

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

## Summary of Selected Events, Reports and Recommendations Regarding Probate Court Reform<sup>1</sup>

### **1952. Study by Edward F. Dow, University of Maine<sup>2</sup>**

This report, *County Government in Maine: Proposals for Reorganization*, was completed by Professor Dow of the University of Maine for the the Maine Legislative Research Committee. Professor Dow's report examined the sheriffs and municipal court system in detail. He issued seven recommendations. As regards the probate court system, he offered the following:

1. "Judges of probate should be appointed. They are presently the only elected judges in Maine."
2. "Registers of probate and clerks of courts should be appointed by the courts."<sup>3</sup>

### **1967. Statewide Referendum approving Constitutional amendment.<sup>4</sup>**

Resolve 1967, Chapter 77 proposed an amendment to the Constitution of Maine that would remove Article VI, Section 6, which provides for the election of Probate Judges and Registers of Probate. The referendum passed.<sup>5</sup> However, the resolve provided that the amendment becomes effective "at such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges,"<sup>6</sup> a contingency that has yet to occur.

### **1967. University of Maine Bureau of Public Administration Report<sup>7</sup>**

The *Report of the Preliminary Analysis of the Feasibility of a Probate District Court System for Maine*, prepared by the Bureau of Public Administration at the University of Maine at the request of the Legislature's Probate Court Revision Committee, compiled information on the workings of the probate court system, with an eye towards reform. Based on its research, the bureau observed that a "district court system for probate courts is feasible with full time judges selected through some appointment procedure rather than being elected by the people."<sup>8</sup> However, it also noted that judges and attorneys surveyed were of the opinion that the functions of the Probate Court could not be "well attached to another type of

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<sup>1</sup> Professor Dierdre Smith provides a comprehensive overview of many of the reports and events described below in her 2016 work: Deirdre M. Smith, *From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts*, 68 Me. L. Rev. 45 (2016), available at <https://digitalcommons.maine.gov/mlr/vol68/iss1/11>. Please also see the forthcoming book from Justice Donald Alexander, *The Maine Supreme Judicial Court and the Maine Judiciary: Prepared in Recognition of the 200th Anniversary of the Creation of the State of Maine and the Maine Supreme Judicial Court* at ch. VI, Pt. C §1(c). In addition, copies of the materials discussed in this summary are posted at the following link: <https://legislature.maine.gov/commission-to-create-a-plan-to-incorporate-the-probate-courts-into-the-judicial-branch-background-materials>.

<sup>2</sup> Edward F. Dow, *County Government in Maine: Proposals for Reorganization* (1952).

<sup>3</sup> *Id.* at III.

<sup>4</sup> See Resolve 1967, Chapter 77.

<sup>5</sup> See Law and Legislative Reference Library, Amendments to the Maine Constitution, 1820-Present, available at <https://www.maine.gov/legis/lawlib/llrd/constitutionalamendments/>.

<sup>6</sup> *Id.*

<sup>7</sup> Bureau of Public Administration, University of Maine, *Report of the Preliminary Analysis of the Feasibility of a Probate District Court System for Maine*, Project Report No. 67-1. (1967).

<sup>8</sup> *Id.* at III-IV.

court.”<sup>9</sup> Rather, the report suggested that the “preferred method for establishing the probate districts is to use some combination of counties which would continue the present system of handling probate records within easy access of the registry of deeds” and further proposed that, based on data the bureau collected, combining the Probate Courts into “5-7 districts seem[s] plausible.”<sup>10</sup> Nevertheless, the bureau identified several problems that may arise in implementing such a proposal: “financial arrangements for cost sharing, the actual selection procedure, relationships between the full-time probate judges and county and state officers, procedural matters, and jurisdiction.”<sup>11</sup>

### **1969. Institute of Judicial Administration Report<sup>12</sup>**

This report, *The Desirability of Integrating Activities of the Probate Courts of Maine into the Superior Court*, was prepared by the New York-based Institute of Judicial Administration for the Legislature’s Legislative Research Committee. After reviewing the problems with the current probate court structure through discussions with all active Probate Judges, nearly all active Registers of Probate, practicing probate attorneys across State, the chief justice and several other justices of the Supreme Judicial Court, and after updating the statistical information compiled by the Bureau of Public Administration in 1967, the Institute recommended a plan for restructuring the Probate Courts. Its proposed court structure included a three-tier court system, the first tier being the district court, the second a superior court as the trial court of general jurisdiction that would handle the majority of probate cases, necessitating the appointment of additional superior court justices, and the third the Supreme Judicial Court.<sup>13</sup> The Institute further recommended that Registers of Probate be full-time county officers appointed by the Chief Justice in the same manner as court clerks.<sup>14</sup>

