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COMMITTEE FOR THE STUDY ON COURT STRUCTURE
IN RELATION TO PROBATE AND FAMILY LAW MATTERS

REPORT
to the
JUDICIAL COUNCIL

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This committee was formed in July by the Judicial Council and charged, in essence, with two tasks:

(1) examining the present operation of the system of probate courts with special attention to (a) questions concerning the propriety of the practice of law by Maine's part-time probate judges, and (b) the effect on the operation of those courts by the new Probate Code which went into operation in 1981; and

(2) examining the need for changes in the judicial structure for handling family-related matters, including the possibility of creating a special "family court" structure.

The committee was to report back to the Judicial Council the committee's recommendations in these two areas.

During the six months of its existence, the committee has met eight times, and its chairperson and reporter have once reported informally to a meeting of the Judicial Council on the status of the committee's deliberations. During the course of its study the committee also met with Governor Brennan to discuss the issues related to possible recommendations in these areas. The committee has heard from a variety of people in the areas of interest that are involved in the committee's study[1], including members of the public who have in one way or another experienced the courts' handling of divorce, custody, adoptions, and protective proceedings. It has heard from representatives of the various state courts, the Department of Human Services, and other state agencies with relevant experience and expertise. Two members of the committee attended a special conference on family court systems held in Rhode Island in October 1984 and reported to the committee on that conference.

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1. Witnesses before the committee include: Chief Judge Bernard Devine of the District Court; Active Retired Justice Ian MacInnes of the Superior Court; Howard Barrett and Robert Crowley, Judges of Probate for Waldo and York Counties, respectfully; Lincoln Clark, Director of the state's Court Mediation Service; Debra Olken, Director of Policy and Analysis for the Administrative Office of the Courts; James E. Smith, Senior Assistant Attorney General for the Department of Human Services; Peter Walsh, Director of the Bureau of Social Services of the Department of Human Services; Catherine Johns, Chairperson of the Family Law Section of the Maine State Bar Association, which had conducted a previous study concerning a family court system for Maine; Cushman Anthony, past chairperson of the Family Law Section and currently working for Community Counseling Center in Portland; and Neville Woodruff, an attorney with Legal Services for the Elderly. One member of the committee, Allan Woodcock, is Probate Judge for Penobscot County, and another member of the committee, Cecilia Rhoda, is Register of Probate for Aroostook County. In addition to the appearances of the above witnesses, the committee received written memoranda and correspondence, and studied relevant reports written by other groups. A list of these materials is attached at the end of this report.

This report is an effort to summarize the results of the committee's study and to set forth its recommendations and the options for implementing them.

I. The Probate Courts

Turning first to the nature of the Probate Courts under the new Probate Code, statistics gathered by the committee through the Registers of Probate indicate that most of the work of the Probate Judges that deals with the probating of wills or determinations of intestacy, the appointment of personal representatives for a decedent's estate, and the administration of estates has become a matter handled by the registers or by the interested parties, as was intended by the probate code reform enacted by the legislature in 1979. In 1983, for example, more than 95% of probate and appointment proceedings were done informally through the register. In that same year, approximately 42% of all determinations made in the probate courts were made by judges and 58% were made informally by registers.

The nature of the judicial work within the probate court system has therefore changed by a shift in emphasis away from the traditional handling of decedents' estates and towards the other remaining areas of the probate courts' jurisdiction. The net result has been a reduction in the total judicial workload coupled with a change in its character. In some areas of probate jurisdiction there may be an increase in workload. In the area of adoptions and guardianships the new Probate Code and the Rules of Probate Procedure that were promulgated to implement it have increased notice requirements over what may have been the practice previously, so that formal proceedings in those areas may be more elaborately done now than in the past. The number of guardianship proceedings has been rising sharply in Kennebec and Penobscot Counties, where two state and one federal mental health treatment facilities are located. The new Probate Code's provision of jurisdiction concurrent with the Superior Court in actions to which an estate may be a party has resulted in a new, but not significantly large, area of additional caseload.

