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Executive Summary

The 130th Legislature established the Commission To Create a Plan To Incorporate the Probate Courts into the Judicial Branch (referred to in the report as the “commission”) with the passage of Resolve 2021, chapter 104. In accordance with the resolve, 15 members were appointed to the commission: two members of the Senate appointed by the President of the Senate; three members of the House of Representatives, appointed by the Speaker of the House; four members appointed by the Chief Justice of the Supreme Judicial Court, including one judicial branch clerk; one member of the Maine Probate Judges Assembly appointed by the Speaker of the House; one Register of Probate appointed by the Speaker of the House; one member of the Probate and Trust Law Advisory Commission; one member of the Family Law Advisory Commission; and two members of the Maine State Bar Association, one of whom is a member of a nonprofit organization providing statewide free legal services.

Resolve 2021, chapter 104 directs the commission to create a plan for a probate court system with full-time judges and to describe how the system will be funded. The resolve authorizes the commission to consider including features in that plan that will:

- Ensure timely, convenient and meaningful access to justice;
- Promote judicial responsibility and adherence to the Maine Code of Judicial Conduct;
- Provide for qualified full-time judges and adequate professional staff;
- Reflect efficient practices in scheduling and case management throughout the system;
- Allow for convenient and consumer-friendly processing of uncontested matters; and
- Reflect economies of scale in all appropriate operational aspects.

Over the course of four meetings, the commission received presentations from subject-matter experts and stakeholders (including commission members) and solicited and received oral and written public comments. The commission also gathered as much data as possible regarding the current county Probate Court system in the short time frame allotted for the commission’s work, including information regarding the governing statutes and rules; the current caseload, facilities, and budgets for county Probate Courts; and the costs associated with court-appointed attorneys, guardians *ad litem* and visitors in county Probate Court Proceedings. After considering all of this information and engaging in lengthy, thoughtful discussion, a majority of the commission voted in favor of the following recommendations:

We will include the final language of the commission’s recommendations for (a) state probate judges; (b) retaining registry system in counties; (c) allocating cost of court-appointed professionals; and (d) three-year review - as well as transition plan-- here. See grey text in chart presented at Nov. 30th meeting.

I. Introduction

Article VI, Section 6 of the [Constitution of Maine](#) provides for the election of county Probate Judges and Registers of Probate:

Judges and registers of probate, election and tenure; vacancies. Judges and registers of probate shall be elected by the people of their respective counties, by a plurality of the votes given in, at the biennial election on the Tuesday following the first Monday of November, and shall hold their offices for 4 years, commencing on the first day of January next after their election. Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in manner aforesaid at the November election, next after their occurrence; and in the meantime, the Governor may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January next after the election aforesaid.

Accordingly, there are currently 16 county Probate Courts across the State of Maine. These courts operate largely independently both from one another and from the state Judicial Branch, although they are governed by the same statutory and constitutional strictures; are equally subject to the Maine Rules of Probate Procedure prescribed by the Supreme Judicial Court; and persons involved in matters within the Probate Court's jurisdiction are required to use the official probate forms adopted by the Maine Advisory Committee on Probate Rules.¹ Probate judgeships are generally part-time in nature, although the case load and attendant time required to perform judicial duties in each county varies. Probate Judges are therefore exempt from Rule 3.10 of the Maine Code of Judicial Conduct, which prohibits all other Maine judges from engaging in the practice of law.² In addition, as the only elected judges in the State, Probate Judges are exempt from the rules of the Maine Code of Judicial Conduct restricting the political activity of all other Maine judges.³

In 1967, the Legislature proposed an amendment to the Constitution of Maine that would repeal Article VI, Section 6 and would "become effective at such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges."⁴ The amendment was approved by a majority of the Maine voters who participated in the election held on November 7, 1967.⁵ Nevertheless, despite a number of studies addressing the possibility of Probate Court reform, legislation establishing a Probate Court system with full-time judges has not yet been enacted. Article VI, Section 6 of the Constitution of Maine accordingly has not yet been repealed.

¹ See [4 M.R.S. §8](#) ("The Supreme Judicial Court has the power to prescribe, by general rules, for the Probate, District and Superior Courts of Maine, the forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law."); [M.R. Prob. P. 84\(a\)](#) ("All persons involved in matters within the Probate Court's jurisdiction must use official forms. "Official forms" shall be those forms as promulgated by the Maine Advisory Committee on Probate Rules, after review by the Maine Probate Judges Assembly and the Maine Association of Registers of Probate.").

