Melvin failed to raise this issue in the District Court, and, therefore, we do not address it except to note that he will receive all of the procedural protections outlined in the termination statutes. *See* 22 M.R.S. § 4053 (2005) (requiring service and notice); 22 M.R.S. § 4054 (2005) (requiring a hearing before parental rights may be terminated); 22 M.R.S. § 4055(1)(B)(2) (requiring the clear and convincing burden of proof).

[¶12] In summary, the court did not lack subject matter jurisdiction or proper venue. Because the mother's petition alleged all the statutory prerequisites to termination pursuant to 22 M.R.S. § 4055(1), the court erred in dismissing her petition.

The entry is:

Judgment vacated.

Attorney for appellant:
Sarah E. LeClaire, Esq.
421 Main Street
Presque Isle, ME 04769

Attorney for appellee:
James M. Dunleavy, Esq.
Dunleavey Law Offices, P.A.
P.O. Box 33
Presque Isle, ME 04769

Attorneys for *amicus curiae*:

G. Steven Rowe, Attorney General
Matthew Pollack, Asst. Atty. Gen.
6 State House Station
Augusta, ME 04333-0006

Guardian *ad Litem*:

Kathleen T. O'Boyle, Esq.
477 Main Street
Presque Isle, ME 04769

MAINE SUPREME JUDICIAL COURT Reporter of Decisions
Decision: 2008 ME 152
Docket: Cum-07-744
Submitted
On Briefs: May 29, 2008
Decided: October 7, 2008

Panel: SAUFLEY, C.J., and CLIFFORD, ALEXANDER, LEVY, SILVER, MEAD, and GORMAN, JJ.

MARY E. PHILBROOK et al.

v.

LYNN THERIAULT et al.

SAUFLEY, C.J.

[¶1] Mary E. and David R. Philbrook appeal from a judgment entered in the District Court (Bridgton, *Beaudoin J.*) dismissing their complaint for parental rights and responsibilities regarding their grandsons on the ground that they lack standing to proceed. The Philbrooks contend that they functioned as the boys' de facto parents for substantial periods of time and that the District Court erred when it dismissed their complaint. We affirm the dismissal.

I. BACKGROUND

[¶2] The following facts are taken from the parties' affidavits and the procedural record. The Theriault children are the sons of Lynn and Gary Theriault. Lynn is the daughter of David and Mary Philbrook. In early 1996, when Lynn became pregnant with her youngest son, she and her older son moved in with the

Philbrooks as a result of Lynn's need for assistance with a difficult pregnancy. Following the youngest child's birth, Lynn and her sons remained in the Philbrook home until March 1997 when Lynn had fully recovered from her pregnancy and delivery.

[¶3] Shortly thereafter, Lynn and the boys moved back in with the Philbrooks due to marital difficulties between Lynn and Gary. In June 1998, however, Lynn and Gary attempted reconciliation, and she and the boys moved back into the family home. Although they had moved out of the Philbrooks' home, the boys continued to stay at their grandparents' home for some period of time each school week because their parents both worked on a schedule that required them to be at work early each morning and sometimes to work into the night. When the boys stayed overnight, Lynn would frequently either stay at the Philbrooks' home or remain there in the evenings until the boys went to bed.

[¶4] In June 2004, Lynn filed for divorce. Several months later, Lynn and the boys moved back in with the Philbrooks. The Philbrooks intervened in the divorce proceeding, and in February 2005, the court entered an order agreed upon by the parties in the divorce action directing that the boys' primary residence be with the Philbrooks. At the time this order was entered, Lynn also lived with the boys at the Philbrook residence.

[¶5] By the fall of 2005, Gary and Lynn had reconciled and were again living together. In November of that year, the District Court modified its order regarding the children's residency and ordered that the parents share the residence of the boys.

[¶6] In June 2006, Lynn moved to dismiss the divorce case. In August, the divorce court signed an order dismissing all claims but staying the dismissal until September 8, 2006. The court ordered that, if the Philbrooks filed a new action seeking rights of contact or parental rights by that date, the stay would remain in effect until either (1) an interim order was entered in that case, or (2) the stay was terminated in the divorce case.

[¶7] On September 8, 2006, the Philbrooks filed a complaint seeking parental rights and responsibilities regarding their grandsons on the basis that they were the boys' de facto parents and as third parties pursuant to 19-A M.R.S. § 1653(2)(C) (2007).[1] At the end of September, Lynn moved to dismiss the Philbrooks' complaint.

---

[1] The full text of 19-A M.R.S. § 1653(2)(C) (2007) provides:

> **2. Parental rights and responsibilities; order.** This subsection governs parental rights and responsibilities and court orders for parental rights and responsibilities.
>
> . . . .
>
> **C.** The court may award parental rights and responsibilities with respect to the child to a 3rd person, a suitable society or institution for the care and protection of children or the department, upon a finding that awarding parental rights and responsibilities to either or

[¶8] During the following month, before any action had been taken on Lynn's motion to dismiss the Philbrooks' complaint, the divorce court terminated the stay of dismissal in the divorce proceeding. As a result, the Theriaults had exclusive custody of their children again. Marital problems later arose between the Theriaults, however, and Lynn filed a new action for divorce in April 2007. Lynn and the boys then moved back in with the Philbrooks.

[¶9] In September 2007, the court denied Lynn's motion to dismiss the Philbrooks' parental rights and responsibilities complaint. The court ordered the parties to file affidavits concerning the facts upon which their respective claims about the de facto parent status of David and Mary Philbrook were based.

[¶10] In October, in the divorce proceeding, Lynn obtained exclusive possession of the marital home through an interim order, and she and the boys moved out of the Philbrooks' home at that time. Within the same month, the court entered a final divorce judgment allocating parental rights and responsibilities by agreement between Gary and Lynn.

[¶11] The Philbrooks filed affidavits in support of their de facto parent status in the parental rights and responsibilities action in late October 2007. Lynn filed her affidavit in early November. According to Lynn's affidavit, she has

---

both parents will place the child in jeopardy as defined in Title 22, section 4002, subsection 6.

always had primary caretaking responsibility for both of her sons. Lynn asserts that she and Gary make the decisions about the boys' education and medical care, and that she meets with the boys' teachers to work on their individualized education plans. She also asserts that she and Gary make all decisions about discipline, extracurricular activities, household chores, and homework.

[¶12] The Philbrooks aver in their affidavits that they were the primary caretakers for the children from 1996 until 2005. The Philbrooks maintain that they shared the primary parental responsibilities for the children because Lynn had been devastated by earlier life events and because living conditions in the Theriault trailer were less than hospitable. The Philbrooks' affidavits state that they were also the primary providers of any medical care the boys needed. They indicated in their affidavits that they paid most of the expenses associated with the boys' medical care. They allege that they intervened in the divorce proceedings between Lynn and Gary because the boys' guardian ad litem felt that Lynn and Gary might have been using drugs.

[¶13] A family friend of the Philbrooks also filed an affidavit indicating that she visited the Philbrook home often and that, on the occasions when she visited, she observed Mary and David Philbrook providing primary care for the boys, but observed Lynn in the Philbrook home with the boys very infrequently.

[¶14] After reviewing the pleadings and the affidavits, as well as taking judicial notice of the divorce proceedings between Lynn and Gary Theriault,[2] the court determined that the Philbrooks did not have standing to seek parental rights and responsibilities as de facto parents.[3] The court dismissed the Philbrooks' complaint with prejudice. The Philbrooks timely appealed.

II. DISCUSSION

A. Procedure

[¶15] The procedure used by the court to settle the question of the Philbrooks' standing is instructive. Before requiring the parents to invest the time and resources to engage in a full evidentiary hearing on the issue of the Philbrooks' status as de facto parents, the court ordered both the Philbrooks and the Theriaults to submit affidavits detailing facts that would either support or refute that status. After examining the affidavits, the court made the determination that the Philbrooks had not made a prima facie showing that they qualified as de facto parents and dismissed their claim without holding a hearing.

---

[2] Although the Philbrooks argue that the court should not have taken judicial notice of the divorce proceedings, we discern no error in the court's consideration of the divorce records. *See Currier v. Cyr*, 570 A.2d 1205, 1208 (Me. 1990).

[3] The court also determined that the boys would not be in jeopardy if the Philbrooks were not awarded parental rights and responsibilities. The Philbrooks have also appealed from this determination. We find this argument unpersuasive and do not address it further.

[¶16] The court's reliance on the parties' affidavits to determine whether the Philbrooks had demonstrated, at a prima facie level, the potential to qualify as de facto parents was drawn from the process established by *Rideout v. Riendeau*, 2000 ME 198, ¶¶ 29-30, 761 A.2d 291, 302-03. We recently endorsed a similar process in cases involving intervention by grandparents in parental rights proceedings pursuant to 19-A M.R.S. § 1653(2)(B) (2007), which permits a court to award reasonable rights of contact to a third person in a parental rights and responsibilities order. *See Davis v. Anderson*, 2008 ME 125, ¶ 17, 953 A.2d 1166, 1171.

