MAINE PROBATE LAW REVISION COMMISSION

Memorandum

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RE: Probate Court Structure

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To: All Members of the Commission

From: Consultant Loper (Merle W. Loper)

RE: Probate Court Structure

The recently enacted Maine Probate Code, as is true of the Uniform Probate Code, is a body of probate law which can be made compatible with a variety of kinds of court systems. One feature, however, that is required of a probate court system under the new probate code is that it be a court with full powers to judicate the issues before it and a court with a broad enough jurisdiction, at least concurrent with other courts, to hear and dispose of all kinds of matters relating to the subjects of its probate jurisdiction.

While these necessary minimum adjustments, among others, were made in the enactment of the new probate code, further study indicates the desirability of further streamlining the probate court system itself, and dealing with certain other problems within the Maine probate court structure as well. These other problems include the part-time nature of the office of probate judge, and the elective nature of the judge selection process. In order to conform the probate courts to the structure most logically appropriate to the changed position of the court under the new Code, and to deal with the other problems, it is recommended that the probate court jurisdiction be transferred into Maine's court of general jurisdiction, the Superior Court.

I. THE NATURE OF THE APPROPRIATE COURT

A. Full-time Judges. One of the issues that has been present for many years is the question of the appropriateness of the part-time nature of the judicial

office in the probate court system. While there has never been any significant problem of actual abuse of the part-time nature of the probate judge, the fact that a person who is a judge part of the time and at other times is a lawyer dealing with other lawyers who appear before him in his position as judge has bothered a number of people. The ethical problem that this raises has twice been brought to the attention of this commission by Curtis Webber, Esq., on behalf of the Maine State Bar Association's Ethics Committee.

The problem is centered around 4 MRSA §307, which provides for the transfer of probate cases to an adjoining county in situations where the probate judge has an interest in the case. This section has been used as a means for allowing the part-time probate judges to continue to practice probate law without being in the position of ruling on their own cases--a situation which would obviously be intolerable. So long as the position of probate judge is part-time, with the relatively low salary that accompanies such a part-time position, it is understandable that accommodation must be made to allow an attorney to practice law if there is to be any chance of attracting competent attorneys to the judicial position.

That need, and the accommodation that has been made to it, does not, however, avoid the appearance of conflict of interest that arises from the situation. Assuming that lawyer A and lawyer B are both attorneys and both judges of probate in adjoining counties, the appearance of a conflict of interest arises in the following way. Lawyer A appears before lawyer B in the latter's role as judge of probate in his own county. The next day (or at some future time) lawyer B appears as an advocant before lawyer A, the judge in his own county. While this State has lived under this kind of accommodation for many years, and while I am aware of no specific complaints that have ever been raised about judicial conduct, this situation is ethically uncomfortable.

The difficulty in resolving this situation by making the judicial office full-time rest largely in the fact that the work load of a probate judge in most counties would not justify a full-time position. This particular fact is made even more true by the enactment of the new probate code, which will further substantially reduce the judicial work load in the probate area.

The transfer of probate court jurisdiction to the Superior Court would, of course resolve the ethical problem of having part-time probate judges. The basic unit of the judicial system dealing with probate law would still be on a county basis. The lack of a full-time probate work load would be resolved as well by having the judges of the court of general jurisdiction handle probate as well as other cases. As is pointed out at various other points later in this report, the change in the character and status of probate law and the court's role in resolving questions of probate make such a resolution even more appropriate. As probate law is begun to be seen as one more part of the general substantive law, involving the judges only in cases of actual controversy among parties, the apparant need for a separate probate court system decreases and the need to handle probate court matters in the court of general jurisdiction increases.

B. Appointive or Elective Judges. Another aspect of Maine's probate court system that has been critized is the fact that the judges are elected rather than appointed as are all other judicial officers.

There has always been a strain of thought in this country that the judiciary should above the ordinary electoral process in order to help assure that the judiciary is sufficiently insulated from more temporal political concerns, and thereby more free to apply the law in an impartial manner. This idea is gradually gaining more acceptance at the various State levels. As the course of judicial reform has gradually progressed in Maine, it is particularly

anamolous that only one category of judicial officers--probate judges--still remain elective while all other judges in the State are appointed.

