
**Marriage Inequality Under the Maine Probate Code:
Estate Administration and Distribution¹**

The Maine Probate Code (the “Probate Code”) governs the administration of estates in Maine, the distribution of property by will and the distribution of property when a deceased person has not made out a will. In addition, the Probate Code governs the adoption of persons and the guardianship and conservatorship of minors as well as persons lacking capacity.

In 2004 the Maine Legislature established the Domestic Partner Registry, 22 M.R.S.A. § 2710, and amended the Probate Code to grant registered domestic partners, and in some cases unregistered domestic partners, some limited rights that represent only a portion of the rights and protections held by married couples under the Probate Code. Married couples and their families continue to enjoy very broad protections and rights under the Probate Code that are not enjoyed by committed gay and lesbian couples and their families, even if they are registered domestic partners. Following is a description of the rights held by married couples under the estate administration and distribution provisions of the Probate Code in comparison with the rights held by unregistered same-sex couples and registered domestic partners.

I. Intestate Estates.

When a person dies without having left a last will and testament, they are said to have died “intestate” and the Probate Code will control who receives the assets that the deceased person owned at his or her death. If a gay or lesbian couple registers as domestic partners following the procedure outlined in Title 22, Section 2710, then the domestic partner will take the same portion of the estate as a spouse takes when his or her spouse dies without a will. 18-A M.R.S.A. § 2-102. The registered domestic partner will take the following:

- (1) If there is no surviving issue or parent of the decedent, the entire intestate estate;
- (2) If there is no surviving issue but the decedent is survived by a parent or parents, the first \$50,000, plus 1/2 of the balance of the intestate estate;
- (3) If there are surviving issue all of whom are issue of the surviving spouse or surviving registered domestic partner also, the first \$50,000, plus 1/2 of the balance of the intestate estate; or
- (4) If there are surviving issue one or more of whom are not issue of the surviving spouse or surviving registered domestic partner, 1/2 of the intestate estate.

¹ GLAD thanks Joanna Wyman, Esq. of Curtis Thaxter Stevens Broder & Micoleau LLC for her enormous contributions to this document, and Karen Lovell, Esq. of Bernstein Shur for her review and comments.

18-A M.R.S.A. § 2-102. Thus, the Maine Legislature has provided equal intestate protections to same-sex couples who register as domestic partners but not to same-sex couples generally.

II. The Elective Share.

Under Section 2-201 of the Probate Code if a deceased person's will does not provide for the surviving spouse or does not provide as much as this provision would provide, the surviving spouse has the right to do what is known as "elect against the will." 18-A M.R.S.A. § 2-201. When the surviving spouse elects against the will, he or she takes what is known as the "elective share."

Under the elective share provisions, the spouse of a deceased person may elect to take one-third of what is called the "augmented estate" rather than take what could be either nothing, or less than the elective share, under the deceased spouse's will. The augmented estate is essentially all property in which the decedent had an interest at his or her death including assets contained in any revocable trusts as well as any gifts that the deceased person made during the marriage.

The Probate Code has not been amended to allow same-sex couples or registered domestic partners to take an elective share of their deceased partner's estate. Thus, although a member of a committed heterosexual couple is not free to completely disinherit his or her spouse, a member of a committed gay or lesbian couple is free to disinherit his or her partner through the making of a will.

Drafting/Planning.

If a couple has a written contract between themselves, created with the formalities necessary to make it enforceable, then a court might be able to consider whether that agreement is enforceable against the estate, whether the decedent died with or without a will. This would be a matter of first impression in Maine. If the written contract between the couple concerns real estate, it may be possible to show that the agreement provides that a partner was meant to have the house, notwithstanding the contrary provisions in a Will. For example, a contract may provide that a partner "buys-in" to ownership in the home by making or contributing to mortgage payments for X period of time. The deeded owner dies before adding his or her partner to the deed, and also fails to change the Will to devise the home to his or her partner. If the partner can show that he or she has made the requisite number of payments, and has the written agreement, the partner could argue that the Probate Court should find that the partner is due home, even if there is a Will with other devisees (parents/siblings of the decedent).²

² The authors extend thanks to Matthew Dubois, Esq. of Vogel & Dubois for this insight.