[¶17] Efforts by grandparents, or others, to obtain parental rights through litigation, over the objections of parents, implicate the parents' fundamental right to direct the upbringing of their children. *See Rideout*, 2000 ME 198, ¶¶ 21, 30, 761 A.2d at 300, 302-03. To balance the Theriaults' fundamental rights with the Philbrooks' legitimate interest in asserting their status as de facto parents, the court appropriately obtained affidavits from the parties to determine whether the Philbrooks had established a prima facie case that they were de facto parents of their grandsons. *Id.*; *see also Davis*, 2008 ME 125, ¶ 17, 953 A.2d at 1171.

B. De Facto Parent Status

[¶18] In the absence of a determination that a child would be in circumstances of jeopardy if placed with either parent, grandparents may seek

parental rights or contact with their grandchildren over the objections of parents in two ways: (1) grandparents may seek visitation rights pursuant to Maine's Grandparents Visitation Act, 19-A M.R.S. §§ 1801-1805 (2007), *amended by* P.L. 2007, ch. 513, § 4 (effective June 30, 2008) (to be codified at 19-A M.R.S. § 1803(8)(A)); s*ee generally Rideout*, 2000 ME 198, 761 A.2d 291, or (2) they may, as the Philbrooks have done, file a parental rights and responsibilities proceeding, demonstrate to a court that they are the de facto parents of their grandchildren, and seek parental rights and responsibilities in accordance with that status, *see C.E.W. v. D.E.W.*, 2004 ME 43, ¶¶ 9-10, 845 A.2d 1146, 1149-51.[4]

[¶19] When any person who is not a legal parent, including a grandparent, seeks to have the court declare that that person is a de facto parent to a child over a parent's objection, the court must make a preliminary determination that such a relationship does in fact exist before a parent can be required to fully litigate the issue. *See, e.g.*, *Davis*, 2008 ME 125, ¶ 17, 953 A.2d at 1171; *Rideout*, 2000 ME 198, ¶ 30, 761 A.2d at 302-03. This determination establishes whether a party has standing to seek the relief requested. *See Davis*, 2008 ME 125, ¶ 17, 953 A.2d at

[4] Grandparents may also present their home as a possible placement when a court has found that a child would be in circumstances of jeopardy if placed with either parent. *See* 19-A M.R.S. § 1653(2)(C) (2007); 22 M.R.S. § 4036(1), (1-A) (2007). This finding may be made either in a child protection proceeding, 22 M.R.S. § 4036(1), (1-A), or in a divorce or parental rights and responsibilities proceeding, 19-A M.R.S. § 1653(2)(C). A finding of jeopardy in either type of case must comport with the definition of "jeopardy" provided in the child protection statutes at 22 M.R.S. § 4002(6) (2007). If no child protection, divorce, or parental rights and responsibilities proceeding is pending, grandparents may also initiate a three-party child protection petition pursuant to 22 M.R.S. § 4032(1)(C) (2007), and seek care or guardianship of their grandchildren if jeopardy is found in that proceeding.

1171 (characterizing the determination whether a party can establish a de facto parent relationship as a standing issue that poses a "threshold question for the court"); *Rideout*, 2000 ME 198, ¶ 30, 761 A.2d at 302 (citing 19-A M.R.S. § 1803(1) (entitled, "Standing to petition for visitation rights")).

[¶20] Our standing requirement is prudential, with the basic premise being to "limit access to the courts to those best suited to assert a particular claim." *Roop v. City of Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966, 968 (quotation marks omitted). The prerequisites necessary for a party to have standing depend on the context. *See id.*

[¶21] Absent any argument that the court committed clear error in its factual findings regarding standing, *see Bissias v. Koulovatos*, 2000 ME 189, ¶ 6, 761 A.2d 47, 49, we address de novo the legal question of what is required to establish standing to seek parental rights and responsibilities as a de facto parent, *see id.*; 19-A M.R.S. § 1653 (2007), *amended by* P.L. 2007, ch. 513, §§ 2, 3 (effective June 30, 2008) (to be codified at 19-A M.R.S. § 1653(6-A)(A), (6-B)(A) (authorizing a court to enter an order regarding parental rights and responsibilities for a child)).

[¶22] In this context, standing to seek parental rights and responsibilities requires a prima facie demonstration of de facto parent status. *See Davis*, 2008 ME 125, ¶ 17, 953 A.2d at 1171; *Rideout*, 2000 ME 198, ¶ 30, 761 A.2d at 302.

Although we have not precisely defined the parameters of the de facto parent concept, we have made clear that it is a doctrine that may be applied only in limited circumstances, *C.E.W.*, 2004 ME 43, ¶ 10, 845 A.2d at 1150-51, when the putative de facto parent has "undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life," *id.* ¶ 14, 845 A.2d at 1152.

[¶23] We have never extended the de facto parent concept to include an individual who has not been understood to be the child's parent but who intermittently assumes parental duties at certain points of time in a child's life. Rather, when we have recognized a person as a de facto parent, we have done so in circumstances when the individual was understood and acknowledged to be the child's parent both by the child and by the child's other parent. *See C.E.W.*, 2004 ME 43, ¶¶ 2-4, 11, 13, 845 A.2d at 1147, 1151; *Stitham v. Henderson*, 2001 ME 52, ¶ 17, 768 A.2d 598, 603.

[¶24] For instance, we held that a man was a de facto parent when he raised a child as his own for several years beginning upon the child's birth and later discovered that he was not the child's biological father through paternity testing. *Stitham*, 2001 ME 52, ¶¶ 2-3, 17, 768 A.2d at 599-600, 603. In that case, the child, the mother, and the de facto father all behaved as if the de facto father was the child's father, biologically and emotionally, until blood testing proved otherwise.

Id. He and the child had a parent-child relationship, and he had been the child's legal father. *Id.*

[¶25] In another case, we held that a woman who had functioned as the mother of her partner's biological child for years, and who, by agreement with the biological parent, was raising the child as her own son, was also qualified as a de facto parent. *C.E.W.*, 2004 ME 43, ¶¶ 2-4, 11, 13, 845 A.2d at 1147, 1151. In both *Sitham* and *C.E.W.*, the individual held to be a de facto parent served in a parental capacity, was understood by the child to be a parent, functioned as the parent of the child, and was accepted by the biological parent as a parent.

[¶26] Here, the Philbrooks certainly demonstrated that they provided needed care for the boys, and as the court observed, that they have been "loving and helpful grandparents," but they were never thought to be the boys' parents. Nor were they invited to be treated as parents by the Theriaults as in *C.E.W.* Rather, the Philbrooks functioned as caring grandparents for their grandsons during what was obviously a difficult period for the boys' parents. The children were very fortunate to have had the love and stability that their grandparents provided during their parents' periods of turmoil. In the end, however, the Philbrooks' willingness to provide care for their grandsons was commendable, but the care they provided was not sufficient to transform them into the boys' de facto parents. The court did not, therefore, err in dismissing the Philbrooks' complaint for lack of

standing based on a finding that the Philbrooks had failed to establish a prima facie case that they were de facto parents.

The entry is:

Judgment affirmed.

Attorney for David and Mary Philbrook:

S. James Levis, Jr., Esq.
Levis & Ingraham, P.A.
338 Main Street
Saco, Maine 04072

Attorneys for Lynn Theriault:

Jacquelyn Hadam, Student Attorney
Deirdre M. Smith, Faculty Supervisor
Cumberland Legal Aid Clinic
University of Maine School of Law
246 Deering Avenue
Portland, Maine 04102

MAINE SUPREME JUDICIAL COURT
Decision: 2009 ME 93
Docket: Yor-08-484; Yor-09-41
Submitted
On Briefs: July 8, 2009
Decided: August 20, 2009

Reporter of Decisions

Panel: ALEXANDER, SILVER, MEAD, and GORMAN, JJ.

IN RE RICHARD E.

and

IN RE ANTHONY P.

ALEXANDER, J.

[¶1] The biological mother of Richard E. appeals from a judgment of the York County Probate Court (*Nadeau, J.*) granting a petition to annul Richard's adoption filed by his adoptive parents. In a separate proceeding, the Probate Court granted the adoptive parents' petition to annul their adoption of Richard's half-brother, Anthony P. The biological mother of both children appeals only the order annulling Richard's adoption. Richard and Anthony each appeal the judgment that annulled their respective adoptions.

[¶2] The biological mother asserts that she was entitled to notice of the proceeding pursuant to 18-A M.R.S. § 9-315 (2008),[1] and that service by

[1] Title 18-A M.R.S. § 9-315 (2008), which governs the annulment of adoptions, provides:

> **(a)** A judge of probate may, on petition of 2 or more persons and after notice and hearing, reverse and annul a decree of the Probate Court for one of the following reasons.

publication in the Kennebec Journal was improper pursuant to M.R. Prob. P. 4(e). She also contends that the method of service used was not reasonably calculated to give her notice of the lawsuit and therefore denied her due process. Richard and Anthony assert that the Probate Court erred in concluding that they lacked standing to intervene and present post-judgment motions for relief from the respective judgments. They also join in their biological mother's appeal as amicus curiae.