This animus becomes even less appropriate as the perception and, in fact, the character and nature of the substantive probate law changes with the newly enacted code. If probate matters are now to be treated as legal matters in the same manner as other issues in the law, and as the role of the court in probate matters becomes the same as the role of the courts in other legal substantive areas, the judges deciding issues in probate should be selected as other judges are selected.

One again, this would be achieved by transferring the probate jurisdiction into the Superior Court. There would be a court with full power and general jurisdiction, with full-time judges appointed in the accpeted way, which would deal with probate matter in the context contemplated by the new Probate Code.

C. A Family Court for Probate Matters. Proposals have been made from time to time for the creation of a special court, or a special division within the courts, to handle family related matters. It has been thought that such a court system would develop special expertise in the area of family matters and be able to render particularly appropriate assistance in resolving problems that arise in that area of basic human and social concern.

A number of issues seem to make the creation of such a family court system, as part of the general probate court reform, inappropriate at this particular time. First, there is a considerable question as to the actual and meaningful relationship between matters of probate law (most of which are extremely routine) and matters such as divorce, marriage, and child custody and support that are usually more directly thought of as being appropriate for family court treatment. Probate law seems to raise problems and legal issues that are separate and of a different nature. They do not involve the same kind

of judicial discretion that is often required in determining such things as custody and equitable property settlements upon disolution of a marriage.

Secondly, the primary concern, in light of the basic changes recently enacted in the substantive probate law, should be to formulate a probate court system that is most appropriate in carrying out the purposes of the recent substantive reform. The proposal to transfer probate jurisdiction into the Superior Court in no way precludes subsequent consideration by other commissions or by the legislature of the appropriateness of a family court system. A family court system could well be achieved, if it is found to be desirable, by creating such a division within the Superior Court. This would avoid any undesirable further fragmentation of the judicial system while still achieving the purposes of a family court.

Attempts at this time to formulate the adjustments in the various courts within the present judicial system in order to implement a family court system would involve a major re-adjustment of the entire judicial structure including not only the probate and Superior Courts, but also the District Courts. Questions would arise as to budgetary considerations for support of services that would help to make the family court concept more meaningful.

For all of these reasons it does not seem appropriate to attempt to deal with or implement a system of family courts or a family court division of the Superior Court by this Commission at this time.

II. The Appropriate Court for Probate Matters

The objectives of the new Probate Code may be realized in a variety of different kinds of court systems. As pointed out before, the two characteristics that are inherent in a court system for the new Probate Code are that it have jurisdiction over all matters related to the handling of probate estates, and that it have full power with in those areas. These characteristics have

been enacted into the new Code.

Further reform of the probate court structure, however, is desirable. The problems mentioned before concerning part-time judgeships, the appointment of judges, as well as increased judicial efficiency, can best be achieved by re-structuring the present system.

The question arises as to the kind of court that would best achieve these objectives. The present basic probate court structure could be retained as a separate system on a county basis with the judges being made full-time and appointive. This, however, would result in the extreme under utilization of the judges, particularly in light of the reduced work load that will be achieved under the new Code. A second alternative is to have a separate probate court system on a district basis. Objections are raised to this, however, because it does not fit well with the county based system of probate and of probate record keeping. A third alternative is to make probate law a part of the District Courts' business. This alternative raises some of the same problems as that of a separate district court probate system. In addition, as will be pointed out further, such a system would not fit well with the present judicial structure of Maine.

In light of the already existing substantial connection between the work of the probate courts and the Superior Court, the most logical and practical reform of probate court structure would be to transfer the jurisdiction of the probate courts into the Superior Courts, and to intergrate the administrative aspects of the probate court system into the general court system. While considerations of judicial efficiency and uniformity argue strongly in favor of intergrating the administrative aspects of the probate system into the general court system, the special nature of probate court records and the probate registry require that they be treated in a significantly different and separate manner even though

integrated into the system in many ways. This problem will be dealt with in a later section of this report.

As the trial court of general jurisdiction, the Superior Court, unlike the District Courts, already possesses all of those characteristics which are either necessary or desirable for an efficient system of probate judication. It is a court of general jurisdiction with full judicial powers in law and equity. Its judges are, of course, full-time and constitutionally appointive. Were the probate court jurisdiction to be transferred to the District Court, adjustments could be made in the extent of that court's jurisdiction and the nature of its powers in those areas. No such adjustments, however, would need to be made if the jurisdiction were transferred to the Superior Court, which already has all of thos characteristics. Furthermore, there seems to be just no reason to put the probate jurisdiction within the District Court.

