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STATE OF MAINE
ONE HUNDRED AND TWENTY-NINTH LEGISLATURE
COMMITTEE ON JUDICIARY

January 21, 2020

Honorable Aaron Frey, Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333

Re: Request for Attorney General's Opinion

Dear Attorney General Frey:

The new Maine Uniform Probate Code, Title 18-C, retains the prior (Title 18-A) Probate Code's provisions on the appointment of public guardians and public conservators. At the time the Judiciary Committee was considering the enactment of Title 18-C in 2018, questions were swirling around the required bond for public guardians and public conservators, having been raised by a case wending its way through the courts. The Judiciary Committee decided to not affect any pending cases and did not amend any of the relevant language. To make it clear that no change in interpretation was intended by replacing the existing Probate Code, the Summary to Committee Amendment to LD 123 included this specific statement: "With regard to the Maine Revised Statutes, Title 18-C, section 5-710, the Legislature intends to continue the prior practice that the State is immune from suit on all tort claims seeking recovery of damages as public guardian or public conservator, but that the surety is responsible for all risk of loss for assets managed by the public guardian or public conservator."

The public guardian or conservator owes the same fiduciary duties to its protected persons as a private guardian or conservator. The Probate Code currently requires, for an estate of \$50,000 or more, a conservator to furnish a bond with a surety the court specifies, or require an alternative asset-protection arrangement, conditioned on faithful discharge of all duties of the conservator. The court may waive the requirement only if the court finds that a bond or other asset-protection arrangement is not necessary to protect the interests of the individual subject to conservatorship. The court may not waive the requirement if the conservator is in the business of serving as a conservator and is being paid for the conservator's service, with certain exceptions. With respect to an estate of less than \$50,000, the court in its discretion may require a bond or other surety. 18-C §5-416, sub-§1. The Probate Code requires the public guardian or public conservator to furnish a bond, not in individual guardianships or conservatorships but the surety bond must cover all the persons subject to the public guardian or conservator. 18-C, §5-710. The State of Maine has faithfully furnished a bond through the Fidelity and Deposit Company of Maryland, renewed every two years and approved by the Kennebec County Probate Court. The Surety Rider executed on August 2, 2017 indicates a bond amount of \$14,380,000 in recognition of the assets of the persons for who the Department of Health and Human Services acts as public guardian or public conservator.

In a March 2017 opinion *Claire Dean Perry et al. v. William T. Dean Jr. et al.*, 2017 ME 35, the Law Court determined that the Department of Health and Human Services is immune from the breach of fiduciary duty claims asserted by the estate of William T. Dean, Jr., for whom the Department served as the public conservator, even though 18-A §5-611 (now 18-C §5-710) required the Department to furnish the surety bond. The Court found that because the Probate Code did not expressly waive sovereign immunity (and the Department did not waive immunity by obtaining liability insurance), the broad declaration of sovereign immunity in the Maine Tort Claims Act applied in this situation. The Court expressed no opinion regarding sovereign immunity in an action brought against the bond pursuant to Title 18-A, §8-309 (now Title 18-C, §8-209), which became the only recourse for the breach of fiduciary duty claims made by Mr. Dean's estate.

The personal representative of Mr. Dean's estate filed suit against the surety in federal court, which certified the following question to the Maine Supreme Judicial Court: "May a surety assert the immunity defense of its principal, the Department of Health and Human Services, in an action against the surety on a bond issued pursuant to 18-A MRSA §5-611?" Before the Law Court responded, the parties settled and the terms of the settlement are confidential. The Judiciary Committee has been holding LD 82, An Act to Determine the Necessity for a Public Guardian or Conservator Bond, relying on the latest court case to provide direction as to the effect of the existing law with regard to the liability of the surety as well as the protection of the interests of those subject to public guardianship or public conservatorship. Unfortunately, the settlement does not provide us with the guidance we were seeking.

My question is whether the current requirement of a surety bond in 18-C, §5-710 serves a purpose in its current formulation. Is a public conservator and guardian bond necessary given the law Court's opinion, and, if it is, can you think of a scenario in which there would be a successful claim against the bond? I am seeking your guidance as to the best way to clarify the statute. The Legislature could amend the Probate Code to specifically waive the sovereign immunity of the Department of Human Services in its role as public guardian or public conservator, which could be considered consistent with the requirement that the Department post a bond covering all the individuals subject to public guardianship or public conservatorship. The Legislature could amend the statute to make it clear that, despite the sovereign immunity of the Department of Human Services, the surety is still liable for the breaches of fiduciary duties carried out by the Department. Why else would the bond be required? One more alternative would be to delete the requirement of the bond because of the Department's sovereign immunity. Note that Title 18-C, section 5-417, subsection 2 provides: "2. Proceeding against surety. A proceeding may not be brought against a surety of a bond under this section on a matter as to which a proceeding against the conservator is barred." (Language is the same as former Title 18-A, section 5-416.)

Any guidance you can provide would be most helpful.

Thank you for your assistance.

Sincerely,



Representative Donna Bailey, House Chair
Joint Standing Committee on Judiciary

cc: Members, Joint Standing Committee on Judiciary
Assistant Attorney General Chris Taub