[¶3] Because the biological mother received insufficient notice of the proceeding, we vacate the judgment as to Richard. As the matter will have to be reconsidered on remand, we do not reach the other issues raised on appeal regarding Richard. We conclude that the Probate Court did not err or abuse its discretion in denying Anthony's post-judgment motions and affirm the judgment regarding Anthony.

---

(1) The court finds that the adoption was obtained as a result of fraud, duress or illegal procedures.

(2) The court finds other good cause shown consistent with the best interest of the child.

(b) Notice of a petition to annul must be given to the biological parents, except those whose parental rights were terminated through a proceeding pursuant to Title 22, section 4055, subsection 1, paragraph B, subparagraph (2), and to all parties to the adoption including the adoptive parents, an adoptee who is 14 years of age or older and the agency involved in the adoption.

(c) After the Probate Court annuls a decree of adoption, the register of probate shall transmit immediately a certified copy of the annulment to the State Registrar of Vital Statistics.

I. CASE HISTORY

[¶4] Richard E. was born on November 5, 1995. The next day, the Department of Health and Human Services (DHHS) requested and received a preliminary child protection order. After a hearing, the District Court (Portland, *Wheeler, J.*) found, by agreement,[2] that Richard was in circumstances of jeopardy and ordered that he be placed in the custody of his maternal grandmother.

[¶5] Richard remained with his grandmother until September 1997, when he was placed with a couple who petitioned the York County Probate Court to adopt him. The biological mother consented to the adoption. Because the parental rights of Richard's biological father were terminated by the Sagadahoc County Probate Court (*Voorhees, J.*) in November 1997, the father's consent to the adoption was not required. Richard's adoption was finalized on April 9, 1998.

[¶6] Anthony P. was born in 1997 to the same mother. He was adopted by the same couple after the biological mother's parental rights were terminated by consent pursuant to 22 M.R.S. § 4055(1)(B)(1) (2008) and the biological father's parental rights were terminated on the grounds of abandonment. 22 M.R.S. § 4055(1)(B)(2)(iii) (2008).

[¶7] Soon after being adopted, Richard began to exhibit significant problems with hyperactivity and aggression and was later diagnosed with severe

[2] Richard's biological father was not present and did not participate in the agreement.

mental illnesses. He resides in a therapeutic foster home, and his relationship with his adoptive family is "irretrievably broken." Anthony exhibited problems similar to Richard's, and has also been placed in a therapeutic foster home.

[¶8] In February 2008, members of the clinical staff at the therapeutic foster home, the adoptive parents, and representatives from DHHS participated in two separate meetings: one to discuss Richard's needs and one to discuss Anthony's needs. All agreed that the adoptive parents could not meet the boys' extensive needs, and that both boys needed to remain in therapeutic foster settings.

[¶9] On April 3, 2008, the adoptive parents petitioned the York County Probate Court to annul the adoption of Richard. On April 9, 2008, they petitioned the Cumberland County Probate Court to annul the adoption of Anthony. The adoptive parents then moved for a change of venue of Anthony's case, and Anthony's case was transferred to the York County Probate Court.

[¶10] In their petitions, the adoptive parents alleged that the children's behaviors and needs were beyond their abilities to control or help, and that it was in each child's best interest to become a ward of the State. They also noted that DHHS supported the petitions, was willing to accept the children as wards of the State, and would facilitate the necessary legal process.

[¶11] The adoptive parents then attempted to notify the biological mother of the petition to annul Richard's adoption pursuant to 18-A M.R.S. § 9-315(b).[3] The attorney for the adoptive parents requested that the York County Register of Probate search the confidential adoption file and the docket for the biological mother's current name and address, and then send her a copy of the petition to annul Richard's adoption.[4] The Register of Probate informed the attorney that there was no current address available for the biological mother. The attorney requested that the Register seek contact information for the biological mother from DHHS, believing that DHHS would be more likely to disclose this information, if DHHS had it, to a court official. He was informed that DHHS was unable to provide current contact information. The attorney also inquired of the Attorney General's Office about contact information, and was advised that there was none on file.

---

[3] The adoptive parents apparently erroneously concluded that the biological mother's parental rights to Anthony were terminated without parental consent pursuant to 22 M.RS. § 4055(1)(B)(2) (2008), and therefore that she was not entitled to notice of the petition to annul Anthony's adoption pursuant to 18-A M.R.S. § 9-315(b). However, her rights were terminated by consent pursuant to 22 M.R.S. § 4055(1)(B)(1) (2008), and she was entitled to notice. Because the biological mother does not appeal from the order annulling Anthony's adoption, this issue is not addressed further.

[4] In 2003, when the attorney had requested access to the adoption file to search for information regarding the mother's medical history, the attorney was not permitted to view the file. He was provided with paperwork from which all of the biological mother's identifying information had been redacted. He therefore believed that, when seeking identifying information about the biological mother, it would be better to request that the Register review the file.

[¶12] Without any new information available, the attorney relied on the adoptive parents' belief as to the biological mother's last known name and her last known address in Richmond.[5] He then conducted a diligent White Pages and Internet search of name matches, but was unable to locate the biological mother.

[¶13] On May 13, 2008, the Probate Court granted the adoptive parents' motion for notice and service by publication, *see* M.R. Prob. P. 4(e), finding that the adoptive parents, through their counsel, had made diligent but unsuccessful efforts to identify the whereabouts of the biological mother. Notice was published in the Kennebec Journal on June 9, 2008, and June 16, 2008.[6] A default judgment was entered against the biological mother on July 21, 2008.

[¶14] On August 20, 2008, the court held separate hearings on the petitions to annul the adoptions of Richard and Anthony. The court granted both petitions. That same day, DHHS requested and obtained orders of preliminary child protection for both Anthony and Richard. In the documents requesting those orders, DHHS identified the children's biological mother and disclosed her correct address in Waldoboro. It is unclear why DHHS, which had this information, had refused to disclose it earlier when disclosure would have facilitated timely notice to the biological mother.

---

[5] In 2003, the Probate Court sent a certified letter on the adoptive parents' behalf addressed to the biological mother at an address in Richmond. The letter was returned marked "refused."

[6] The Kennebec Journal is published in Kennebec County. Richmond is part of Sagadahoc County.

[¶15] On September 2, 2008, the District Court (Springvale, *Foster, J.*) held a hearing on each preliminary order. The District Court found that the biological mother had no legal rights or obligations to either child and ordered that the preliminary child protection orders would remain in effect. The District Court also granted the request of the guardian ad litem, who had been appointed by the District Court, that legal counsel be provided for the children pursuant to 22 M.R.S. § 4005(1)(F) (2008).[7]

[¶16] The biological mother filed a notice of appeal of the annulment of Richard's adoption. She did not attempt to obtain relief, pursuant to M.R. Prob. P. 60(b), from the default judgment entered against her. Richard and Anthony subsequently appealed the denial of their requests to reopen the judgments and participate in the annulment proceedings. We address in detail only the issues raised by the biological mother's appeal.[8]

---

[7] Title 22 M.R.S. § 4005(1)(F) (2008) provides: "The guardian ad litem or the child may request the court to appoint legal counsel for the child. The District Court shall pay reasonable costs and expenses of the child's legal counsel."

[8] During the course of these proceedings, Anthony was ten years old. By statute, 18-A M.R.S. § 9-315(b), an adoptee under the age of fourteen is not entitled to notice of annulment proceedings. Rules regarding required notice in statutory proceedings are also viewed as identifying those who have standing to participate in the proceeding. *See R.K. v. A.J.B.*, 666 A.2d 215, 217 (N.J. Super Ct. Ch. Div. 1995) (stating that those not entitled to notice have no right to participate and object); *In re Adoption of Reeves*, 831 S.W.2d 607, 609-10 (Ark. 1992) (holding that a biological father was not entitled to statutory notice and did not have standing to challenge an adoption decree); *see also* Restatement (Second) of Judgments § 31 cmt. f (1982). Thus, the Probate Court did not err in determining that Richard and Anthony lacked standing to participate in the annulment proceedings. Accordingly, the judgment regarding Anthony, appealed only by Anthony, will be affirmed. On remand in Richard's case, the Probate Court may revisit the issue of Richard's participation, as Richard may turn fourteen during the remanded proceeding.

II. LEGAL ANALYSIS

[¶17] The biological mother argues that the affidavit of diligent search filed by the adoptive parents was inadequate to support service by publication. She also contends that service by publication in the Kennebec Journal was improper because the petition was filed in York County and therefore service by publication should have been in a newspaper of general circulation in York County pursuant to M.R. Prob. P. 4(e)(1).

[¶18] We review the trial court's decision to grant a motion for service by publication for an abuse of discretion. *Gaeth v. Deacon*, 2009 ME 9, ¶ 12, 964 A.2d 621, 624. Any factual findings regarding the court's decision to grant a motion for service by publication are reviewed for clear error, but whether the commencement of an action and the service of process comport with the requirements of due process and with procedural rules is a question of law that we review de novo. *Id.* ¶ 12, 964 A.2d at 624-25.

