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Commission to Create a Plan to Incorporate the Probate Courts into the Judicial Branch

RE: Practical Concerns from the Adoption Bar

Dear Senator Carney, Representative Cardone and Commission Members:

I am a member of the American Academy of Adoption Attorneys and my firm has been working in the adoption field since the mid 1990s. My personal involvement with adoption goes back in the early 1980s when my siblings were adopted. I have worked with every active licensed adoption agency, including the Department of Health and Human Services. My firm represents birth parents or adoptive families.

My primary concerns regarding the incorporation of the Probate Courts into the Judicial Branch with respect to adoption matters are administrative scheduling and judicial specialization.

### **Scheduling**

First, it is critical that a birth parent consenting to an adoption be able to schedule such a court date quickly, efficiently and in advance of the actual birth. This is to enable their own healing process, reduce legal uncertainty for the child, and fairly notify the other potential parents of the adoption.

#### *Probate Court v. District Court*

The typical goal for a consent hearing is for the consent to be heard within two weeks of the birth. By statute the consent cannot be earlier than three days in most cases (Title 18-C section 9-202; however the timeframe is ten days in ICWA cases pursuant to Federal Law). When representing a birth mother, the second task after communicating with the client is to call various courts before the action is filed and the birth, and ascertain the best combination of distance and time for the birth mother. Pre-reservation of court dates before the action is filed and the birth is normal in the Probate Court.

An extremely “fast” hearing in the District Court may be two to four months after filing. This is not workable for three reasons; first, the vast majority of birth parents do not want to extend the process. Second, for unhomed birth mothers, an extended process means that they cannot consent, and they must face the additional legal complications of a termination. Finally, for Putative Parents, this means additional months before knowing there is a child- time which might count against them in a termination action. A Putative parent that does not know that they are a parent cannot establish their parental rights.

Currently the Probate Courts are excellent at prioritizing consents and notice to the putative parents; whereas, unless there is a statutory change, rule change or a significant budget increase for the Courts, the District Court will not be able to match the speed of the Probate Court.

### *Birth Parents and Children- Why is a Timely Consent Important?*

Who are birth parents? They range from young adults in college, people struggling with their own mental health and drug issues, sexual assault victims and minors. All recognize that they are not ready to parent a child, and wish a better life for their child and a family that can provide what they cannot. Some people wish a great deal of contact after the adoption placement; others, often sexual assault survivors, wish to have nothing to do with the child as it is too emotionally painful. The vast majority of birth parents desire to go to court as soon as possible, and a large number are upset that they have to go to court and cannot consent in a more private setting at a time of their choosing. Frequently, birth parents will mention going to court is as traumatic as the initial placement of the child or the sexual assault.

Psychologically, many birth parents cannot start the path of emotional recovery from deciding on adoption until their consent is resolved. Two illustrative examples are sexual assault victims and housing insecure birth parents. Sexual assault survivors, particularly the minors, tell me that they feel re-victimized by both the pregnancy and the legal process; and ask that the legal process be completed as quickly as possible so that they can start to heal. Additionally, housing insecure birth parents frequently displace and have no reliable means of communication. If the legal process is not resolved quickly, there can be significant long term consequences for the birth parent and child. I recently had a housing insecure birth parent call me requesting to place a child, and stated that she was traveling across the United States in a few days with no plans of settling down in any particular location. If she was unable to be consent in a very short time frame, a termination of her rights would be necessary and the case would have been at the taxpayer’s expense as opposed to a privately paid case. Fortunately the Court was able to take her consent in a time frame that worked for her.

Children, even infants, bond with their care takers. It is of the utmost importance that the legal risk of the adoption be resolved quickly for the child. If a putative parent objects to the adoption, the court needs to move quickly in resolving the parental rights and providing stability for the child.

### *Non Consenting Parents- Constitutional Right to Timely Notice*

Before a putative parent can object to an adoption, they need to be legally notified after the birth by the Court. Some birth fathers do not know there is a pregnancy until they are notified, and this is their first opportunity to determine if they can parent or wish to participate in the adoption.