As a result of these trends the Probate Courts today might be more accurately characterized as "Guardianship and Adoption" courts rather than "Probate" courts, as far as the judicial workload is concerned. Among the determinations made by probate judges in 1983 nearly one-third (29%) dealt with the appointment of guardians or conservators, adoptions constituted 24%, name changes constituted 22%, and formal probate, appointment of estate representatives, and formal closings combined for slightly under 11%. Although a few cases in any of these categories might be hotly contested, the vast majority of these determinations, including the formal proceedings in the traditional probate area, have been relatively routine and uncontested.

Much evidence was put before the committee to show that the Probate Courts were working effectively within the areas of their jurisdiction. Two probate judges appeared before the committee, and many others wrote to the committee, describing their operation. The committee heard no significant complaint against the present probate courts, except for the problem raised by the practice of law by part-time judges and the lack of uniformity in the procedures from one county to another in similar kinds of cases. The lack of uniformity in procedures was brought to the committee's attention specifically in the adoption area, in the implementation of statutory requirements for guardianship, conservatorship, and other protective proceedings, and in the general operations of the independent courts of the various counties.

The strengths deemed to exist in the present probate court structure seem to be the ability of the judges to deal with prople on a more informal basis, their availability for emergency orders. and the local orientation of the judges. A major reason for the ability of the probate judges to deal more informally with those before them seems to arise from their lighter caseload in comparison to Maine's other courts. The statistics for 1983 show that the average number of determinations per probate judge in that year was 225. The average number of cases handled by a judge in the District Court in 1983 was 11.225. and the average number of cases handled by a justice of the Superior Court was 1,185.[2] The number of cases and the amount of time spent, of course, varies greatly from county to county, and probate judges in the more populous counties have much more of a caseload than is represented in these averages. Based upon estimates furnished by the probate judges and registers, the amount of time spent on judicial duties ranges from five hours per month in some of the smaller counties to 86 in the most populous, with the average being slightly more than 29 hours per month.[3] Based upon this data showing the number of hours worked by the judges, as reported by the probate courts, it was estimated for the committee that four full-time judgeships would be the equivalent of the present part-time system.[4] The salaries of the present part-time probate judges ($184,184) totals somewhat more than the salaries of four full-time judges in the District Court ($168,344) or the Superior Court ($174,944), based on 1984 salaries.

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2. These statistics do not lend themselves easily to straight forward comparison among the three trial level courts. The figures for the probate courts count the number of <u>determinations</u> made by the judges of probate, while the figures for the District and Superior Courts count the number of <u>cases</u> per judge in those courts; one case may, of course, require several determinations. There are also differences in the nature and complexity of the various cases handled by each of the three court systems. Most of the judicially determined matters in the probate courts are not contested, even in the case of formal proceedings, although some of them are vigorously contested, complex and may require evidentiary hearings lasting several days. The District Court caseload varies from routine dispositions to relatively long trials and ranges over a large array of subject matter. The Superior Court caseload contains, on the whole, the most complex cases, including both civil and criminal jury trials, which are available exclusively in that court. It must also be taken into account that the probate judges are also committed to part-time, rather than full-time positions.

3. The figures submitted by the probate judges were incomplete in two ways: (a) no information was furnished for one of the sixteen judges; (b) information on the hours spent in court was submitted for three other judges, but the time spent out of court was not determined. These statistical inadequacies were compensated by (a) assigning the average time per judge to the one for whom no information was submitted (and who serves in one of the smaller and less populous counties of the state), and (b) by assuming that the other three judges worked the same amount of time out of court as they did in court (which is in fact a higher proportion of out-of-court time than is shown by the information concerning the ten judges for which such information was furnished). Two of the judges kept time-sheets, which were used to determine their hours.

4. This equivalency to work-time, based on the number of hours in a regular work-year, was prepared by Debra Olken, Director of Policy and Analysis for the Administrative Office of the Courts on the basis of the figures furnished by the probate court judges and registers.

The availability of the probate judges for emergency action in guardianship matters constitutes one of their values. The committee found, however, that the probate courts are not unique in their emergency availability. The Superior Court, based also on a county system with an equivalent number of judges, and the District Court with more judges than the probate courts, are also all traditionally available for emergency relief. The District and Superior Court judges are full-time positions which should make them, if anything, even more available than Probate Court judges. Indeed the evidence before the committee indicated that there is greater emergency availability of District and Superior Court judges. Other devices, such as the use of complaint justices, are also available for dealing with the need for emergency judicial action.