### **1975. Report on Administrative Unification of the Maine State Courts<sup>15</sup>**

This report, *Report on Administrative Unification of the Maine State Courts*, was prepared for the benefit of the Maine Legislature by the National Center for State Courts pursuant to a contract between the Trial Court Revision Commission and National Center for State Courts. The report included recommendations for reform of the trial courts in Maine. The report authors did not focus on the Probate Courts, though they did recommend creation of a “judicial conference” to include a Probate Court judge. They also suggested that the Chief Justice designate a presiding justice for each judicial region, who would have oversight authority over all courts in that region, including the Probate Courts. Finally, they suggested creation of an administrative office for the courts, which would coordinate the personnel activities of all courts, including the Probate Courts.

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<sup>9</sup> *Id.* at IV.

<sup>10</sup> *Id.* at IV.

<sup>11</sup> *Id.*

<sup>12</sup> The Institute of Judicial Administration, *The Desirability of Integrating Activities of the Probate Courts of Maine into the Superior Court*, Legislative Research Committee, Pub. No. 104-21. (1969).

<sup>13</sup> *Id.* at 16.

<sup>14</sup> *Id.* at 22-23.

<sup>15</sup> National Center for State Courts, *Administrative Unification of the Maine State Courts*, Pub. No. R0020 (January 1975).

### **1980. Maine Probate Law Revision Commission Report<sup>16</sup>**

This report, *Report to the Legislature: Recommendations Concerning the Probate Code and Constitutional Amendment*, was prepared by the Maine Probate Law Revision Commission at the direction of the Legislature. After examining the current probate court workload and system, including the newly enacted Probate Code, the Commission concluded that the best approach to reform was to transfer the jurisdiction of the Probate Courts to the Superior Court and increase by 3 the number of Superior Court justices.<sup>17</sup> The report also proposed preserving the county-based nature of Registers of Probate and probate registries. Rather than integrating the functions into the Superior Court clerks' offices, the commission recommended that the Chief Justice appoint and maintain supervisory authority over Registers of Probate. The report included proposed language for a bill to achieve these goals.

### **1980. Supreme Judicial Court Opinion.<sup>18</sup>**

The Senate, concerned over the constitutionality of instituting the Maine Probate Law Revision Commission's recommendations and resulting bill, S.P. 775, L.D. 1968, sought an opinion from the Supreme Judicial Court. The Justices were asked the following questions:

1. Would S.P. 775, L.D. 1968, if enacted, constitute a violation of the Constitution of Maine, Article V, Part First, Section 8, which excludes the appointment of "judges of probate" from the Governor's authority to appoint all judicial officers?
2. Would S.P. 775, L.D. 1968, if enacted, constitute a violation of the Constitution of Maine, Article VI, Section 6 in that it would not "establish a different Probate Court system with full-time judges?"<sup>19</sup>

The Justices provided the following answers:

1. Enactment of legislation transferring probate jurisdiction to the Superior Court would not constitute a violation of the Constitution of Maine, Article V, Part First, Section 8 because expanding the jurisdiction of Superior Court justices to include probate matters along with all of the other matters currently within their jurisdiction did not make those justices "judges of probate";<sup>20</sup> and
2. Enactment of legislation transferring probate jurisdiction to the Superior Court would not violate the Constitution of Maine, Article VI, Section 6 because the legislation authorizes Superior Court justices to adjudicate controversies arising under the Probate Code, thereby creating a new probate court system with full-time judges and triggering repeal of Article VI, Section 6 under Resolve 1967, chapter 77.<sup>21</sup>

It should be noted that the language of Article V, Part First, Section 8 was amended in 1980 (after the Opinion of the Justices was published) after a constitutional resolution<sup>22</sup> was approved to allow the

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<sup>16</sup> Maine Probate Law Revision Commission, *Report to the Legislature: Recommendations Concerning the Probate Code and Constitutional Amendment* (1980).

<sup>17</sup> *Id.* at 1, 11.

<sup>18</sup> *Opinion of the Justices*, 412 A.2d 958 (1980).

<sup>19</sup> *Id.* at 958.

<sup>20</sup> *Id.* at 982.

<sup>21</sup> *Id.* at 982.

<sup>22</sup> Const. Res. 1979, ch. 4., passed in 1980.