On the contrary, the presently existing connections, and overlaping concurrent jurisdictional areas between the probate and Superior Courts indicate that the most logical place for probate court jurisdiction is in the Superior Court.

The Superior Court under the present system is the Supreme Court of Probate. As such it has dealt with probate matters for decades. In appeals from the probate courts, the Superior Court has acted as a de novo trial court. While the probate law case load of the Superior Court on de novo appeals has not been particularly heavy, it is not likely to be particulary heavy under the new probate code. In any event, the Superior Court is the court presently existing within the (Maine judicial system aside from the probate courts themselves) which has familiarity with probate matters.

Under the new Probate Code, as it now stands, the probate court would have concurrent jurisdiction with the Superior Court of all actions outside of the exclusive jurisdiction of the probate court which are related to the administration of estates. In addition to that, prior to the effective date of the new Probate Code, the Superior Court has concurrent jurisdiction with the probate courts in several areas. 18 MRSA §3951 (to fill trustee vacancies in any deed of trust or mortgage); 22 MRSA §1354 (to approve voluntary agreements to the imposition of restraint for the purpose of receiving treatment for alcoholism or drug addiction); and 22 MRSA §1355 (to annul the voluntary agreement to the imposition of restraint). As a court of general jurisdiction the Superior Court has concurrent jurisdiction with the probate court over any action which is not within the exclusive jurisdiction of the probate court and over which the probate court has jurisdiction. As pointed out before, the Superior Court is already a probate court -- the Supreme Court of Probate -- by virtue of its de novo appeal powers over probate actions.

Not surprisingly perhaps, almost all of the provisions specifying the limited jurisdiction of the District Courts provide for concurrent jurisdiction with the Superior Court, rather than with the probate courts. The few exceptions include concurrent jurisdiction of actions for separation (19 MRSA §588; changed by the new Probate Code), to order a husband to contribute to the support of his wife and minor children (19 MRSA §301), and to determine protective custody of minors (22 MRSA §3792). Because of the closer connection between the subject matter of the District and Superior Courts than between the District and probate courts, the Commission previously saw fit to recommend the amendment of 19 MRSA §588 to provide for concurrent jurisdiction of separation actions in the District and Superior Courts instead of in the District and probate courts. This amendment was enacted by the Legislature in the new Probate Code.

Indeed, when one looks at the kind of judicial business in the District Courts, it becomes apparent that the District Courts do not have the familiarity that is possessed by the Superior Court with the primary matters dealt with by the probate courts -- probate and trust related matters.

III. Judicial Workload

The proposed bill provides for increasing the number of judges on the Superior Court from 14 to 19 in order to provide for the additional work resulting from the transfer of probate court jurisdiction into the Superior Court. As pointed out in my memorandum of February 7, this does not purport to be a final determination of the appropriate number of additional judges that will be needed. Further information on this point will be provided at the February 12th meeting.

In an attempt to determine as concretely as possible how many additional Justices would be required in the Superior Court, I have undertaken a study of the workload of the probate court in Cumberland County, particularly as it relates to the changes that can be anticipated because of the new Probate Code. An examination was made of the court's docket books and the judge's court calendar for particular periods of time in order to obtain a hopefully representative sample of the kinds and number of determinations that were made by the probate judge during those time periods. These kinds of determinations will be compared to the kinds of actions that a probate judge would be likely to be taking under the new Code. For example, an order probating a will or appointing an executor would be needed under the new Code only when formal proceedings were instituted.

The court calendar's recording of hearings should furnish some indication of how many of the matters before the court were infact contested, rather than routine. Since the new Code contemplates that the probate judge will be involved

only when there is actual controversy, the court's hearing calendar -- showing the contested matters -- should help to give an idea of the judicial workload that can be expected under the new Code.

The records of probate courts generally do not lend themselves well to this kind of analysis. No summaries are kept of the kind of filings or orders that are made during a particular time period, and the court's calendar does not always specify the nature or length of the hearing. As a consequence, the only way in which the necessary information can be obtained is by a thorough and lengthy examination of the docket books, whose entries are arranged by cases in the chronological order in which the case was filed in the registry. The nature of this task is gargantuan, to say the least, and the nature of the data obtained is not always entirely clear.