One point of serious complaint with the Probate Court system today is the practice of law by the part-time Probate Judges and the serious appearance of impropriety raised by it. A Probate Judge lawyer who decides his colleague's case in the probate courtroom today and then negotiates with that same colleague as a private attorney in another matter tomorrow puts himself in as awkward a position as he puts his colleague. It is not enough to say that there is only a "possibility" of a conflict of interest in such a situation, or that no actual cases have been proven in which a lawyer actually engaged in improper conduct as a result of the inherent tension between a judge's duty to impartiality and a lawyer's duty to his client. However successfully a person may resolve that tension in individual instances, the interests that do in fact exist in such situations do in fact conflict with each other. One lawyer dealing with another lawyer who is also a judge before whom the first lawyer may need to appear in the future cannot help but have feelings of ambiguity about the effect of his present dealings on his future cases before the attorney-judge. A judge who decided a closely contested case against an attorney with whom he presently must deal on another matter must likewise have uncertainties about the effects of his decision-making on his future dealings with his fellow attorneys. Even assuming the most honest of people are involved (and the committee has heard no evidence to the contrary), the psychology of such situations is too elusive to allow any assumption that there is no conflict, or that it has no effect. The problem is enlarged by the fact that the conflict of interest extends beyond the individual judge to the members of the judge's law firm. And while the problem may not seem to be a burning issue in the general public's perception, one who is a litigant may well be upset with a judicial system that pits his own attorney against a lawyer who next week may be the judge in a case against the lawyer who is judging this litigant's case now.

This is a situation which, in the committee's view, should no longer be allowed to continue. Just as Maine has worked toward the elimination of similar kinds of unhealthy conflicts of interest in the past by eliminating the part-time municipal judge positions and the part-time nature of the former county attorney positions, so should this conflict of interest situation be eliminated in the case of our part-time probate judges.

Another problem with the present Probate Court system that has been raised by some is, in one sense, not a problem at all, but the very strength of the system -- the allocation of resources that allows the probate courts to operate with more time to deal with its caseload, and treat informally with people. There can be no doubt that far more resources per case are allotted to the probate courts than to the other courts in this state. Even allowing for all reasonable assumptions about the non-comparability between the caseload statis-

tics among the three Maine trial courts, the disparity between the 225 determinations per year for Probate Judges and the 11,225 cases per year for District Court judges is just too dramatic to allow any other conclusion. Considering the more complex nature of the Superior Court caseload, the same can be said for the comparison to the 1,185 cases per year for the Superior Court justices.

This relatively lower caseload may allow for more informal and personal handling of the cases before the Probate Courts, and that in itself is good. The problem lies in the fortuity of this allocation of resources; it is the product of the accident of historical development. No one has made any deliberate decision that a greater proportion of resources should be given to formalizing adoptions than to the handling of child abuse cases, or to the appointment of guardians and conservators than to resolving custody disputes in divorces, or to probating wills than to granting orders for protection from abuse or dealing with drunk drivers. It is not likely that anyone would make those choices in the allocation of judicial resources.

The question of resource allocation in light of the really pressing problems that exist to a seemingly increasing degree in the other courts that handle family matters has recently been highlighted by the Report of the Governor's Working Group on Child Abuse Proceedings. Among the conclusions in that report are recommendations that call for greater allocation of judicial time in both the District and Superior Courts for the scheduling and consideration of child abuse and neglect cases. (Recommendations Nos. 21-26, 32, 33, 47, 48, and 50.)

It is not clear that reallocating the probate court system resources into the whole picture of problems -- and particularly family-related problems -- with which our courts must deal would make any dramatic difference. It is more clear that putting the family-related problems mentioned above into the probate courts would no doubt undermine the ability of those courts to do what they are now deemed to do best: handle cases effectively in an informal and personal manner, because the relatively lower caseload allows the time to do that. The question of whether the misallocation of resources to the probate court system is justified may come down to a question of the value of preserving the one small pocket of the judicial system where a tiny portion of the less-pressing family-related matters can be handled with a remaining degree of time and comfort. It would be preserved not as a rational allocation of resources, but as an endangered species.