² See [M. Code Jud. Conduct R. 3.10](#) ("A judge shall not practice law. . . ."); [M. Code Jud. Conduct, Coverage & Eff. Date I\(B\)\(2\)](#) ("A judge of the Probate Courts shall comply with the provisions of this Code, except that a judge of probate . . . [i]s not required to comply with Rule[] . . . 3.10 . . . A judge of probate shall not, however, act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.").

³ See [M. Code Jud. Conduct, Coverage & Eff. Date I\(B\)\(2\)](#) (exempting a judge of the Probate Courts from the requirement to comply with Rule 4.1(A)(1)-(4) of the Maine Code of Judicial Conduct).

⁴ [Resolve 1967, chapter 77](#).

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

The Commission To Create a Plan To Incorporate The Probate Courts into the Judicial Branch was established by the 130th Legislature through [Resolve 2021, chapter 104](#), “to honor the intent of a long-standing vote of Maine people and ensure that Maine people currently have the same access to justice in all Maine courts.” (A copy of Resolve 2021, ch. 104 is included as Appendix A.) In accordance with the resolve, 15 members were appointed to the commission: two members of the Senate appointed by the President of the Senate; three members of the House of Representatives, appointed by the Speaker of the House; four members appointed by the Chief Justice of the Supreme Judicial Court, including one judicial branch clerk; one member of the Maine Probate Judges Assembly appointed by the Speaker of the House; one Register of Probate appointed by the Speaker of the House; one member of the Probate and Trust Law Advisory Commission; one member of the Family Law Advisory Commission; and two members of the Maine State Bar Association, one of whom is a member of a nonprofit organization providing statewide free legal services. (A list of commission members is included as Appendix B.)

Resolve 2021, chapter 104 directs the commission to create a plan for a probate court system with full-time judges and to describe how the system will be funded. The resolve authorizes the commission to consider including features in that plan that will:

- Ensure timely, convenient and meaningful access to justice;
- Promote judicial responsibility and adherence to the Maine Code of Judicial Conduct;
- Provide for qualified full-time judges and adequate professional staff;
- Reflect efficient practices in scheduling and case management throughout the system;
- Allow for convenient and consumer-friendly processing of uncontested matters; and
- Reflect economies of scale in all appropriate operational aspects.

The resolve further directs the Administrative Office of the Courts and registers of probate to provide the information and assistance requested and required by the commission in the performance of its duties. Ultimately, the resolve requires the commission to submit a report that includes its findings and recommendations, including suggested legislation, for presentation to the Joint Standing Committee of Judiciary. The Judiciary Committee may report out a bill on the subject matter of the report during the Second Regular Session of the 130th Legislature.⁶

II. Commission Process

This draft does not include a detailed summary of commission members’ discussions at each commission meeting, focusing instead on information received by the commission and the ultimate recommendations made by the commission. It is possible to provide more detail regarding member discussions in the final report, but members’ ability to correct any potential mischaracterizations of the discussion in that summary will be limited due to FOAA concerns. It also may not be necessary as video and audio recordings of each meeting are archived and available on YouTube and the Legislature’s website.

The commission held four public meetings at the Maine State House on October 19, November 1, November 15 and November 30, 2021. These meetings were conducting using a hybrid format, through which commission members could choose to attend each meeting either in person or remotely through a Zoom webinar. Members of the public were afforded an opportunity to attend each meeting in person, to view a live video stream or archived video recording of each meeting on YouTube or to listen to a live audio stream of each meeting through the Legislature’s website. In addition, members of the public were

⁶ Although [Resolve 2021, chapter 104](#) established December 1, 2021, as the deadline for submission of the commission’s report, the Legislative Council granted the commission’s request pursuant to [Joint Rule 353\(7\)](#) to extend the report-submission deadline to December 15, 2021.

afforded the opportunity to provide public comment during the meeting held November 1st either in-person or remotely by attending the Zoom webinar. The commission further invited members of the public to submit written comments at any time prior to completion of the commission's work. Meeting materials and background materials were also posted online and remain archived at the following website: <https://legislature.maine.gov/commission-to-create-a-plan-to-incorporate-the-probate-courts-into-the-judicial-branch>.