III. The Omitted Spouse.

Under the Probate Code, if a person marries after making out a will and fails to change the will to include the new spouse, the spouse will take according to the laws of intestacy. 18-A M.R.S.A. § 2-301. Thus, the surviving spouse would take the entire estate if the deceased spouse had no surviving children or parents and roughly one-half of the estate if the deceased spouse had surviving children or parents.

This provision has not been amended to grant the same rights to same-sex couples or registered domestic partners. Thus if a committed gay or lesbian couple becomes registered domestic partners and one partner fails to change a previously executed will, the domestic partner would not be able to either elect against the will or receive the intestate share but instead would receive nothing.

Drafting/Planning.

It is crucial that same-sex couples create wills that protect one another. Same-sex couples do not have the luxury of procrastination as heterosexual married couples do, but they simply must create wills as soon as they determine that they would like to provide for one another after death.

IV. The Allowances.

Under the Probate Code there are a number of particularly important provisions that can protect the spouse and children of a person who dies with significant debt. These provisions are absolutely vital to the most vulnerable members of our society who, without these provisions, could stand to lose a home or an entire life savings to their deceased spouse's creditors. These protections are not available to gay and lesbian couples. These allowances are set aside for the surviving spouse (and children in some cases) prior to the allowance of creditors' claims and these allowances are in addition to the intestate share, elective share or devised share of a surviving spouse. 18-A M.R.S.A. §§ 2-401, 2-402, 2-403.

A. The Homestead Allowance.

The surviving spouse of a decedent is entitled to a "homestead allowance" of \$10,000. 18-A M.R.S.A. § 2-401. This means that the surviving spouse can protect up to \$10,000 of the deceased spouse's assets from debts owed by the decedent.

Surviving same-sex partners and surviving registered domestic partners are not entitled to the homestead allowance.

B. The Exempt Property Allowance.

In addition to the homestead allowance, the surviving spouse of a deceased person is entitled to protect up to \$7,000 of certain property that is exempt for bankruptcy purposes. 18-A M.R.S.A. § 2-402. The property covered by this provision includes a residence, a motor vehicle, furnishings, furnaces and tools of the trade. 14 M.R.S.A. § 4422. The children of a decedent are entitled to the exempt property allowance if there is no surviving spouse (see below for discussion of the issue of children and the allowances).

Surviving same-sex partners and surviving registered domestic partners are not entitled to the exempt property allowance.

C. Family Allowance.

The surviving spouse and minor children of the decedent are also entitled to protect an amount equal to the “family allowance” from the deceased spouse’s creditors. This allowance is meant to be an amount that will support the surviving spouse and minor children for up to a year if the estate is inadequate to pay all of the debts of the decedent and other expenses. 18-A M.R.S.A. § 4-403. “The family allowance is exempt from and has priority over all claims but not over the homestead allowance.” 18-A M.R.S.A. § 2-403. The amount of the family allowance is determined by the personal representative but may not exceed \$12,000 per year. 18-A M.R.S.A. § 2-404.

Surviving same-sex partners and surviving registered domestic partners are not entitled to the family allowance.

In total, the surviving spouse of a decedent who dies leaving debt that threatens family assets is entitled to protect up to \$29,000 in assets. For those who enjoy the rights of marriage, this amount will be protected from a deceased person’s creditors and will be in addition to any amount payable to the surviving spouse under the decedent’s will or the intestacy statute.

D. A Note about Children

Sometimes an allowance may be available to the child(ren) of a same-sex couple even if not to one of the adults. The birth or adopted children of a gay or lesbian person would be able to take the homestead allowance and the exempt property allowance. However, if one of the parents is not related to the child through birth or adoption and is partnered with the child’s birth or adoptive parent, it is unclear at this time as to how that parent can obtain parental rights that would entitle his or her children to the homestead

allowance should he or she die. In addition, if a non-birth parent were to die before obtaining parental rights through adoption, these allowances would not be available to that person's children.