II. Family Courts

The committee heard a considerable amount of evidence concerning various structures, including separate family courts, for handling family-related disputes that end up in the judicial system, and particularly considered the current structures for handling family-related matters in Maine's trial courts. It seems obvious to the committee that the overwhelming concentration of family matter jurisdiction in the District Court makes that court by far Maine's predominant court for the handling of family disputes, or other disputes that have a significant impact on families. Unless the state is willing to wholly revamp its judicial system for the handling of family matters, it seems to the committee that structural changes to refine the system should focus on the District Court: family-related jurisdiction should be consolidated there (although not in a way that would preclude concurrent jurisdiction on items that further study indicated were appropriate for concurrent jurisdiction) and structural refinements and other techniques should be examined for use there (such as the enlargement of the role of mediation and other informal and non-adver-

sarial approaches where appropriate, or possibly the creation of a separate family law division within the District Court).

The committee was somewhat surprised not to find more dissatisfaction with the judicial handling of family matters in Maine, or more real support for a family court concept. The main concerns about the present system seem to be: (a) the need for more judicial time to deal with cases on a more personal and informal basis, which seems to translate into a need for more judges; (b) the need to develop less adversarial ways of handling family disputes where possible and appropriate; (c) a need for training to develop more skill and sensitivity in the handling of particular family related problems by judges, district attorneys, lawyers, and other state agency and court personnel; (d) the need for greater assurance of continuity in the handling of individual cases; and (e) the need to provide more effective physical insulation of family cases from the rest of the District Court docket, especially criminal matters (although juvenile offenses are traditionally considered to be "family cases" in most family court systems).

The development of expertise by judges dealing exclusively in family-related matters is often listed as one of the advantages of a family court system. The witnesses before this committee seemed to be more concerned about the potential that such exclusive jurisdiction has for "burn-out". Family related matters seem almost universally to be viewed as among the most persistently frustrating kinds of cases to deal with. In addition, most of the relevant evidence before the committee seemed to suggest that judges who handle family matters as often (although not exclusively) as our present District Court judges do, inevitably develop an expertise in those matters to the same degree as they would if they were handling nothing but those matters; the variety may in fact have, in some sense, a refreshing value.

III. Recommendations

1. The committee recommends that the Code of Judicial Conduct be made applicable so as to prohibit the practice of law by all judges, including the present Judges of Probate as of the end of the term of any judge who is holding that position at the time such a prohibition would otherwise go into effect.

2. The committee recommends that the judges who handle the matters within the present jurisdiction of the probate courts be appointed by the Governor, and that the Registers of Probate be appointed in the manner that clerks of other courts are presently appointed. In this regard, the committee further recommends that the physical locations of the Registries of Probate remain where they are and be separately maintained so as to continue to facilitate their use as a repository for land records. While the committee recommends that the registries be brought within the state court administrative system, because of the special and traditional functions of these offices it is important that they occupy a separate status within that system. The exact manner in which these arrangements should be made is more appropriately dealt with by those in charge of probate court and state court administration.

3. The committee recommends that the funding for the probate court system be assumed by the State at the time that it is brought within the state court system, and that the counties be thereby relieved of that financial responsibility.

4. The committee suggests that these recommendations be implemented by one of the three alternative options described below. The committee did not itself have a consensus behind any particular one of these options; the various members entertained their individual preferences among them. Most members of the committee, however, would support the adoption of any one of these options in order to implement the foregoing recommendations. Each one of these options would achieve the previously stated recommendations of the committee.

A. Transfer the jurisdiction of the present probate courts to the Superior Court in estate and trust related matters, to the District Court in family law matters, and concurrently between the Superior and District Courts in guardianship, conservatorship, and other protective proceedings. This jurisdictional division would place estate related matters (probate and trusts) in that court which has traditionally handled such matters either by its concurrent jurisdiction with the probate courts in trust and estate related matters or as the former do novo appellate tribunal for the probate courts. It would also help to further consolidate family matter jurisdiction (adoptions and name changes) within the court where all other family matters are primarily handled and which must be the focus of any further reforms in structuring our courts to handle family matters, short of a complete reorganization into some form of separate family court concept. The placing of protective proceedings into the concurrent jurisdiction of both courts recognizes the dual estate / family nature of those proceedings, and enhances the availability of judges for the provision of emergency relief.