In the study that was undertaken, the docket entries were checked for all of the cases that were filed during the first six months of 1977.[1/] Notation was made of each kind of filing and judicial action made in those cases. It should be noted that the resulting figures do not represent the filings and judicial actions that were taken during that time period, since many of most of them would have occurred beyond that time -- several months or several years after the case is first filed. The figures represent, instead, the filings and actions taken in cases that were filed during the first six months of 1977. However, on the seemingly reasonable assumption that similar kinds of filings and judicial actions were occurring during those six months in cases filed before 1977, it

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1. The first six months of 1977 were chosen as the most appropriate time period because the cases filed then would be relatively recent and thus reasonably close to the kind and number of filings occurring currently, but would also have been in process long enough to have allowed them to go through the average time required for handling most probate cases. The time period was chosen with these criteria in consultation with Judge Child's secretary, Ms. Debbie McKinley.

seems fair to assume that these figures may represent something close to the kind and amount of activity that was taking place during the first six months of 1977.

While these figures have not yet been fully analyzed or related to the amount of work that may be required under the new Code, or to the costs involved in the transfer of jurisdiction and financial responsibility, some preliminary information may be of interest. The total number of separate filings which required judicial action in cases filed during the first six months of 1977 in the Cumberland County probate court totaled 1,769. The total number of actual hearings scheduled on the court's calendar during that same period is 10. Based on the court's calendar, there were a total of 26 hearings conducted in 1977, 20 hearings conducted in 1978, and 48 hearings conducted in 1979.

It would appear that the probate judge at the present time is burdened with an almost unbelievable amount of routine paper work which is essentially unnecessary. This is certainly one of the problems that the new Probate Code should relieve. Although more analysis must be made before the best estimate can properly be made, if the number of hearings that can be gleaned from the court's calendar reflect the actual workload of the judge in matters where actual controversy exists, the number of Justices required to carry on the probate court's work in the Superior Court may well be fewer than the five provided for in the proposed bill. A more complete analysis of this issue and the information will be presented at the February 12th meeting.

IV. Probate Registers

The proposed probate court structure bill preserves the separateness of the probate registries and their records, and preserves them on a county basis -- both of which are essential to their primary use as land title records. It also

preserves the registries' autonomy from the rest of the judicial clerk system. The bill would integrate the probate registries and their personnel into the overall Superior Court system for purposes of judicial control and compensation. Ultimate authority and supervision of the register is given to the Chief Justice of the Supreme Judicial Court, who is also given authority to provide by rule for the setting of probate court fees. The compensation of the registers and other personnel would be assumed by the state. Court fees would be turned over to the state. The savings to the counties from the elimination of the separate probate court, and the assumption of financing by the state, would also accrue to the state so that they would cover in whole or in part the cost of the additional Superior Court Justices and other supportive services.

The technique used to pass through these savings is based on the method used when the state assumed the financing of the Superior Court in 1976. The operation of the technique is shown by the two separate paragraphs of Section 6 of the bill. An estimate of the comparable costs between the present separate probate court system with part-time judges and the proposed system within the Superior Court depends in large part on the number of Superior Court Justices that need to be added, and has not been fully worked out. A further report will be made at the February 12th meeting.

Under the proposed bill, the registers of probate, including deputy and temporary registers, would be appointed by the Chief Justice. In addition, the Chief Justice would have discretion to appoint either full- or part-time registers and to set their salaries in the manner that is now provided for the Superior Court clerks.

The Chief Justice is also given discretion in Section 5 of the bill to assign justices for probate work -- in effect providing for the possibility of a separate probate division within the Superior Court. This provision would give him the flexibility to determine and provide for separate probate

divisions, as appropriate, within the various counties. The separate assignment of a justice to probate work may be appropriate in some counties, but not in others — e.g., less populated counties where fewer Superior Court Justices are available and where the amount of probate work would not require or justify it. This provision would, in effect, allow the Chief Justice the necessary discretion to designate justices of the Superior Court for probate work and use the judicial resources in their most efficient and logical manner, depending upon the circumstances from one county to another and from time to time.

V. Conflict of Interest

Section 307 of Title 4 has given rise to questions concerning both its interpretation and the ethical problems which were discussed in Part I of this memorandum. Those problems are largely avoided in-so-far as probate judges are concerned by the transfer of probate jurisdiction to the Superior Court. There may still be problems concerning conflicts of interest in-so-far as registers of probate in particular counties are only part-time positions held by lawyers in practice. Section 33 of the proposed bill is an attempt to deal with this problem by borrowing from the provisions of the present 4 MRSA §307 and from provisions governing the conduct of clerks of the Superior Court.