The minor children who are entitled to the Family Allowance are those children "whom the decedent was obligated to support and children who were in fact being supported by him . . ." 18-A M.R.S.A. § 4-403. Thus, there is an argument that even if the non-birth parent had not yet adopted the children, but was in fact supporting the children, that those children would be entitled to the family allowance.

E. Drafting/Planning.

There is no document and no planning that can be done that would provide the same-sex partner of a deceased person with any protection from their deceased partner's creditors. Regarding the children of a non-birth/non-adoptive parent who is partnered with the birth/adoptive parent of that couple's children, the homestead and exempt property allowances could be obtained for the children through adoption. Please see GLAD's publication on adoption for information about how to complete a joint adoption in Maine.

V. Revocation by Divorce.

Under the Probate Code, if a married person executes a will naming his or her spouse as a beneficiary of his or her estate, or appoints the spouse as an executor, trustee, or guardian under the will, and then subsequently gets a divorce, the provisions regarding the former spouse are automatically revoked. 18-A M.R.S.A. § 2-508. "No change of circumstances other than as described in this section revokes a will." *Id.* Thus, if a divorced person simply never gets around to revising the will after the divorce or is unable to do so for some reason, such as lack of testamentary capacity, the former spouse will not benefit.

This provision does not affect same-sex couples or registered domestic partners. Thus, if same-sex partners or registered domestic partners terminate the partnership but fail to change their wills and one former partner dies, that person's ex would still inherit and receive priority for appointment under the will.

Drafting/Planning.

Again, same-sex couples do not have the luxury of procrastination. As soon as a same-sex couple terminates their partnership, whether registered or unregistered, and they

determine they do not wish to provide for the other after death, they should immediately revise their wills.

VI. Wrongful Death.

The wrongful death provision in the Probate Code continues to discriminate against same-sex couples. The statute states that the proceeds of a wrongful death action are for the

exclusive benefit of the surviving spouse if no minor children, and of the children if no surviving spouse, and one-half for the exclusive benefit of the surviving spouse and one-half for the exclusive benefit of the minor children to be divided equally among them if there are both surviving spouse and minor children, and to the deceased's heirs to be distributed as provided in section 2-106 if there is neither surviving spouse nor minor children.

18-A M.R.S.A. § 2-804. Section 2-106 provides that amounts go to heirs under the “per capita at each generation” scheme.

If a registered domestic partner died without leaving minor children, a surviving registered domestic partner might have an argument that he or she should take as an “heir” under the intestacy statute. However, this argument might not be successful because the wrongful death statute was enacted long before the revisions to the intestacy provisions that allow the registered domestic partner to take and it would be a question of the intent of the Legislature which has up until now declined to amend the wrongful death statute to allow domestic partners to take. Either way, if the person died leaving minor children the minor children would take and the partner would not.

Drafting/Planning.

There is no document that can be drafted and no planning that can be done to provide same-sex couples with the protections of this provision as the right to maintain a wrongful death suit is a statutory right and cannot be altered through drafting or planning.

It is always wise for parents and couples to consider life insurance for their families but for same-sex couples it is even more important because of the lack of statutory protections.

VII. Priority for Appointment as Personal Representative.

The order in which persons are considered for appointment as a personal representative is as follows:

- (1) The person with priority as determined by a probated will including a person nominated by a power conferred in a will;
- (2) The surviving spouse of the decedent who is a devisee of the decedent;
- (3) Other devisees of the decedent;
- (4) The surviving spouse of the decedent;
- (4-A) The surviving domestic partner of the decedent;
- (5) Other heirs of the decedent;
- (6) Forty-five days after the death of the decedent, any creditor;
- (7) Six months after the death of the decedent if no testacy proceedings have been held or no personal representative has been appointed, the State Tax Assessor upon application by that officer.