This recommendation would require the creation of four additional judgeships to replace the Judges of Probate whose positions would be eliminated. These additional judges in the District and Superior Courts would help make available the full quantity of judge-resources in those courts where the most difficult and pressing problems now exist -- abuse of children and spouses, custody determinations, OUI enforcement -- and thereby allow a more effective and rational application of those resources to those problems. While the committee assumes that this number of judges might be assigned equally between the two courts, further study by those in charge of judicial administration might show the need for a different division.

This option would resolve the ethical problems arising from the practice of law by the part-time judges without giving rise to concerns about the inability to assure adequate staffing of any judicial position. No constitutional change would be needed in order to legislate these reforms, which would merely be carrying out the program that was constitutionally authorized by the voters in 1967 and 1980. See Opinion of the Justices, 412 A.2d 958, 980-982 (Me. 1980).

B. Create a Probate and Family Court Division of the District Court with full-time, appointed judges who would be rotated, at the discretion of the Chief Judge, within the other particular areas of that court.

C. Maintain the present structure of county-based part-time probate courts and judges, except that (1) the Code of Judicial Conduct would be applied to the probate judges by the Supreme Judicial Court so as to prohibit the practice of law by those judges, (2) the judges would be appointed by the Governor for four-year terms, and (3) where the Governor could not find a competent attorney

willing to serve as probate judge in a particular county, the Governor would have discretion to appoint a judge to serve two or more adjacent counties, perhaps on a more nearly full-time basis. The primary purpose of this option would be to preserve to the extent possible the present probate court system and the values that some see it as having, while at the same time resolving the ethical problem of the practice of law by judges. The appointment power of the Governor, and the discretion to appoint a judge to serve more than one county, are in response to the concern that the prohibition on law practice by probate judges would shrink the pool of competent candidates who would be willing to accept the position. In addition, to the extent that judges are appointed to serve more than one county, the position would become more nearly full-time and thus more inherently self-supporting. To the same extent, on the other hand, such combined appointments might also cause the system to lose the very characteristics that are admired by those who find the current probate court system desirable.[5]

The implementation of this alternative would probably require an amendment to the Maine Constitution, since the Constitution presently provides that probate judges shall be elected unless the Legislature enacts a different system of probate courts with full-time judges of probate. It could be argued that alternative C is a different system of probate courts and that its provision for combined appointment of judges to serve more than one county would satisfy the "full-time judge" requirement. If that argument were accepted by the courts no constitutional amendment would be necessary.

5. The committee has set forth in Part II of this Report some of its observations concerning judicial structures and other measures for the handling of family matters in the courts. While further study of ways for improving the effectiveness of courts in dealing with such important and sensitive cases might be desirable, the committee feels that an effective study of these issues is beyond its own competence and would leave that task to others more qualified.

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5. Judge Woodcock has suggested an additional alternative and requested that it be noted in this report:

> A proposition that appeals to me is to formulate a system of regional judges, possibly five in number, who would, in the aggregate service the entire State. They would be full-time, appointed officials thus eliminating the conflict of interests problem and at the same time removing from the election process the only judges in Maine now so chosen.
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> Under this suggestion the jurisdiction would remain the same and thereby many potential difficulties would not have to be addressed. Also, I think that a goodly measure of the close-up working relationships currently existing between the judges and the users of the court could be preserved, even considering the larger area (with its consequent time demands) that each such regional judge would be covering.
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> Preferably, such a system would be financed by the State, thus relieving certain County obligations and also placing the Probate Courts clearly within the Judicial Department.

Certain further observations can, however, be made concerning the nature of such studies:

A. The District Court is the center of gravity for family matters in this state and is, in that sense, its "family court." As such, it is the most likely focus for any future development of more effective judicial structures for the handling of family problems.

B. Further studies will be more productive if they focus on "family matters in court" rather than on a "family court." Problems that are directly perceived can be addressed in a more concrete and meaningful way. The notion expressed here is perhaps well-illustrated in the recent study and report by the Governor's Working Group on Child Abuse and Neglect Proceedings.

C. There is no substantial support for a major restructuring of our court system to create a separate "family court" and no prospect for the resources to do so in the near future. It is the committee's sense that both of these feelings are shared by most of the people who work in the area of family law in this state. The needs that are perceived are more of the nature of what is suggested in observation B above. Based on this, no major "family court" study would be likely to be productive in the near future, and is not needed.

Respectfully submitted,

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