Governor to appoint judges of probate as long as there is no other manner for selecting probate judges in the constitution or statute. This amendment resolved a future constitutional conflict with Article V, Part First, Section 8 that might present in the event legislation passed providing for the appointment of probate judges.

### **1985. “Cotter Report”<sup>23</sup>**

This report, created by the Committee for the Study on Court Structure in Relation to Probate and Family Law Matters, is referred to as the “Cotter Report” as the committee was chaired by William R. Cotter.<sup>24</sup> The committee was tasked by the Judicial Council with studying the current probate court system, with a special emphasis on family law matters. Among the Committee’s recommendations were the following:<sup>25</sup>

1. That the Code of Judicial Conduct be amended to prohibit the practice of law by sitting Probate Judges;
2. That Probate Judges be appointed by the Governor; that Registers of Probate be appointed in the same manner as other court clerks in the state court system; and that probate registries become part of the state court system but nevertheless remain separately maintained within each county; and
3. That the State assume all funding of the Probate Courts.

In terms of the structure of the Probate Courts, the commission offered the following options for achieving the three recommendations above:<sup>26</sup>

1. Transfer jurisdiction of estate and trust matters to the Superior Courts; transfer jurisdiction of family matters to the District Court and transfer concurrent jurisdiction of guardianship and protective matters to both the Superior Court and District Court;
2. Establish a Family and Probate Division within the District Courts; or
3. Keep the current structure of county-based, part-time Probate Courts and judges, but prohibit the practice of law by Probate Judges and also require that Probate Judges be appointed by the Governor to 4-year terms, rather than elected, with the Governor granted discretion to appoint a judge to serve multiple counties (to increase the workload and salary, thereby attracting a larger pool of candidates). The committee observed that this third option would likely require a state constitutional amendment.

### **1986. Commission to Study Family Matters in Court Report<sup>27</sup>**

The 112th Legislature established the Commission to Study Family Matters in Court to review the handling of family law matters in Maine courts and, specifically, to examine, *inter alia*, whether

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<sup>23</sup> Committee for the Study on Court Structure in Relation to Probate and Family Law Matters, *Report to the Judicial Council* (1985).

<sup>24</sup> Smith, *supra* n. 1, at 95.

<sup>25</sup> Report to the Judicial Council, *supra* n. 23, at 6.

<sup>26</sup> Report to the Judicial Council, *supra* n. 23, at 7.

<sup>27</sup> Commission to Study Family Matters in Court, *Final Report to the 112th Legislature* (1986).

family courts or a family division would “offer advantages in administration services and expertise available to families”; whether “the jurisdiction of the Probate Court should be transferred to the Superior Court and District Court” and whether the jurisdiction of these courts should be “rearranged to more adequately handle family matters.”<sup>28</sup> In its report, the Commission recommended “elimination of the scattered jurisdiction over family matters existing in Maine courts,” and proposed “the creation of a Family Division of the District Court.” Furthermore, the Commission recommended “the establishment of a Probate Court within the Judicial Department,” comprised of 6 full-time judges appointed to 7-year terms by the Governor to serve 6 defined regions of the State. The Commission also recommended that the Registers of Probate remain elected county officials, funded by remitting a small percentage of probate filing fees to each county.<sup>29</sup> The commission did not recommend immediately transferring jurisdiction over guardianship or adoption proceedings from the Probate Court to the Family Division, however, but noted that it might make sense to do so in the future.<sup>30</sup>

### **1993. Report of the Commission to Study the Future of Maine’s Courts.** <sup>31</sup>

In 1993, the Commission to Study the Future of Maine’s Courts released a comprehensive report on the state of the court system in Maine entitled *New Dimensions for Justice*. The report included many recommendations for reforming Maine’s judicial system. Specifically regarding the structure of Probate Courts, the Commission recommended “Establishing full-time regional Probate Judges as members of the Judicial Branch and eventually bringing the Probate Courts and Registers fully into the Judicial Branch.”<sup>32</sup> With respect to the latter recommendation, the Commission recommended that once the other changes in the report (not summarized here) it recommended to the state court system as a whole in “have increased the accessibility, affordability, and efficiency of the system to the level of the present Probate Courts,” current Probate Judges be replaced over time with 4 full-time Probate Judges who would be: part of the Judicial Branch, assigned to specific regions of the state, receive the same pay as District Court Judges and Superior Court Justices; and available for cross-assignment in the District Court and Superior Court. The commission also recommended that the probate registries be transferred to the Judicial Branch at the same time as the Probate Courts, with Registers of Probate appointed in the same manner as clerks of court.<sup>33</sup> The Commission also recommended that a new study examine “whether to change the jurisdiction of the Superior, District, and Probate Courts to minimize those areas of concurrent jurisdiction for which there are no compelling reasons” without harming access to justice in rural areas.<sup>34</sup>