This provision comes into play most frequently in intestate estates. If a decedent left a will, this provision controls the appointment of a Personal Representative only if the will itself designates no Personal Representative, or if the people or institutions designated by the will are unable or unwilling to serve as Personal Representative.

It appears from a first read that the Legislature has made this provision fair, and it has largely done so, but it has failed to do so completely for the following reason. Even if the surviving domestic partner was named in the will, if another person was also named in the will, that person would have the same priority as the domestic partner for appointment provided that the will did not make an effective personal representative appointment. Thus, a domestic partner could be in the absurd position of fighting the appointment of, for example an aunt, uncle or parent of the decedent who perhaps received a small specific bequest in the will. This circumstance would rarely come up but the fact remains that it is extremely difficult to provide for perfect equality without simply allowing same-sex couples to marry.

Drafting/Planning.

It is crucial that if a person in a same-sex partnership wishes for his or her partner to have control of the probate process after his or her death, that he or she execute a will appointing the partner as his or her personal representative.

VIII. Interested Persons.

Under the Probate Code, persons who qualify under the definition of “interested person” enjoy certain important rights. Domestic partners, even those who are not “registered” enjoy this very important status at this time as the term “interested person” includes

heirs [persons who take under the intestacy statute], devisees [persons who take under a will], children, spouses, domestic partners, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person that may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons.

18-A M.R.S.A. § 1-201(20). An interested person has no greater rights to a share of the deceased person’s estate than would be provided otherwise, but an interested person can keep tabs on the proceedings. Interested persons have the right to notice of, to intervene in, and to be heard in any formal probate proceedings concerning the decedent’s estate. See 18-A M.R.S.A. §§ 3-401, 3-403, 3-404 3-408. Interested persons may challenge the actions of a personal representative by petition of the court. 18-A M.R.S.A. §§ 3-607, 3-611. Whenever notice is required to be given under the Probate Code it must be given to each “interested person.” 18-A M.R.S.A. § 1-401.

IX. Conclusion.

There are two lessons to be learned from this review of the rights held by same-sex couples under the Probate Code in comparison with the rights of heterosexual couples who can marry. First and foremost, it is clear that the only way to achieve true equality under the Probate Code is to simply provide that same-sex couples can marry. It is an absurd proposition to try to fight out every small change in the Code to allow registered domestic partners the same rights as married couples and in many instances it is impossible for same-sex couples to create these rights through drafting. When drafting is

an option it is simply discriminatory to force same-sex couples to incur legal fees that heterosexual couples are not required to incur to obtain the same protections. If we have

the political will to provide true equality, it is far easier and less messy to just allow same-sex couples to marry.

The second lesson learned from this review is that until such time as same-sex couples have full marriage rights under the Probate Code, all same-sex couples must take the time and money to have all planning in place. Committed same-sex couples should always take the following minimum steps to protect each other and their families: (1) become registered domestic partners, (2) execute wills providing for one another and their children if they have children and appointing one another as personal representative, (3) execute powers of attorney, and (4) execute advanced health care directives. Same-sex couples simply do not have the luxury that married couples have under the Probate Code to not do the planning. For example, simple procrastination on changing a will after entering a domestic partnership could have major consequences as there would be no omitted spouse protection for the surviving partner who could go completely unprovided for.

X. Appendix of Definitions.

“Child’ includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant.” 18-A M.R.S.A. § 1-201(3).

“Domestic partner’ means one of 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other’s welfare. 18-A M.R.S.A. § 1-201(10-B).

“Heirs’ means those persons, including the surviving spouse or surviving registered domestic partner, who are entitled under the statutes of intestate succession to the property of a decedent.” 18-A M.R.S.A. § 1-201(17).

“Issue’ of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this Code.” 18-A M.R.S.A. § 1-201(21).

“Parent’ includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.” 18-A M.R.S.A. § 1-201(28).

“Registered domestic partners’ means domestic partners who are registered in accordance with Title 22, section 2710.” 18-A M.R.S.A. § 1-201(36-A). Probate Code 03-16-08