A. First Meeting - October 19, 2021⁷

The first meeting on October 19, 2021, began with commission member introductions, opening remarks by commission co-chair Representative Barbara Cardone, and an overview by legislative staff of the commission's authorizing legislation, including the duties, process and timeline for the commission's work. In addition, legislative staff provided commission members with a brief summary of selected background materials relating to the potential restructuring of the county Probate Courts, including two studies conducted prior to approval of the contingent constitutional amendment in 1967 and multiple study reports and law review articles published after that date. (A copy of the Summary of Selected Events, Reports and Recommendations Regarding Probate Court Reform is included as Appendix C.⁸)

During the course of the first meeting, the commission also heard from and discussed the information it received from the following individuals:

1. *Commission member Kathy Ayers, Kennebec County Register of Probate, provided an overview of the Register of Probate's responsibilities in the current Probate Court system.*

Register Ayers explained that each elected county register is subject to various degrees of oversight by the county Probate Judge, county commissioners and municipal budget committees as well as by the Supreme Judicial Court through its rulemaking authority and the Legislature through the enactment of legislation. Registers have a host of responsibilities, including: performing traditional court clerk functions—maintaining the docket, scheduling hearings and assigning appointed counsel, guardians *ad litem* and visitors; performing a quasi-judicial role in informal probate proceedings—for example, appointing personal representatives when decedents are intestate and overseeing other informal proceedings; assisting members of the public, including by directing individuals to appropriate resources when a family member has died and by providing assistance to parties in completing and correcting court petitions and other forms; supervising registry staff of varied sizes in different counties; preparing and presenting the Probate Court budget to the county administrator, county commissioners and municipal budget committees and accounting for all Probate Court fees and expenses; performing research for updated court rules and forms; preserving historic probate records; and performing various non-court related duties including processing passport applications in some counties. (A copy of Register Ayers's presentation is included as Appendix D.)

In response to commission members' questions, Register Ayers reported that the most pressing current challenges for registers include the additional reviews required in guardianship proceedings under the newly enacted Maine Uniform Guardianship, Conservatorship and Protective Proceedings Act,⁹ the lack of attorneys willing and available to take court appointments, and the incomplete information with which

⁷ A recording of this meeting is available at the following link: https://www.youtube.com/watch?v=uTKeGxA_zls.

⁸ Scanned copies of each of the background materials summarized by legislative staff are posted to the commission's webpage at: <https://legislature.maine.gov/commission-to-create-a-plan-to-incorporate-the-probate-courts-into-the-judicial-branch-background-materials>.

⁹ See 18-C M.R.S. art. 5, pts. 1-5, which incorporates many of the provisions of the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act (UGCOPAA).

Probate Courts must proceed when the respondents in adult guardianship proceedings are subject to involuntary commitment proceedings in District Court. Although state law does not impose specific eligibility criteria for registers, Register Ayers explained that the Maine Association of Registers of Probate has engaged in efforts to assist newly elected registers by, for example, creating a policy book, conducting trainings prior to the onset of the COVID-19 pandemic, and providing the expertise of experienced registers when new registers request assistance.

2. *Commission member William Avantaggio, Lincoln County Probate Judge, provided an overview of the role of the Probate Judge in proceedings involving wills, trusts and estates.*

Judge Avantaggio explained that, when a person dies, that person may be intestate or may have either a “good” or a “bad” will. In many intestate cases and cases where the decedent has a “good” will, informal proceedings conducted by the Register are sufficient and the Probate Judge does not become involved. By contrast, a “bad” will can lead to judicial involvement, requiring determinations, for example, of whether a specific document is in fact the testator’s will, whether the will is valid, and the meaning of the will’s language. In these cases, it is important that members of the public, who are dealing with difficult and sometimes dysfunctional family situations, to feel they have been heard. Probate Judges also have jurisdiction over trusts, which can be simple or complex and are a mechanism for individuals to exert control over their assets after their death. Trust proceedings include requests by beneficiaries for an accounting, for interpretation of trust language or even to terminate or to modify the trust. While trust and estate proceedings are important aspects of the Probate Judge’s workload, Judge Avantaggio indicated that Probate Judges spend the majority of their time on adult and minor guardianships and related proceedings, which often require more immediate attention and process.