### **2010. Peter Murray Article on Judicial Reform**

In 2010, Peter Murray published a law review article entitled *Maine’s Overdue Judicial Reforms*, which provided an overview of some of the challenges facing Maine’s courts, including the Probate

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<sup>28</sup> P. & S.L. 1985, ch. 65., available at [http://ldc.mainelegislature.org/Open/Laws/1985/1985\\_PS\\_c065.pdf](http://ldc.mainelegislature.org/Open/Laws/1985/1985_PS_c065.pdf).

<sup>29</sup> *Final report to the 112th Legislature*, supra note 27 at 17-21.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> Commission to Study the Future of Maine’s Courts, *New Dimensions for Justice* (1996).

<sup>32</sup> *Id.* at V.

<sup>33</sup> *Id.* at 72.

<sup>34</sup> *Id.* at 74.

Court System.<sup>35</sup> He was particularly critical of the election and part-time nature of Probate Judges<sup>36</sup> and suggested that the political power of Probate Judges has impeded judicial reform.<sup>37</sup> He concluded: “Ultimately, it appears that the most likely mechanism to achieve and effectuate significant reforms to the Maine judicial system will be some kind of task force sanctioned by the Legislature, guided by the Supreme Judicial Court, but staffed largely by members of the bar and legal academics who would do the bulk of the work.”<sup>38</sup>

#### **2014. Family Division Task Force Report<sup>39</sup>**

In 2014, the Family Division Task Force-2013 released its final report examining the function of the Family Division. Among its recommendations was that the Legislature authorize the District Court to exercise concurrent jurisdiction over certain matters that were at that time within the exclusive jurisdiction of the Probate Court—specifically, name changes in paternity actions and guardianship or related proceedings—when parallel family matter proceedings are pending in District Court. To this end, the Task Force also recommended increased communication between District Court judges and Probate Court judges in resolving cases involving families to facilitate the recommended consolidation of such proceedings within the District Court.<sup>40</sup>

#### **2016. Dierdre Smith Article on Probate Courts and Parental Rights Matters<sup>41</sup>**

Professor Dierdre Smith’s 2016 Maine Law Review article, *From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts*, focused on parental rights and family law matters and the intersection between the Probate Court and District Court in Maine. She described in detail the difficulties posed by the current Probate Court structure and proposed reforming to the system by, *inter alia*:

1. Expanding the jurisdiction of the District Court to include exclusive jurisdiction over “guardianship of a minor, change of a minor’s name, and adoption (including paternity determinations and terminations of parental rights in the context of adoption petitions)” whenever the child is subject to an interim or final order in a family matters proceeding or is the subject of a pending family matters proceeding in the District Court;<sup>42</sup>
2. Mandating the recording of all probate court proceedings involving parental rights;<sup>43</sup> and
3. Limiting the practice of law by Probate Judges by, at a minimum, amending the Maine Code of Judicial Conduct to prevent Probate Judges from appearing as attorneys in Probate Courts or in other, non-probate courts within the county that they serve.<sup>44</sup>

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<sup>35</sup> Peter L. Murray, *Maine’s Overdue Judicial Reforms*, 62 Me. L. Rev. 631 (2010), available at <https://digitalcommons.maine.edu/mlr/vol62/iss2/14>.

<sup>36</sup> *Id.* at 639.

<sup>37</sup> *Id.* at 641.

<sup>38</sup> *Id.* at 646.

<sup>39</sup> Maine Judicial Branch, Family Division Task Force-2013, *Final Report to the Justices of the Maine Supreme Judicial Court* (2014).

<sup>40</sup> *Id.* at 6-7.

<sup>41</sup> Smith, *supra* note 1.

<sup>42</sup> Smith, *supra* note 1, at 99.

<sup>43</sup> *Id.* at 104.

<sup>44</sup> *Id.* at 104-05.

Summary of Selected Events, Reports and Recommendations Regarding Probate Court Reform

As an alternative to the foregoing recommendations, Professor Smith observed that the Maine Legislature consider adopting a “different Probate Court system with full-time judges” as proposed in Resolve 1967, chapter 77, perhaps by eliminating the separate Probate Courts and creating a “Probate and Family Court” within the Judicial Branch, which would have comprehensive jurisdiction of nearly all types of proceedings involving children.<sup>45</sup>

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<sup>45</sup> *Id.* at 106-07.