[¶19] In an adoption annulment proceeding, "[n]otice of a petition to annul must be given to the biological parents, except those whose parental rights were terminated through a proceeding pursuant to [22 M.R.S. § 4055(1)(B)(2)] and to all parties to the adoption including the adoptive parents, an adoptee who is 14 years of age or older and the agency involved in the adoption." 18-A M.R.S. § 9-315(b); *see also Adoption of Spado*, 2007 ME 6, ¶ 7 n.2, 912 A.2d 578, 581. Pursuant to

18-A M.R.S. § 1-401 (2008): "Whenever notice of any proceeding or hearing is required under [the Probate Code], it shall be given to any interested person in such a manner as the Supreme Judicial Court shall by rule provide."

[¶20] Maine Rule of Probate Procedure 4(d)(1)(B) provides that service may be made by publication "as provided in subdivision (e) of this rule upon any such persons whose address or present whereabouts is unknown and cannot be ascertained by due diligence." Subdivision (e) requires that when service by publication is necessary in formal probate proceedings, "the register, on behalf of the applicant or petitioner, shall cause . . . a brief statement of the object of the petition, to be published once a week for two successive weeks in a designated newspaper of general circulation in the county where the application or petition was filed."

[¶21] When actual notice is accomplished, a technical defect in service may be overlooked. *Phillips v. Johnson*, 2003 ME 127, ¶ 24, 834 A.2d 938, 945. Otherwise, to accomplish service, a method specified by the rule must be properly utilized. *See Adoption of Spado*, 2007 ME 6, ¶ 12, 912 A.2d at 582; *Brown v. Thaler*, 2005 ME 75, ¶ 9, 880 A.2d 1113, 1116.

[¶22] In this case, the petition to annul Richard's adoption was filed in York County. Therefore, service by publication in the Kennebec Journal did not comply with the requirements of Probate Rule 4(e). The biological mother did not receive

actual notice of the annulment proceeding, and therefore, failure to comply with the requirements of Probate Rule 4(e) necessitates vacating the annulment order. *See Brown*, 2005 ME 75, ¶ 9, 880 A.2d at 1116.

[¶23] We must also note that DHHS had and has maintained an active interest in the annulment proceeding, and they are a party to the pending child protective proceeding. Throughout the proceeding, DHHS was apparently aware of the biological mother's current name and address. Timely disclosure of that information in the annulment proceeding would have avoided the necessity of service by publication and the remand that noncompliance with Probate Rule 4(e) now requires.

The entry is:

> The annulment of the adoption of Richard E. is vacated. Remanded to the York County Probate Court for further proceedings in accordance with this opinion.
>
> The judgment regarding Anthony P. is affirmed.

Attorney for the biological mother:

Katharine S. Forte, Esq.
Forte Law, P.A.
PO Box 1830
Wells, Maine 04090

Attorneys for Richard E. and Anthony P.:

Andrew Matulis, Student Attorney
Molly Watson, Student Attorney
E. James Burke, Supervising Attorney
Christopher Northrop, Supervising Attorney
Cumberland Legal Aid Clinic
246 Deering Avenue
Portland, Maine 04102

Attorney for the adoptive parents:

M. Thomasine Burke, Esq.
Brown & Burke
85 Exchange Street
PO Box 7530
Portland, Maine 04112-7530

MAINE SUPREME JUDICIAL COURT
Decision: 2010 ME 80
Docket: Yor-10-230
Submitted
On Briefs: July 21, 2010
Decided: August 17, 2010

Reporter of Decisions

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.

GUARDIANSHIP OF JEWEL M.

ALEXANDER, J.

[¶1] In this appeal we address, again, an issue that has recently arisen with some frequency: the quality of evidence that must be presented and standards of proof that must be met to remove a child from a parent's care and custody through a guardianship proceeding. *See* 18-A M.R.S. § 5-204(c) (2009). For the second time, the father of Jewel M. appeals from a judgment of the York County Probate Court (*Bailey, J.*) granting the child's maternal grandmother's petition for a temporary guardianship, establishing the grandmother as Jewel's temporary coguardian along with the father. *See Guardianship of Jewel M.* (*Jewel I*), 2010 ME 17, 989 A.2d 726.

[¶2] The father argues that the Probate Court erred by: (1) granting the grandmother's petition because relitigation of the issues involved is barred by res judicata; (2) failing to consider the father's parental fitness before establishing the temporary guardianship; and (3) concluding that the living situation at the father's

residence is temporarily intolerable pursuant to 18-A M.R.S. § 5-204(c). The father also argues that attorney fees and costs should be assessed against the grandmother. Because the court's findings, based on the evidence submitted, cannot support the imposition of a guardianship in a contested proceeding, we vacate and remand with direction to terminate the temporary coguardianship awarded to the grandmother and allow the father to parent his child. We decline to award attorney fees.

I. GOVERNING LEGAL STANDARDS

[¶3] Before addressing the particular circumstances of this appeal, it is useful to review the legal standards that govern a case when a third party, here the grandmother, invokes legal process to attempt to limit or remove a parent's fundamental right to parent his or her child.

[¶4] A decade ago, the United States Supreme Court ruled that a parent has a fundamental liberty interest in parenting his or her child—an interest that cannot be infringed without strict adherence to the Due Process Clause, which: "does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000). Thus, the United States Supreme Court has observed that the state has only a "de minimis" interest in child care decision-making by a fit parent. *See Stanley v. Illinois*, 405 U.S. 645, 657-58

(1972). Reflective of this "de minimis" state interest, "there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

[¶5] The same year that *Troxel* was decided, we ruled similarly in *Rideout v. Riendeau*, 2000 ME 198, ¶ 18, 761 A.2d 291, 299, addressing a grandparents' visitation statute, a law that, like the guardianship statute as applied in this case, "allows the courts to determine whether parents will be required to turn their children over to the grandparents against the parents' wishes," *id.* ¶ 21, 761 A.2d at 300. We held that "[t]he power of the court to adjudicate such disputes and to enforce its own orders constitutes state involvement in a way that clearly implicates parents' fundamental liberty interests in the care and custody of their children." *Id.*[1]

[¶6] Last year, in a guardianship appeal, we emphasized that:

> [W]e have consistently recognized, absent a showing of unfitness, parents' fundamental liberty interest with respect to the care, custody, and control of their children. *See Rideout*, 2000 ME 198, ¶ 18, 761 A.2d at 299; *Osier v. Osier*, 410 A.2d 1027, 1029 (Me. 1980) (recognizing that "any decision terminating or limiting the right of a parent to physical custody of his child also affects his constitutionally protected liberty interest in maintaining his familial relationship with the child"); *Danforth v. State Dep't of Health & Welfare*, 303 A.2d

[1] Citing *Connecticut v. Doehr*, 501 U.S. 1, 10-11 (1991) (noting that prejudgment remedy statutes enable a party to utilize state procedures with the "overt, significant assistance of state officials," thereby involving state action substantial enough to implicate the Due Process Clause); *see also Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982).

794, 797 (Me. 1973) (discussing the natural and fundamental rights of parents to the custody of their children).

Guardianship of Jeremiah T., 2009 ME 74, ¶ 27, 976 A.2d 955, 962.

[¶7] This year in *Jewel I*, we reviewed the issues that are before us again on this appeal as follows:

> Title 18-A M.R.S. § 5-204(c) does not define the term "temporarily intolerable . . . living situation." 18-A M.R.S. § 5-204(c). Our construction of that term is informed, however, by the fundamental liberty interest parents have in parenting their children. *See Guardianship of Jeremiah T.*, 2009 ME 74, ¶ 27, 976 A.2d 955, 962. Because a temporarily intolerable living situation must relate to a parent's inability to care for the child, proof of parental unfitness is a required element to support the establishment of a guardianship over the parent's objection. *Id.* The statute's requirement of a "living situation . . . that is at least temporarily intolerable for the child even though the living situation does not rise to the level of jeopardy required for the final termination of parental rights," 18-A M.R.S. § 5-204(c), thus requires the court to find that the parent's inability to meet the child's needs constitutes an urgent reason that "may have a dramatic, and even traumatic, effect upon the child's well-being," *Rideout v. Riendeau*, 2000 ME 198, ¶ 26, 761 A.2d 291, 301, if the child lives with the parent.
>
> Accordingly, a guardianship may only be ordered pursuant to section 5-204(c) if the court finds that (1) the parent is currently unable to meet the child's needs and that inability will have an effect on the child's well-being that may be dramatic, and even traumatic, if the child lives with the parent, and (2) the proposed guardian will provide a living situation that is in the best interest of the child. This standard is, as indicated in section 5-204(c), less stringent than the standard for finding jeopardy. *See* 22 M.R.S. § 4002(6) (2009). Although a temporarily intolerable living situation may arise from the physical condition of a parent's residence, it is by no means restricted to that circumstance.

Jewel I, 2010 ME 17, ¶¶ 12-13, 989 A.2d at 729-30.