Birth Parents who are not consenting to the adoption must be notified, after order of the court, of the adoption or termination, this notification includes a court date. If the consent is not rendered quickly, the non-consenting parent will have no legal notice of the adoption nor opportunity to ascertain their options ranging from agreeing to the adoption, objecting, requesting visitation or seeking mediation. Furthermore, it is of the utmost importance for the child to have consistent care taking. If there is a fit parent objecting to the adoption, the adoption should be unwound as quickly as possible. As noted above, that objecting parent may not even know there is a child until the court notifies them of their first hearing date.<sup>1</sup>

In the Probate Court, it typically takes about two weeks after the Consent for the Notice to issue, so the majority of non-consenting parents will receive notice within six weeks of the birth. If a fit parent objects to the adoption, the best result for everyone is that the adoption placement is unwound as quickly as possible; if the objecting parent is not fit or it cannot be readily ascertained, appointing a guardian ad litem to investigate quickly is in the child's best interest. In all cases, speed is very important, as delay will have lifelong consequences on the child.

### *Inter State Adoption*

Furthermore, many birth parents want some space between themselves and the child, and select families from other states like New Hampshire or Vermont to raise the adopted child. Birthparents want contact at certain predictable times, not at the grocery store. Any child crossing state lines is subject to approval by Maine Interstate Compact on the Placement of Children and the receiving state. Such approval is conditioned by the requirements of Regulation 12, which includes both discharge from the hospital and that the placing parent has consented to the adoption. In the majority of interstate cases, ICPC approval takes about two weeks from the birth due to these requirements. If the District Court does not schedule adoption consents to be completed within a week or two of the request, Maine birth parents will not have the same choices as people in other states, or forgo the protections of Maine Law.

Unless courts treat adoptions like child protective cases or protection from abuse cases, there is a real risk that fewer people will be able to avail of private adoption,

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<sup>1</sup> Other States address notifying putative parents as quickly as possible via putative parent registry, where persons who have potential parental rights may register with the state that if a child is born that they will support the child or parent the child. State which have such registries require them to be checked before the consent of the other parent and ICPC submission. For example see the New Hampshire Putative Father Registry.

increasing the burden on the State Department of Health and Human Services. Quite a few birth parents struggling with addiction have had children removed from their care by Child Protective Services. Unlike DHHS, adoptions the birth parents have greater say in what happens to their child, contact with their child and the child has a permanent home significant faster with a private adoption.

It is not typical that a District Court Clerk will discuss prescheduling a hearing in advance of a case being filed; whereas that is the norm in the Probate Court. Examining other States, in New Hampshire, adoption surrenders (functionally the same as a Maine consent) are typically scheduled for a hearing within days, or at most a week or two.

### **Specialization**

A second, but related concern is that of the specialization of the Probate Court. The Probate Court judges have limited areas of law that they focus on. While the breadth of the District Court Judge's jurisdiction may give them more tools to craft appropriate results in some cases, I am only aware of two private adoptions in the District Court. While the District Court has become used to resolving Department adoptions, it is not unusual for a simple adoption to take three months for scheduling; if not significantly longer. It is common for even an infant placement in a Department adoption to take four years to resolve through adoption, where it is a very unusual Probate adoption that takes more than six to nine months... and, in the right case, a month or two. The current record that I am aware of in Maine is three weeks. The District Court is used to cases taking years, not days or months. The Probate Court understands the critical nature of service on putative parents, and the vast majority of requests for service are resolved in two weeks from the request, such that the putative parent receives notice within six weeks of the birth. It can take a District Court six weeks to docket a new case.

Right now for contested adoptions, the Counties pay for the counsel of the objecting parent, and at times the guardian ad litem. Significant resources would need to be allocated for such representation by the State. If the Legislature does not increase the funding of the Court System, including both judges and clerks, moving the adoption docket from the Probate Court to the District Court may have a negative impact on Maine children and families, increase the costs on the Department of Health and Human Services and delay the ability of putative parents to participate in their children's lives.

### **Conclusion**

The ideal solution from the adoption bar's perspective would be the full funding of a certain number of dedicated Judges and clerks to the adoption docket, and training and procedures/statute put in place to guarantee that consent to an adoption would be heard no later than two weeks from the birth or filing.

If additional state resources are not allocated, the danger is an overburdening of the judicial system, and the efficient process currently in place being lost. While many of the current backlogs are understandable given COVID and other disruptions, court cases

involving children are taking significantly longer to docket and resolve, including uncontested cases. Without a statutory mandate that consents be treated with high priority in certain time frames, the costs incorporating the Probate Court into the Judicial would be paid by Maine children.

It is critical that a birth parent consenting to an adoption be able to schedule such a court date quickly, efficiently and in advance of the actual birth. Timeliness is critical to allow the consenting birth parent to start their healing, allow for the child to have a permanent home as quickly as feasible, and allow non-consenting parents notice and the ability to participate in decision making.

Sincerely yours,

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