In response to commission members’ questions, Judge Avantaggio explained: in his experience, very few Probate Court cases are transferred to Superior Court for resolution, although matters in which the parties invoke the right to a trial by jury must be transferred to Superior Court and may be returned to Probate Court after trial for administration; it is difficult to estimate the percentage of Probate Court cases that require hearings, especially given the large number of informal probate proceedings that do not require his involvement as a judge; and it is rare for the parties on both sides of a contested case to be represented by counsel. In addition, Judge Avantaggio reported that each county has a single Probate Court courtroom, except Sagadahoc County, which no longer has a courtroom because the former courtroom is now utilized by the county sheriff’s department.

3. *Commission member Elizabeth Mitchell, Kennebec County Probate Judge, provided an overview of the role of the Probate Judge in proceedings involving adult and minor guardianships, adoptions and name changes.*

Judge Mitchell noted that minor guardianships arise for many different reasons and these cases can be quite complex. Only rarely do such cases begin with emergency *ex parte* orders—for example, if the child’s parents die in a car accident—which must be followed by emergency review hearings. A more typical minor guardianship proceeding arises when the Department of Health and Human Services investigates suspected abuse and advises the parents that they must either identify and secure a suitable guardian for the child or the child will be placed in foster care. These proceedings require adherence to important due process protections for the parents’ constitutional rights and an evaluation of the best interests of the minor. If the minor is 14 years of age or older, the judge will also talk to the minor about the proceeding. While Probate Court guardianships are often intended to be temporary, unlike in District Court child protection proceedings, no rehabilitation and reunification services are available in Probate Court. Recently, the new guardianship law has required additional periodic reviews in these cases, which have proved helpful in alerting Probate Judges to many of the issues they would otherwise not realize have arisen with these families.

Adult guardianships, Judge Mitchell explained, are often initiated by adult protective services and hospitals in addition to family members. The Probate Judge appoints a visitor to provide notice of the proceeding to the respondent and to gather information for the judge. If an *ex parte* order is entered, it must be followed by an emergency review hearing, which must be scheduled quickly and typically lasts approximately 2-3 hours. Given the potential curtailment of respondent's fundamental rights, the court must appoint counsel for an unrepresented respondent who objects to the guardianship. If the respondent is indigent, the county pays the respondent's attorney's fees. Judge Mitchell observed that the shortage of attorneys available to take these court appointments has been problematic. In addition, because Riverview Psychiatric Center is located within Kennebec County, Judge Mitchell has adjudicated many cases without knowing that the respondents subject to the guardianship order were also involuntarily committed in District Court. The overlap in jurisdiction and lack of information-sharing between the Probate Courts and District Court in these mental health guardianship cases requires further study.

Adoption proceedings arise in Probate Court for myriad reasons, including traditional parental consent adoptions as well as step-parent adoptions involving the surrender of parental rights by one of the child's birth parents in favor of the other birth parent's spouse. Probate Courts also handle petitions for adoptions of adults. Adults may also bring petitions for a name change in Probate Court; a Probate Judge may not deny an adult's name change request unless the Probate Judge believes that the change will defraud creditors or others. More legal processes and standards apply to name change proceedings for minors. The court must ensure that any non-petitioning parent whose parental rights have not been terminated receives notice of the proposed name change, even if the petitioning parent has been awarded sole parental rights in a family matter proceeding.

Judge Mitchell emphasized the importance of her relationship with Kennebec County Register of Probate Kathy Ayers, who assists her not only in scheduling proceedings but also in discussing the issues that arise in pending proceedings. Because Probate Courts are "form-driven," Judge Mitchell further emphasized the critical nature of the register's role in assisting *pro se* litigants in completing forms correctly. In response to questions from committee members regarding the dearth of attorneys available for court appointments, Judge Mitchell explained that, although many counties track the court-appointed attorney payment rate established by the Maine Commission on Indigent Legal Services, that rate is insufficient to attract experienced probate attorneys. As a result, Probate Courts often must appoint newer attorneys who have not yet gained expertise in this area of law. Although her county has had difficulty finding attorneys, the pool of available attorneys is likely even smaller in rural counties.