[¶8] With this background, the law governing review of the Probate Court decision at issue in this appeal may be summarized as follows:

[¶9] First, the father has a fundamental liberty interest in parenting his child that may not be infringed simply by proof that a grandparent might provide a "better" living arrangement for the child.

[¶10] Second, because a temporarily intolerable living situation must relate to a parent's inability to care for the child, proof of parental unfitness is a required element to support the imposition of a guardianship over the parent's objection.

[¶11] Third, while the standard for proof of a temporarily intolerable living situation, 18-A M.R.S. § 5-204(c), may be less stringent than the standard for a finding of jeopardy, 22 M.R.S. § 4002(6) (2009), a guardianship may only be ordered, pursuant to section 5-204(c), if the court finds that: (1) the parent is unfit in that he is currently unable to meet the child's needs and that inability will have an effect on the child's well-being that may be dramatic, and even traumatic, if the child lives with the parent; and (2) the proposed guardian will provide a living situation that is in the best interest of the child.

[¶12] Fourth, while section 5-204(c) states that the standard of proof may be less stringent than the standard for finding jeopardy, section 5-204(c) imposes on the guardianship petitioner the higher, clear and convincing evidence burden of

proof to create in the fact-finder an "abiding conviction" that it is "highly probable" that facts sought to be proved are the correct view of the events. *See Taylor v. Comm'r of Mental Health & Mental Retardation*, 481 A.2d 139, 153 (Me. 1984).

[¶13] Having stated the law that will govern our review, we proceed to consider the factual and legal issues in this appeal.

II. CASE HISTORY

[¶14] Jewel M. was born in April 2005. The mother and father were divorced when Jewel was two years old. The mother was granted primary physical custody, and the father was granted rights of contact. After her parents separated, Jewel was exposed to domestic violence by the mother's boyfriend and another individual and may have been sexually abused by men while in her mother's care.

[¶15] On September 9, 2008, without notice to the father, the maternal grandmother filed two petitions in Probate Court: one for appointment as temporary guardian and the other as guardian of the child. The Probate Court appointed the grandmother as temporary guardian on September 17, 2008. The child was subsequently diagnosed with post-traumatic stress disorder and began weekly therapy with a therapist in the vicinity of the grandmother's residence in Biddeford.

[¶16] In January 2009, the father, a resident of Holden, filed a motion to dissolve the temporary guardianship. After a hearing on the father's motion and the grandmother's outstanding petition for guardianship, the Probate Court granted the grandmother's petition in April 2009. The Probate Court found the father's living situation "intolerable" because he: (1) lacked a parental rights order giving him the primary residential care of the child; (2) had had limited and inconsistent contact with the child; (3) had not arranged for a qualified therapist for the child near his home; and (4) had yet to establish through hair follicle drug testing that he was drug-free.

[¶17] The Probate Court's April 2009 order provided a plan for the child to transition to the father's care and custody if certain conditions were met. Thus, the Probate Court ordered that the court would terminate the guardianship and the father would have complete care, custody, and control of Jewel when the father provided proof that: (1) the District Court had approved an agreement, into which the parents had recently entered, to modify the father's and mother's parental rights judgment to provide that the father would have primary residential care of the child; (2) the father had procured a qualified therapist for the child near his home; and (3) the father had passed a hair follicle drug test. The court ordered a visitation schedule between the father and Jewel.

[¶18] In May 2009, the father appealed from the Probate Court's judgment granting the grandmother's petition for guardianship. On appeal, the father argued that the court erred in (1) finding that a temporarily intolerable living situation existed with respect to him, and (2) denominating the grandmother's guardianship as permanent when it was, in effect, temporary.

[¶19] In July 2009, while the father's appeal was pending, the father, grandmother, and the child attended an intake session with a doctor at Acadia Hospital in Bangor for the purpose of transitioning the child from her therapist in the Biddeford area to a therapist near her father's residence in Holden. The child was accepted for therapy at Acadia Hospital, but was put on a waiting list. Follow-up appointments proved difficult because, under the court-ordered visitation schedule, the father had physical custody of the child only at times when the facility was not available for appointments. The child was later scheduled for an appointment in September 2009, but the appointment was cancelled and not rescheduled.

[¶20] The father asserts that the grandmother cancelled the therapy appointment. The grandmother asserts that she contacted the assigned therapist and informed her that Jewel had been engaging in play therapy with her current therapist, and that the Bangor area therapist said she did not offer play therapy and suggested another therapist who was supposed to initiate setting up a new

appointment. Under either version, it is evident that the grandmother's initiative led to the cancellation of the September 2009 appointment.

[¶21] We heard oral argument on the father's appeal in January 2010 and issued *Jewel I* on March 9, 2010. We affirmed the court's finding that the father presented a temporarily intolerable living situation, basing our conclusion primarily on two of the Probate Court's findings as supported in the record: (1) no court order was then in effect granting the father the right to Jewel's primary residential care, and (2) the father's limited and inconsistent contact with Jewel could result in trauma to Jewel if there were a sudden shift in her residence from her grandmother to her father. *Jewel I*, 2010 ME 17, ¶¶ 15-16, 21, 989 A.2d at 730-31, 732. Noting these findings, we held that there was a sufficient basis to extend the guardianship to allow for a transition in residence. *Id.* ¶ 21, 989 A.2d at 732. We also concluded that the father's failure to find a therapist for Jewel as of the April 2009 hearing was relevant to the temporarily intolerable living situation inquiry, but we noted that the finding, considered in isolation, "might not support a court concluding that a temporarily intolerable living situation exists under the unique circumstances of this case. . . ." *Id.* ¶ 17, 989 A.2d at 731.

[¶22] In conclusion on that issue, we stated:

> Jewel's need for a slow, steady transition of increasing contact with the father, and the father's need to finalize his custody rights in the family matter and procure a therapist for Jewel, considered

> together, established a temporarily intolerable living situation. If Jewel were placed immediately with the father without the opportunity for a transition and before the father could legally assert a right to custody superior to that of the mother, the resulting situation would be, as the court found, traumatic for Jewel and contrary to her well-being.

Id. ¶ 21, 989 A.2d at 732.[2]

[¶23] We further held that, as a matter of law, the Probate Court's order established a temporary guardianship, rather than a permanent guardianship. *Id.* ¶ 24, 989 A.2d at 732-33. We modified the Probate Court's judgment to reflect the fact that the guardianship ordered was temporary. *Id.* Reflecting our understanding from review of the record, the briefs, and representations made at oral argument that the parties were cooperating in working toward a transition to full custody for the father, we stated at the conclusion of our decision that:

> Both parties represented at oral argument that the father's visitation had occurred as required by the court's judgment and that the father had been awarded residential care of Jewel by the District Court in the family matter. We expect that once the father has provided the Probate Court with the name of a licensed qualified therapist for Jewel, the court will terminate the guardianship and Jewel will be transferred to her father's custody without condition.

Id. ¶ 25, 989 A.2d at 733. The mandate was: "Judgment is modified in accordance with this opinion and, as modified, is affirmed." *Id.*

---

[2] We did modify the Probate Court's order, however, by striking the finding that evidence established a need for the father to prove through hair follicle testing that he was drug-free, concluding that the "total body of evidence" and other of the court's findings indicated an absence of proof that the father had a substance abuse problem. *Guardianship of Jewel M.*, 2010 ME 17, ¶ 20, 989 A.2d 726, 732.

[¶24] Subsequent events quickly proved our understanding of the parties' cooperation mistaken. On the day our decision was published, the grandmother immediately, and in violation of the Probate Court's order, terminated the father's access to the child. We also take judicial notice, *see* M.R. Evid. 201, of District Court files indicating that subsequently the grandmother, using her standing as a guardian, has obtained temporary protection from abuse orders that have restricted or barred the father's access to his child, although that access is, presumably, authorized by an outstanding, valid parental rights order. *See Finn v. Lipman*, 526 A.2d 1380, 1381 (Me. 1987) (holding that a court can take judicial notice of court records in other cases including pleadings and docket entries).

[¶25] On or about March 12, 2010, the father submitted a letter to the Probate Court, pursuant to *Jewel I*, stating that the father had "identified [a doctor] as the qualified, licensed therapist who will be working with [the child] prospectively."

[¶26] Our mandate in *Jewel I* was docketed in the Probate Court on March 29, 2010. On the same day, the grandmother filed a new petition for temporary guardianship of Jewel, asserting that the father had taken no action to engage a therapist for Jewel and that Jewel had reported that the father had abused her. The father filed a motion to dismiss the grandmother's petition for temporary guardianship, arguing that he had submitted the name of a qualified therapist to the

Probate Court and had otherwise complied with *Jewel I*, that he was, therefore, entitled to custody of the child, and that the grandmother's allegations were barred by res judicata.

[¶27] On April 8, 2010, the Probate Court held a hearing to address the then-existing guardianship order as well as a testimonial hearing on the grandmother's new petition for a temporary guardianship. At the hearing, the court apparently first concluded, over the grandmother's objection, that the father had complied with the terms of the then-existing guardianship order and with *Jewel I* by providing the name of a therapist for Jewel, and that the court was obligated to terminate that temporary guardianship pursuant to *Jewel I*. Accordingly, the court terminated that order.