In particular, the last sentence of the section attempts to address a problem that has been raised by a number of registers of probate. That problem is the difficulty of drawing a line between improper counseling of persons filing papers in the probate registry, and the carrying out of the normal misterial duties of the register of probate. It is clear that the registers should not give legal counsel to persons in a manner that constitutes the practice of law; however, it seems equally clear that a public official in that position should be allowed and encouraged to be helpful in the ordinary ways that reasonable members of the general public would expect. To prevent the first

and allow the second of these things is the goal of the last sentence of Section 33 of the bill.

VI. Incumbent Judges and Registers

The last section of the proposed bill, Section 86, provides for the continuance of incumbent probate judges and registers until their terms expire or they resign or are terminated in some other way. Allowing such continuation serves two purposes: (1) it avoids the need for a constitutional amendment to assure that the rights to finish out their terms can legally be cut short, or, in the alternative, it avoids the possibility of controversy and litigation that might arise without such an amendment, or maybe even if such a constitutional amendment were ratified; (2) it provides some continuity and leeway during the transition process from the separate probate court system to the integration of probate jurisdiction into the Superior Court.

Allowing this continuation may entail an uncertain price tag in-so-far as the probate judges are concerned -- uncertain particularly because it would not be known whether some present probate judges might resign upon the effective date of the change, or how many would do so. Some, of course, might be appointed to the Superior Court to fill the new positions that would be provided there. Any additional cost in continuation of the registers would be avoided to the extent that the present registers were appointed to continue as registers under the new system at least until the end of their terms -- in fact, the system would almost necessitate either such appointment or the withholding of any new appointment of a register until the end of the incumbent's term since it would seem inappropriate and unworkable to have more than one register within any given probate registry.

The third sentence of Section 86 deals with the problem of coordinating the continuation of the incumbent separate probate courts with the new Code as it would be amended by the proposed bill.

VII. Constitutional Problems

The constitutional poblems arising from the exclusion of probate judges from the Governor's general authority to appoint all judicial officers are described and discussed in my Memorandum to the Commission previously distributed and dated January 4, 1980. They are also covered more particularly in the Commission's Report to the Legislature dated January 24, 1980 (blue covered booklet, Part II).

The problem basically is that (1) if Superior Court justices are construed to be "judges of probate" within the meaning of the constitutional provision, and thus could not be appointed without constitutional change, and (2) if the Legislature is constitutionally incapable of enacting legislation concurrently with a constitutional amendment process that is necessary for the validity of the legislation, even though that legislation is not scheduled to become effective until a specified date which would be after the constitution has been amended in a way that would authorize the legislation, then any proposed bill which provided for appointed probate judges could not be passed in this session.

I do not believe that either proposition is legally correct. An Attorney General"s Opinion, however, supports the first proposition, and prior Opinions of the Justices provide a basis for argument that the second proposition is true.

For these reasons, it is recommended that the Commission recommend to the Legislature that the Legislature seek an Opinion of the Justices of the Supreme Judicial Court that would clarify the matter. The following two questions

could be submitted to the Justices, accompanied by both the proposed Constitutional Resolution recommended to the Legislature in the Commission's January 24, 2980 Report and the proposed bill, as modified by the Commission:

> Question 1. Would the attached pending bill, if enacted, constitute a violation of the language of Article V, Part First, Section 8 of the Constitution of the State of Maine which excludes the appointment of "judges of probate" from the Governor's authority to appoint all judicial officers?
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> Question 2. If the answer to the first question is in the affirmative, would the attached pending bill, if enacted in the present session of the 109th Legislature be invalid as unconstitutional if the attached pending Constitutional Resolution is passed by the Legislature and ratified by the People at the next statewide election in November 1980?

My research indicates that the submission of these questions to the Justices of the Supreme Judicial Court would be appropriate under the constitutional provision for such a procedure -- that an important question of law is involved and that a "solemn occassion" would be presented. Based upon the past dispatch of the Justices in responding to such questions, there should be sufficient time to follow this procedure if the Commission's recommendations are transmitted to the Legislature soon.