4. *Professor Dierdre Smith of the University of Maine School of Law presented an overview of past efforts to restructure Maine's Probate Courts and suggested considerations for the commission to consider in developing recommendations for reform.*

Professor Smith, whose scholarship has focused on minor guardianships, adoptions, and child protection matters, serves as the managing director of the Cumberland Legal Aid Clinic, through which she supervises students who practice in Maine trial courts including county Probate Courts. Professor Smith became interested in the history of the Probate Courts while supervising clinic students litigating guardianships and adoptions in county Probate Courts. She was curious why these matters were not within the jurisdiction of Family Division if the District Court, why Probate Courts were separate from the state Judicial Branch, and why Probate Judges are elected and may practice law unlike other Maine Judges.

The original Constitution of Maine in 1820 established the Supreme Judicial Court and authorized the Legislature to create all other courts by statute. The Legislature established Probate Courts in 1821,

following the Massachusetts county-based court model, with one Probate Judge and Register of Probate in each county. While justices of the Supreme Judicial Court rode the circuit to conduct trials and appeals, the Probate Courts provided residents with a local court to obtain letters of administration and additional assistance when a family member died. Probate Judges were appointed by the Governor at that time and the Register of Probate office was created to maintain estate records. This original structure has largely been maintained in the State.

In 1855, an amendment to the Constitution of Maine removed probate, municipal and police court judges from the Governor's appointment power and provided for the election of Probate Judges at the county level. Although subsequent constitutional amendments reinstated the Governor's appointment power over some of these positions, Probate Judges were not included in these amendments and remain elected officials. Indeed, a separate proposed constitutional amendment for appointment of Probate Judges was defeated in 1875. The Maine Constitutional Commission established in 1963 supported eliminating the practice of electing Probate Judges, but the commission could not agree on a model for Probate Courts and thus did not include Probate Courts in its recommendations. The Legislature eventually proposed a constitutional amendment in 1967 to repeal Article VI, section 6 of the Maine Constitution, requiring the election of Probate Judges and Registers of Probate, but the amendment was made contingent upon the creation of a new system of probate courts.

Turning to legislative changes that have affected the Probate Courts, Professor Smith explained that the jurisdiction of Probate Courts has essentially remained unchanged since the first Maine Probate Courts were established in 1821. The most significant developments include the enactment of the Uniform Probate Code in 1981, which clarified the jurisdiction and function of Probate Courts in the administration of estates and clarified the allocation of responsibility between the Probate Judge and Register of Probate, and the Probate Court's evolving jurisdiction over family matters. The Probate Courts have held jurisdiction over minor guardianships since the court's inception in 1821 and were afforded jurisdiction over adoptions when adoption was first created by statute in 1855. Over time, Probate Courts were granted and then lost jurisdiction over actions for desertion and nonsupport and they currently have concurrent jurisdiction with state courts to issue preliminary protection orders in child protection proceedings. Most importantly, the recent expanded use of minor guardianships has rendered these cases a significant portion of the Probate Courts' work.

It is important, Professor Smith observed, to understand that while the Probate Courts have remained largely unchanged, Maine's other courts have undergone significant restructuring. In 1852, the Legislature enacted a court reorganization act, which expanded the number of Supreme Judicial Court justices—who served both in trial and appellate roles—and their jurisdiction. In 1929, the Legislature created the statewide Superior Court to serve as a statewide trial court of general jurisdiction and later, in 1961, the Legislature abolished the municipal courts and created a statewide District Court within the state Judicial Branch. In combination, these efforts gave Maine one of the most uniform court systems in the country, with all courts centrally administered except the county Probate Courts. In the 1997, the Family Division was created within the Judicial Branch, followed by the grant of exclusive jurisdiction over divorce and other family matters cases to the District Court, thus establishing a distinct division between District and Superior Courts. Each of these changes was consistent with national trends: Beginning in the Progressive Era of the 1920s, states began establishing trial courts of general jurisdiction with central administration rather than maintaining separate courts for each type of legal problem. State Supreme Courts were also empowered to establish rules for the entire state court system, consistent with the American Bar Association's 1970 best practice standards for unification and central administration of court forms, rules and budgets. Maine deviated from the trend of central administration, however, by not integrating its Probate Courts by granting courts of general jurisdiction authority over probate matters.