[¶28] The court then heard testimony as to the grandmother's new petition for a temporary guardianship. Although the grandmother had indisputably played a role in limiting follow-up visits to engage a Bangor area therapist, the grandmother testified that the father had done nothing since the July 2009 intake session at Acadia Hospital to procure a therapist for Jewel, and, although the father had identified a therapist, the grandmother claimed that the identified therapist did not see patients and would not personally treat Jewel.

[¶29] The child's therapist in the Biddeford area did not appear at the hearing but was permitted to testify by phone, as she was on a trip. That therapist

testified that she had engaged Jewel in weekly play therapy for eighteen months; that neither the father nor another therapist had contacted her about transitioning Jewel to another therapist; that it would be traumatic for Jewel if her treatment ended abruptly; and that it would be best for Jewel to have a slow and steady period of transition between her current and new therapists in order to develop trust with the new therapist. This last position about the need for a transition period was similar to the position taken at the April 2009 hearing, at which time the child's guardian ad litem had recommended a five-month transition period to full custody for the father. That transition period would have been completed in September or October of 2009.

[¶30] The therapist also testified that on that very day, April 8, 2010, apparently while preparing for her trip, she had engaged in a play therapy session with Jewel in which Jewel had disclosed, for the first time, that her father had sexually abused her. The therapist also claimed that in December 2009 and January 2010, Jewel disclosed to her incidents of physical abuse by the father, which the therapist was required to report. A case manager at Spurwink Services, a private contractor for the State, indicated that after a follow-up investigation, the December and January abuse allegations were not pursued further.[3]

[3] Spurwink Services opened an inquiry as a result of the reports that the father was abusive to or neglectful of Jewel, but the case was closed because the child was living with the grandmother. Despite

[¶31] Responding to questions by the guardian ad litem and the child's mother, the therapist conceded that she was "really not at all" convinced that the father had actually committed the acts of abuse she had reported to the court, and that the child's statements could have been based on events that had occurred some time ago with individuals other than the father, or could have resulted from suggestions by the grandmother. The child's mother also indicated during her cross-examination of Jewel's therapist that the acts of physical abuse that Jewel had reported were similar to abuse that the grandmother had subjected the mother to when she was a child.

[¶32] The father testified that he intends to engage Jewel in therapy once he has custody of her, and that he had recently spoken to Acadia and confirmed that Jewel can receive treatment at that facility. He further testified that because the original intake evaluation is outdated, he must take the child on a weekday for a new evaluation. The father stated that he had been unable to obtain a new evaluation because the grandmother had prevented him from seeing Jewel since *Jewel I* was decided and because compliance with HIPAA laws inhibited his ability to initiate her therapy without the grandmother's presence. He argued that he was not unfit and there could be no intolerable living situation as a result of his

---

these allegations, the father's unsupervised visitation with Jewel continued and, until the April 8 hearing, the grandmother never raised any concerns about the allegations directly with the father.

not having begun counseling for the child when he had not yet had the opportunity to do so.[4]

[¶33] After the hearing, the court entered an order appointing the father and the grandmother as temporary coguardians of the child. The court concluded that an intolerable living situation existed because "[i]t would be traumatic and not in Jewel's best interest for her to be in the full custody of her father without a transition in counseling," and that it would be in the child's best interest to appoint the father and grandmother as coguardians for not more than six months. The court awarded primary residence of Jewel to the father and grandmother for part of each week, respectively, and ordered that they facilitate the child's transition between counselors. The court's order provided that the court would review the matter on June 9, 2010, to assess whether the intolerable living situation had been alleviated and the temporary guardianship would be terminated.

[¶34] The findings in the court's order were sparse. However, we can infer that in making the father a coguardian and allowing Jewel to reside with him for part of each week, the court must have found that: (1) the grandmother had failed to meet her burden to prove that the father was an unfit parent; (2) it was not credible to attribute the reported physical or sexual abuse to the father; and (3) for

[4] At the time of the hearing, the father was not working because he was caring for his wife who was undergoing chemotherapy treatments, but he believed this would not prevent his being able to meet Jewel's needs. The father also has a young son living with him, with whom Jewel has a good bond.

at least part of each week, the grandmother had failed to prove that the father's living situation was intolerable.

[¶35] The father appealed from this judgment pursuant to 18-A M.R.S. § 1-308 (2009) and M.R. App. P. 1.

[¶36] After the father filed this appeal, the grandmother filed a complaint for protection from abuse on behalf of Jewel against the father on April 30, 2010. The District Court (Biddeford, *Foster, J.; Douglas, J.; Janelle, J.; O'Neil, J.*) granted four successive temporary protection from abuse orders, the first of which prohibited the father from having contact with Jewel and, contrary to the orders of the Probate Court and the District Court in the parental rights action, awarded exclusive temporary custody of Jewel to the grandmother. The second and third temporary protection from abuse orders awarded temporary custody of Jewel to the grandmother, but granted the father limited supervised visitation. The fourth order was to remain in effect until further order.

[¶37] The Probate Court was informed on June 8, 2010, of the temporary order for protection from abuse in place against the father and held the previously-scheduled hearing on June 9, 2010. It appears that there was a status conference, but no orders were issued as a result of the conference, and a case management conference was scheduled. It does not appear that the temporary guardianship at issue in this appeal has been terminated since the appeal was filed

or that this appeal is otherwise moot. *See generally* M.R. App. P. 3(b); M.R. Civ. P. 62(a); M.R. Prob. P. 62.

III. LEGAL ANALYSIS

A. Res Judicata

[¶38] The father argues that, because the grandmother filed for, and was granted, a new appointment as temporary coguardian based on the same circumstances that were litigated when the Probate Court granted her original petition for a guardianship, the court was barred by the doctrine of res judicata from granting, over the father's objection, the grandmother's subsequent petition for temporary guardianship. "We review de novo a determination that res judicata bars a particular litigation." *Portland Co. v. City of Portland*, 2009 ME 98, ¶ 22, 979 A.2d 1279, 1287.

[¶39] There are two branches of the res judicata doctrine, issue preclusion and claim preclusion. *Marin v. Marin*, 2002 ME 88, ¶ 7, 797 A.2d 1265, 1267. Issue preclusion, also known as collateral estoppel, "prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and . . . the party estopped had a fair opportunity and incentive" in an earlier proceeding to present the same factual issue or issues it wishes to litigate again in a subsequent proceeding. *Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131, 138-39. "Collateral estoppel arises only if the identical

issue necessarily was determined by a prior final judgment." *Id.* ¶ 25, 834 A.2d at 140 (quotation marks omitted).

[¶40] Claim preclusion bars the relitigation of claims if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in the first action. *Id.* ¶ 22, 834 A.2d at 139.

[¶41] Principles of res judicata must be applied with caution in domestic relations cases, as new developments often inform decisions as to what may be in the best interest of a child in circumstances where relationships must continue and will change over time until a child reaches majority. The issues raised by the grandmother in her new petition for temporary guardianship were based on events and circumstances arising subsequent to the establishment of the original guardianship, i.e., whether (1) given Jewel's current needs and events occurring since the previous guardianship was established, the child would benefit from a transitional period between her existing therapist and a new therapist she had yet to meet near her father's home; and (2) new allegations by the child of abuse or neglect by her father, even if unsubstantiated, warranted the establishment of a new temporary guardianship to take effect.

[¶42] The issues the grandmother raised in support of the petition for temporary guardianship at issue in this appeal, including our opinion in *Jewel I*,

arose, at least in part, after the prior guardianship was established. Therefore, her petition was not barred, as a matter of law, by res judicata.

B. Failure to Follow the Law Court Mandate

[¶43] On remand, a trial court must adhere to our mandate and "'effectuate the decision of the [C]ourt.'" *State v. Patterson*, 2005 ME 55, ¶ 9, 881 A.2d 649, 651 (quoting *Farnsworth v. Whiting*, 106 Me. 543, 546, 76 A. 942, 943 (1910)). In *Patterson*, we held that the trial court's failure on remand to "'make clear its findings of fact and conclusions of law'" in disregard of this Court's decision and the party's request for specific findings constituted "an unsustainable exercise of its discretion." *Id.*; *cf. Estate of Voignier*, 638 A.2d 732, 733-34 (Me. 1994) (holding that, on remand, the Probate Court did not fail to follow this Court's mandate).

[¶44] In this case, we affirmed the Probate Court's determination that a temporarily intolerable living situation existed with respect to the father, finding that it was relevant, though possibly not sufficient in isolation, that the father had not yet found a qualified therapist in his area for Jewel. *Jewel I*, 2010 ME 17, ¶ 17, 989 A.2d at 731. We then stated in conclusion that "[w]e expect that once the father has provided the Probate Court with the name of a licensed qualified therapist for Jewel, the court will terminate the [then-existing] guardianship and Jewel will be transferred to her father's custody *without condition*." *Id.* ¶ 25,

989 A.2d at 733 (emphasis added). The mandate affirmed the court's judgment as modified in accordance with our opinion. *Id.*

[¶45] The Probate Court appeared to find that the father had complied with our decision in *Jewel I* because it terminated the guardianship then at issue. It then took up the new guardianship petition. We do not construe this action as violative of our mandate, although any further guardianship proceedings after this opinion should be precluded for reasons discussed below.

