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SHARED STRATEGIES FOR ESTATE & BUSINESS NEEDS

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New Maine Probate Code

The Maine Legislature has enacted a comprehensive update of the Maine Probate Code which will go into effect on September 1, 2019. The Probate Code governs a broad range of issues, including the validity and interpretation of Wills, administration of estates, determination of legal heirs, guardianship/conservatorship appointments for incapacitated individuals, and non-Will transfers of property at death. This client alert highlights key changes to the Probate Code that may affect your estate planning.

Many of the changes to the Probate Code recognize the evolution of the modern family. For example, if a person dies without a Will (known as “intestacy” or dying “intestate”), step-children may receive property from the estate of a step-parent in certain circumstances. In addition, the intestate share of a surviving spouse (or registered domestic partner) is generally decreased if either spouse has children from a prior marriage. The Probate Code also expands the definition of “child” to include children conceived through assistive reproductive technology, including those born up to 45 months after an individual’s death, as well as other children that are not biologically related to the decedent but with whom the decedent established a parent-child relationship. Because the Code’s default rules generally apply only in the absence of a valid Will, it is important for everyone, particularly those with “nontraditional” families, to ensure that their estate plan documents are consistent with their wishes.

The new Probate Code makes it significantly more difficult, expensive, and invasive to obtain the appointment of a guardian for an incapacitated person. In general, a guardian is required when a person lacks capacity to make decisions for him/herself regarding housing, medical care, and finances. Fortunately, the need to have a guardian appointed can be avoided or limited in most situations by executing comprehensive financial and healthcare powers of attorney that designate an agent to act on one’s behalf in the event of incapacity. We recommend that all clients, regardless of age and/or health, put such documents in place. Individuals with mental health issues should also consider signing a mental health power of attorney and advance directive specifically designed to address mental health wellbeing and care.

The Probate Code also authorizes new techniques for avoiding “probate” on death; for more information on the probate process, please see our prior client alert, [here](#). Under the new Probate Code, most assets, including bank and investment accounts, business interests, and even real estate, may be converted to “transfer-on-death” (“TOD”) assets. A TOD asset passes

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automatically to the designated TOD beneficiary or beneficiaries upon the death of the asset's owner, rather than passing under the terms of the Will (and hence, avoids probate). You can generally convert bank and investment accounts to TOD accounts by completing a form with the financial institution where the account is held. To convert real estate to TOD, you will need to prepare and record a deed that includes specific transfer-on-death language. All such TOD designations can be modified or revoked at any time during life, but become irrevocable on death.

Finally, the new Probate Code contains provisions likely to increase the probability of probate litigation after a person passes away in the event of controversy or discrepancy. Current law generally requires that a deceased person's ("testator's") intent with respect to distribution of his/her property be determined only by the terms of the Will. The new Probate Code will allow a court to consider evidence outside of the Will if certain events occurred or circumstances changed after the Will was signed. The court is also authorized to rewrite the terms of a Will if someone provides clear evidence that the testator made a mistake when he or she signed the Will. These provisions may be used to challenge a Will if there has been a change in circumstances since the Will was executed, including the death of a family member, divorce, and/or the sale of a significant asset. For this reason, it is important to review your estate plan at least every 3-5 years, and any time there is a significant change in your family or assets, to avoid a potential legal dispute after your death regarding the validity or meaning of your Will.

Please let us know if you have any questions about how the new Probate Code may affect your estate plan. And, as always, please feel free to share this Alert with your friends, family, and colleagues.