A series of studies has raised concerns about not including Probate Courts in these court-consolidation efforts.¹⁰ In reviewing these studies, Professor Smith advised commission members to examine the types of data examined, the rationale provided for their recommendations and the influence of the underlying court structure on those recommendations. These studies demonstrate that more than one approach can be taken toward integration of the Probate Courts into the state court system. In 1952, Professor Dow of the University of Maine recommended that the Probate Courts become part of the state court system and that Probate judgeships become appointed, full-time positions. The Maine Intergovernmental Relations Commission recommended integration of the Probate Courts after further study, the Legislature commissioned a more thorough study by the Bureau of Public Administration at the University of Maine in 1967. The bureau gathered comprehensive data and evaluated the pros and cons of creating full-time, appointed Probate Judges with a district-court like system but did not identify a specific structure for the new system, in part due to financial considerations. When the Legislature subsequently passed Resolve 1967, chapter 77 to amend the Constitution of Maine to eliminate the provisions regarding election of Probate Judges and Registers of Probate, it realized that additional studies must be conducted before finally determining the structure of a new Probate Court system. For this reason, the Legislature added contingency language, rendering this the only contingent constitutional amendment in the history of Maine. The Legislature immediately commissioned a new study, conducted by the Institute of Judicial Administration. In its 1969 report, the institute specifically considered and ultimately rejected the Bureau of Public Administration's suggestion of a probate district court system, in part due to the inconsistent workloads across the counties. Instead, the institute recommended merging probate court jurisdiction into the state Superior Courts, necessitating the appointment of additional Superior Court justices, similar to the approach that had recently been adopted in 22 other states.

The next significant development, according to Professor Smith, occurred in 1980 when the Legislature established the Maine Probate Law Revision Commission to decide whether Maine should adopt the Uniform Probate Code (UPC) and, if so, whether changes should be made to the structure of the Probate Courts. With respect to the latter question, the commission proposed legislation that would merge jurisdiction of probate matters with the Superior Court to address concerns regarding the practice of law by part-time judges and the anomalous nature of elected Probate Judges. The Maine Senate then requested an opinion from the Supreme Judicial Court whether the legislation drafted by the Maine Probate Law Revision Commission would survive constitutional challenge, given that several provisions of the Constitution of Maine refer to probate judges. After failure of the 1980 court reform efforts, the 1985 "Cotter Report" noted that the work of Maine's county Probate Courts had shifted away from a focus on trusts and estates toward family matters, which were becoming a larger part of the Probate Court caseload. The Cotter Report recommended applying the Code of Judicial Conduct fully to Probate Judges, by preventing the practice of law and providing for their appointment rather than election, and provided several options for creating a new Probate Court system funded by the State. In his subsequent State of the Judiciary speech to the Legislature, then-Chief Justice Vincent McKusick proposed that the Superior Court assume jurisdiction over estate and trust matters and the District Court assume jurisdiction over family matters but that the county-based registries of probate be maintained within each county.

Later, in 1993, the Commission to Study the Future of Maine's Courts conducted a far-reaching and in-depth study of the entire Maine court system. In its *New Dimensions for Justice* report, the commission recommended establishing full-time probate judges, available for cross-assignment in the District and Superior Courts, who would be paid the same as District Court judges and Superior Court justices. Once again, this commission expressed concern about preserving the helpful features of the county registries of probate. In 2014, the Family Division Task Force expressed noted continuing concerns with having

¹⁰ Copies of most of the studies referenced by Professor Smith are available on the commission's website through the following link: <https://legislature.maine.gov/commission-to-create-a-plan-to-incorporate-the-probate-courts-into-the-judicial-branch-background-materials>.

certain aspects of family matters simultaneously proceeding in District Court and Probate Court due to the fragmented and concurrent nature of jurisdiction over family matter proceedings. As these studies were performed, numerous pieces of legislation were introduced to change the structure of the Probate Court, failing due to concerns over funding and a disagreement over a preferred new structure. The “Home Court Act” was adopted in 2016, however, to prevent simultaneous proceedings involving the same child from being heard in the state District Court and county Probate Court systems.¹¹