C. Sufficiency of the Evidence and the Probate Court's Findings

[¶46] The Probate Court purported to establish the temporary coguardianship at issue in this appeal pursuant to 18-A M.R.S. § 5-204(c), which provides, in relevant part, that guardians or coguardians may be appointed for an unmarried minor when the court finds, by clear and convincing evidence, that:

> [A] living situation has been created that is at least temporarily intolerable for the child even though the living situation does not rise to the level of jeopardy required for the final termination of parental rights, and that the proposed guardian will provide a living situation that is in the best interest of the child.

18-A M.R.S. § 5-204(c); *see also* 18-A M.R.S. § 5-207(c) (2009); *In re Amberley D.*, 2001 ME 87, ¶ 19, 775 A.2d 1158, 1165. We held in *Jewel I* that a "temporarily intolerable living situation must relate to a parent's inability to care for the child" and that "proof of parental unfitness is a required element to support

the establishment of a guardianship over the parent's objection." 2010 ME 17, ¶ 12, 989 A.2d at 729. Accordingly:

> [A] guardianship may only be ordered pursuant to section 5-204(c) if the court finds that (1) the parent is currently unable to meet the child's needs and that inability will have an effect on the child's well-being that may be dramatic, and even traumatic, if the child lives with the parent, and (2) the proposed guardian will provide a living situation that is in the best interest of the child.

Id. ¶ 13, 989 A.2d at 730; *see also Guardianship of Jeremiah T.*, 2009 ME 74, ¶ 27, 976 A.2d at 962.

[¶47] On appeal, we review the Probate Court's findings for clear error. *In re Amberley D.*, 2001 ME 87, ¶ 20, 775 A.2d at 1165. Here, by appointing the father as a coguardian, the Probate Court necessarily concluded that the grandmother had failed to prove, to the clear and convincing evidence standard, that the father was an unfit parent. By allowing the child to reside with the father for part of each week, the Probate Court necessarily concluded that the grandmother had failed to prove, to the clear and convincing evidence standard, that the father's living situation was temporarily intolerable. With the grandmother having failed to prove these essential facts, her second petition for a temporary guardianship should have been denied.

[¶48] The Probate Court's judgment establishing the current temporary coguardianship appears to have been based on a conclusion that a temporarily

intolerable living situation had been created because "[i]t would be traumatic and not in Jewel's best interest for her to be in the full custody of her father without a transition in counseling." This was certainly a legitimate concern, and one that was applied in the April 2009 order to justify imposition of the guardianship at that time. Had the transition contemplated in April 2009 occurred, this case would have been long over. The record of the April 2010 hearing unequivocally establishes that, by her action, the grandmother prevented the counseling transition from occurring.

[¶49] The grandmother cannot prevail on her burden of proof to establish a temporary guardianship by creating the situation that prevents the father from establishing a new therapist for the child in the area where he lives. The court's finding and the evidence in the record do not support, to the clear and convincing evidence standard, the findings we have held are necessary to support imposition of a temporary guardianship and its invasion of a parent's fundamental liberty interest. The temporary guardianship awarded to the grandmother must be terminated immediately, as it is not supported on this record. The mandate shall issue immediately, without the usual fourteen-day waiting period.

[¶50] We conclude with one other observation on issues that have impacted this case. At the point that the Probate Court had terminated the original temporary guardianship in accordance with our opinion, the only operative order governing

custody of the child was the District Court parental rights order. The District Court is the court with primary jurisdiction over actions involving domestic relations, parental rights, and children. 19-A M.R.S. § 103 (2009). The Probate Court recognized this jurisdiction, referencing the District Court parental rights order in its April 2009 decision. To keep all issues before the court with primary jurisdiction for domestic relations and parental rights issues, the appropriate remedy for a grandparent seeking access to a child against a parent's wishes should be a Grandparents Visitation Act action pursuant to 19-A M.R.S. §§ 1801-1805 (2009). This is the primary remedy the Legislature has established to resolve grandparent-parent disputes.

[¶51] While the Probate Court has authority to address grandparent-parent disputes pursuant to the guardianship statute, when there is an outstanding, valid parental rights order, as there is in this case, the Probate Court must, as a threshold matter, determine whether the grandparent should be required to exhaust the remedy provided by the Grandparents Visitation Act as prerequisite to proceeding on the guardianship petition. In this manner, the court recognizes the jurisdiction of the District Court under title 19-A and minimizes the possibility of separate, yet simultaneous proceedings involving the best interest of a child in two courts. Further, this threshold determination will enable the Probate Court to quickly

dispose of marginal guardianship petitions in cases in which a grandparent visitation action can afford complete relief.

The entry is:

> Judgment Vacated. Remanded to terminate the guardianship order. Mandate to issue forthwith.

Attorney for the father:

Amanda E. Ramirez, Esq.
McGarry & Holmes, LLC
PO Box 1647
Wells, Maine 04090

Attorney for the grandmother:

John A. Turcotte, Esq.
Ainsworth, Thelin & Raftice, P.A.
7 Ocean Street
PO Box 2412
South Portland, Maine 04116-2412

York County Probate Court docket number 2008-694
FOR CLERK REFERENCE ONLY

MAINE SUPREME JUDICIAL COURT
Decision: 2012 ME 127
Docket: Cum-12-48
Argued: September 12, 2012
Decided: November 13, 2012

Reporter of Decisions

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, and JABAR, JJ.

ADOPTION OF L.E.

JABAR, J.

[¶1] The parents of L.E. appeal from a judgment of the Cumberland County Probate Court (*Mazziotti, J.*) terminating their parental rights. The mother challenges the sufficiency of the evidence terminating her rights, and both parents argue that the court erred in failing to order attempts at rehabilitation and reunification prior to granting the petition for termination. Finding no error, we affirm the judgment.

I. BACKGROUND

[¶2] L.E. was born on May 30, 2008, to parents who had been married for approximately two years. Both parents had criminal histories before their relationship: the mother was convicted of embezzlement in New Hampshire in 2003 and served a four-month sentence; the father assaulted his five-month-old son by another woman in 1997, causing severe and permanent injuries, and spent seven years in prison. The parents met about eighteen months after the mother's release

from prison, and the mother learned of the father's prior conviction shortly before they were married.

[¶3] After getting married, the parents committed fraud against L.E.'s maternal grandparents. The grandparents purchased a home for the parents and retained a mortgage. Without the grandparents' knowledge, the parents arranged for the mortgage to be fraudulently discharged, which permitted them to obtain another loan. In August of 2009, the grandparents discovered the parents' fraud. The fraud resulted in the parents' incarceration in 2010.[1]

[¶4] While the fraud was ongoing, the parents' relationship deteriorated. During a visit to the parents' home, the grandmother noticed holes in the walls, dents in a new refrigerator, and a broken television, which the mother said were all caused by the father. The mother sought and received a protection from abuse order against the father in July of 2009, and they separated on July 27, 2009.

[¶5] With the incarceration of the parents approaching in April of 2010, the Probate Court granted the petition of L.E.'s grandmother for a temporary guardianship over L.E. with the parents' consent. Even before their incarceration

---

[1] On September 2, 2010, the trial court (*Marden, J.*) entered a judgment of conviction, following the mother's guilty plea, of negotiating a worthless instrument (Class B), 17-A M.R.S. § 708(1)(B)(1) (2011); aggravated forgery (Class B), 17-M.R.S. § 702 (2011); theft by deception (Class B), 17-A M.R.S. § 354(1)(B)(1) (2011); and failure to appear (Class E), 15 M.R.S. § 1091(1)(A) (2011). The record does not include specific information concerning the father's convictions, but the parties seem to agree that he was convicted of similar crimes for his role in the fraud.

began, however, the grandmother ended contact between L.E. and the parents. The court awarded a permanent guardianship over the parents' objection on November 5, 2010, and on November 19, 2010, the grandparents petitioned to adopt L.E. and terminate the parental rights of both parents. The mother's incarceration ended on April 29, 2011, and a hearing on the termination of parental rights was held on July 14, 15, and August 19, 2011.

[¶6] At the hearing, the court received testimony from psychologist William M. Barter, Ph.D., who evaluated the mother on two occasions during her incarceration and diagnosed her with antisocial personality disorder. Barter concluded that the mother was narcissistic and self-focused, which he interpreted as a sign of low self-esteem. This narcissism causes the mother to put her needs ahead of others and make decisions without considering the potential impact on others. Barter's evaluation indicated that the mother has a seriously impaired ability to perceive the actions of others accurately and understand what those actions signify. Based on this evaluation, the court found that the mother is unable "to think logically and coherently[,] which made her less capable of coming to reasonable conclusions about events."

[¶7] Barter identified several behaviors suggestive of antisocial personality disorder. The mother told Barter that she had contacted the father to discuss L.E. while both were incarcerated despite sentencing conditions prohibiting her from

doing so. Barter indicated that this action would be consistent with antisocial personality disorder because it showed a disregard of the law. Similarly, Barter viewed the mother's fraud against the grandparents as very similar to the prior embezzlement in New Hampshire in that it exposed her to punishment again. Barter opined that the mother will tell people whatever is necessary, even in disregard of the truth, to ensure that her needs are met, and that is consistent with an antisocial personality disorder.

[¶8] Katie McCoy, a licensed clinical social worker, testified about the mother's therapy following her most recent incarceration. McCoy acknowledged that therapy for the mother would be very slow and its success might not be known for at least two years. She testified that the mother might be able to reestablish a relationship with L.E. in six months. According to the guardian ad litem, the mother is unable to appreciate L.E.'s interests because despite expressing an interest in devoting more time to L.E., the mother did not acknowledge L.E.'s need for permanency or that any contact would be subject to the guardianship.

[¶9] Applying the presumption of unfitness stemming from his prior aggravated assault on his other child, *see* 22 M.R.S. § 4055(1-A)(B)(5) (2011), the court found that the father was unable or unwilling to protect L.E. from jeopardy and that those circumstances were unlikely to change within a time reasonably calculated to meet L.E.'s needs. *See* 22 M.R.S. § 4055(1)(B)(2)(b)(i) (2011). The

court also found that the mother has been unwilling or unable to take responsibility for L.E. within a time reasonably calculated to meet the child's needs due to her personality disorder and uncertain prognosis. *See* 22 M.R.S. § 4055(1)(B)(2)(b)(ii) (2011). Finally, the court found that termination is in L.E.'s best interest because (1) an adoption would mean that there would be no physical change in circumstances; (2) contentious judicial proceedings would negatively impact L.E. absent termination; (3) the mother and father expressed interest in bringing the father, who poses a threat to L.E., back into the child's life; and (4) L.E. was "happy, comfortable, and free to enjoy spontaneous play" in her grandparents' home. *See* 22 M.R.S. § 4055(1)(B)(2)(a) (2011).

[¶10] The Probate Court issued its judgment terminating the parents' parental rights on January 11, 2012. The parents timely appealed pursuant to 18-A M.R.S. § 1-308 (2011) and Maine Rule of Appellate Procedure 2.

II. DISCUSSION

[¶11] The Adoption Act, codified in article IX of title 18-A of the Maine Revised Statutes, incorporates by reference title 22, chapter 1071, subchapter VI, which deals with termination of parental rights in the child protection context. 18-A M.R.S. § 9-204(b) (2011) (incorporating by reference 22 M.R.S. §§ 4050-4059 (2011)). Pursuant to the Adoption Act, a petitioner seeking adoption in the Probate Court may file a petition to terminate parental rights

contemporaneously with a petition for adoption. 18-A M.R.S. § 9-204(a) (2011). Therefore, in contested adoption proceedings where parental rights have not been previously terminated and the child is under the age of eighteen, absent consent from the parents, the petitioner must prove by clear and convincing evidence that the parent is unfit and termination of parental rights is in the best interest of the child. 18-A M.R.S. § 9-302(b)(2) (2011); 22 M.R.S. § 4055(1)(B)(2); *In re Brandon D.*, 2004 ME 98, ¶ 10, 854 A.2d 228. When the burden of proof at trial is clear and convincing evidence, our review is to determine "whether the fact-finder could reasonably have been persuaded that the required findings were proved to be highly probable." *In re Brandon D.*, 2004 ME 98, ¶ 10, 854 A.2d 228 (quotation marks omitted). "We review the court's factual findings related to the child's best interest for clear error, but its ultimate conclusion regarding the child's best interest for abuse of discretion." *See In re Thomas H.*, 2005 ME 123, ¶ 16, 889 A.2d 297. In order to preserve the parents' due process rights, the court must determine that the parent is unfit before making a finding that termination is in the best interest of the child. *In re Scott S.*, 2001 ME 114, ¶¶ 19-20, 775 A.2d 1144.

A. Fitness

[¶12] The termination subchapter provides circumstances under which a court may declare that a person is unfit to parent a child. Section 4055(1)(B)(2)(b) of title 22 states that a court may find a parent unfit if:

> **(i)** The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs;
>
> **(ii)** The parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs;
>
> . . . or
>
> **(iv)** The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041.

In this case, the court rendered its decision pursuant to subsections (i) and (ii), finding that the father was unwilling or unable to protect the child from jeopardy, and that the mother is unwilling or unable to take responsibility for the child within a time reasonably calculated to meet the child's needs.

[¶13] During an adoption proceeding, the Probate Court is not required to order attempts at reunification before terminating parental rights. Section 4041, which deals with the obligation of the Department of Health and Human Services to pursue rehabilitation and reunification efforts in the protective context, is not among the sections of title 22 incorporated into the Adoption Act. *See* 18-A M.R.S. § 9-204(b) (incorporating by reference 22 M.R.S. §§ 4050-4059).[2]

---

[2] Even though not controlling, 22 M.R.S. § 4041 (2011) concerns reunification in the child protection context, and therefore, provides some guidance here. Although section 4041 requires the Department of Health and Human Services to pursue reunification, its failure to do so does not preclude a termination of parental rights, *In re Doris G.*, 2006 ME 142, ¶ 16, 912 A.2d 572, and does not violate the parent's constitutional rights, *In re Daniel C.*, 480 A.2d 766, 771-72 (Me. 1984).

However, the Adoption Act does incorporate the termination subchapter's purpose, which is to "[a]llow for the termination of parental rights at the earliest possible time *after rehabilitation and reunification efforts have been discontinued* and termination is in the best interest of the child." *See* 22 M.R.S. § 4050(1) (emphasis added). In this case, there were no attempts by either the mother or the father to ask the court to order rehabilitation and reunification efforts. Unlike the Department's obligation contained in 22 M.R.S. § 4041, the Adoption Act does not require petitioners to engage in rehabilitation and reunification efforts before seeking termination of parental rights and subsequent adoption. Therefore, the court did not err in failing to order, sua sponte, attempts at rehabilitation and reunification prior to granting the petition for termination. Because that was the only challenge to the termination pressed by the father, we do not address his appeal further.

[¶14] The remaining question is whether the record before the court was sufficient to establish by clear and convincing evidence that the mother is unwilling or unable to take responsibility for L.E. within a time reasonably calculated to meet her needs. We have stated:

> A parent's fitness is usually called into question due to a serious issue that bears directly on his or her ability to adequately parent the child, such as physical abuse or neglect, sexual abuse, substance abuse, emotional abuse and significant mental health problems, a proven

> inability to care for a child with special needs, or a history of domestic violence.

Adoption of Tobias D., 2012 ME 45, ¶ 22, 40 A.3d 990 (citations omitted).

[¶15] Here, relying heavily on the testimony of Barter, the court found that the mother's behavioral disorder would prevent her from being a predictable attachment figure for L.E. and would impede her ability to provide a warm and stable environment. The court acknowledged that because of the mother's incarceration, L.E. had been living with her grandparents for nearly half her life, and although the mother may be able to re-establish a relationship with L.E. eventually, the process would be slow and lengthy. Also, although testimony at the hearing indicated that the mother might respond favorably to treatment, the prospects of success were uncertain and preliminary results regarding any such success would not be available for several years. Based on these findings, the court rationally could have found by clear and convincing evidence that the mother is unwilling or unable to take responsibility for L.E. within a time reasonably calculated to meet the child's needs. *See* 22 M.R.S. § 4055(1)(B)(2)(b)(ii); *In re Alana S.*, 2002 ME 126, ¶¶ 13, 22-23, 802 A.2d 976 (finding clear and convincing evidence that parents were unfit despite parents' good faith efforts to reunify).

B. Best Interest of the Child

[¶16] In addition to evidence of unfitness, the record also established that at the time the parental rights were terminated, L.E. had already been living with her grandparents for almost two years, L.E. is happy and comfortable in that setting, and contentious judicial proceedings would only harm her further. Recognizing the need for stability and permanency, *see In re Thomas H.*, 2005 ME 123, ¶ 30, 889 A.2d 297, the court concluded that termination was in the best interest of L.E., and there is competent evidence to support this finding. The court did not abuse its discretion in determining that termination was in the best interest of the child.

[¶17] In conclusion, the record supports the court's determination with clear and convincing evidence that both parents were unfit, and that it was in the best interest of L.E. for the court to terminate parental rights and grant the adoption petition.

The entry is:

Judgment affirmed.

On the briefs and at oral argument:

Michael G. Keefe, Esq., Portland, for appellant father

Erika S. Bristol, Esq., Auburn, for appellant mother

Christopher P. Leddy, Esq., Ainsworth, Thelin & Raftice, P.A., South Portland, for appellee grandparents