Overall, Professor Smith observed, several themes emerge from these studies. Most emphasized the excellent customer service provided by and accessibility of county-based Registers of Probate, but nevertheless consistently proposed integrating the Probate Courts into the Judicial Branch for the following reasons: Probate Courts have been left out of the unified and simplified structure of the state court system, which now benefits from central administration and support. Although the Supreme Judicial Court has appellate and disciplinary authority over Probate Judges, the lack of central administration has led to different procedures and a lack of uniformity between counties. Problems also arise from the fragmentation of jurisdiction over probate matters between the Probate Courts and state courts. In addition, the studies noted an inefficient allocation of resources under the current system, which assigns judges based on county lines and not caseloads. Finally, most studies emphasized key differences between Probate Judges and all other state judges, expressing a need for full-time judges to increase the dignity of the court and eliminate the need for these judges to practice law to make a living, which leads to their appearance as attorneys in other cases. When judges also practice law, it is difficult to decide which code of professional conduct applies: the Code of Judicial Conduct or the Maine Rules of Professional Conduct for attorneys. In addition, election of Probate Judges creates ethical issues related to campaigning and campaign financing.

As it conducts its work, Professor Smith recommended that the commission preserve the aspects of the current system that are working well while addressing the concerns that led to the adoption of the 1967 constitutional amendment and answer the following questions: (1) should there be a distinct probate court or should probate jurisdiction be absorbed into courts of general jurisdiction; (2) if the latter, should a separate probate division be established within either the District or Superior Courts; (3) how many additional state judges are needed to conduct these proceedings; (4) should the new courts be county-based or state-based; (5) what should the role of registers be and should they remain elected or be hired in the same manner as state court clerks; (6) should the registers retain their roles that are significantly distinct from the court-clerk role; (7) should the case management systems of the county Probate Courts and state Judicial Branch be integrated; (8) how should the new courts be funded?

In answering these questions, Professor Smith suggested that the commission review the probate court systems in other states, most of which no longer have unique probate courts and instead assign jurisdiction over these matters to general jurisdiction trial courts. In New England, for example, Massachusetts moved away from separate probate courts in the 1970s, Vermont brought its county-based probate courts into its Superior Court in 2010, New Hampshire similarly brought its county-based probate courts into its Circuit Court in 2011. Although Connecticut has retained its county-based probate court system but those courts are nevertheless part of and subject to central administration by the statewide judicial system. Rhode Island, by contrast, has a town-based approach to probate law, where Probate Judges are appointed by town councils. Professor Smith also recommended review of the Probate Court structure in specific states that adopted the UPC after 1980 as well as in Washington State, which is the only state other than Maine to have adopted the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act (UGCOPAA). While none of these states have a county-based, distinct probate court system, each state has taken a different approach. (A copy of a chart prepared by legislative

¹¹ An Act To Ensure a Continuing Home Court for Cases Involving Children, [P.L. 2015, ch. 460](#).

staff comparing the structure and administration of the probate courts in the states identified by Professor Smith is included as Appendix E.)

5. *Attorney Patty Nelson-Reade and retired Probate Judge Richard Morton provided their professional perspectives regarding the current structure of the Probate Court System.*

Attorney Patty Nelson-Reade, who has practiced law for approximately 28 years in Probate Courts across the State, observed that these courts have a unique jurisdiction, are accessible to the public, and often resolve uncontested, routine matters in a way that is very different from the adversarial system in the state Judicial Branch. In her opinion, it would be unfortunate to lose these benefits of the existing system. Most people either directly or indirectly end up with matters before the Probate Courts, which handle three major types of cases. First, Probate Courts address decedent's estates, which affect families who are undergoing periods of confusion and, potentially, dysfunction. While the Probate Court accommodates these disputes, its structure does not invite these disputes. Instead, most cases are handled through an informal process: an application is filed, a personal representative is appointed, and an abstract is filed in the Registry of Deeds. The Probate Court publishes notice in the newspaper for creditors and sends notices to heirs and devisees. The personal representative then pays the relevant taxes and distributes the estate, filing paperwork with the court when the process is complete. Formal procedures exist to handle disputes that arise during informal proceedings as well as to address other disputes, for example, disputes over who to appoint as a personal representative or when the language of a will is unclear. Attorney Nelson-Reade expressed concern that these estate cases not be pushed to the back of the docket in a new Probate Court system, which has been her colleagues' experience in the Massachusetts courts' Probate and Family Division, where guardianship proceedings take precedence.

The second category of proceeding includes guardianships—appointment of a person to make personal decisions for the ward—and conservatorships—appointment of a person to make financial decisions for a ward. These matters involve fundamental rights and due process protections and involve critical times and issues in people's lives, including when a child with a disability reaches the age of majority, when adults experience mental health issues and when seniors have dementia. The Probate Court's goal is that of a gatekeeper, limiting the ward's rights only if absolutely necessary. Most guardianship cases are uncontested and the litigants appear *pro se*, and the courts do not emphasize formal procedural requirements that limit access to the courts. For example, only a "communication" is required from a ward to initiate proceedings to terminate a guardianship, a phone call is often deemed sufficient. Conservatorships more often involve legal representation due to increased financial resources.

The third category of proceedings are civil matters, which usually involve the modification or interpretation of a trust. Even in these cases, the Probate Court is more of a problem-solving than an adversarial court; it is a place where ordinary people feel comfortable as it deals with some of the fundamental events in people's lives. For these reasons, Attorney Nelson-Reade recommended that the commission focus on its duty under Resolve 2021, chapter 104 to "ensure timely, convenient and meaningful access to justice" while also increasing the uniformity of practice across the State and ensuring that the courts have all of the resources that they need. She agreed that the question whether Probate Judges should remain elected was an important one to consider and, to create full-time courts it might make sense to combine some counties into regions. In response to questions from commission members, Attorney Nelson-Reade added that, in her experience, it can take a long time to obtain results when litigation occurs in Probate Court because the judges work part-time, they have to address many emergency proceedings involving guardianships, Probate Judges do not have law clerks, and litigation generally only occurs when there are novel issues, since this is a problem-solving court.

Retired Judge Richard Morton Served as the Franklin County Probate Judge for 36 years, a parents' attorney in protective custody cases for more than 40 years as well as in other positions, including as a

U.S. Army Judge Advocate General, an assistant District Attorney, and an attorney for the Republicans in the Legislature when it was considering whether to adopt the UPC. Judge Morton indicated that many of the topics he planned to address had already been raised before the commission. Nevertheless, he believed it was important to emphasize several aspects of the current Probate Court system that the commission should consider as it moves forward. He began by highlighting the critical importance of a separate docket for probate matters, regardless of which court ultimately handles these proceedings. There is a potential risk that the emergency, heightened focus on children's issues will cause decedent's estate matters to be pushed to the back of the docket, which should be avoided. He also emphasized the unique, complicated nature of probate law, which has specialized deadlines, notice processes, and rules of procedure. Yet, people are often unrepresented and there can be multiple parties; for example, multiple unrepresented parties may appear in the courtroom when it hears a dispute regarding who to appoint as the personal representative for a decedent's estate.

Judge Morton also observed that the current county Probate Courts are flexible and nimble. During the pandemic, for example, they have handled their cases, conducting remote proceedings over Zoom when necessary, and except for a brief time period continued to process paperwork in informal matters. He recommended that the unique mechanisms of the informal probate process, the quasi-judicial nature of the register's duties in these cases, and the enhanced access to justice provided by having a registry located in each county should be preserved, even if the commission decides to incorporate the courts into the state court system. He suggested that the New Hampshire system, where there is a probate division of the circuit court, might work well as might the creation of a separate court akin to the bankruptcy courts at the federal level. These distinct courts could be assigned to handle all of the tradition types of probate matters.

At the close of the first meeting, commission members identified the following types of data and information they believed would be necessary to consider as they develop recommendations regarding restructuring the county Probate Court system and to determine how much a new system will cost:

- The number of cases filed in each Probate Court, including: informal probate matters; formal probate matters; trust matters; minor guardianships and conservatorships; adult guardianships and conservatorships; terminations of parental rights and adoptions; and name changes.
- Information on the number of hearings held in Probate Courts, perhaps as an estimate of the number of scheduled hearing hours per week in each county;
- The average time between the final date of a contested hearing and the date a decision is issued;
- How much time each Probate Judge spends per week, on average, in court hearings, on writing decisions, and on scheduling and other administrative duties and an estimate of the proportion of that time spent on matters involving wills, trusts and estates; guardianships, conservatorships, terminations of parental rights, adoptions and name changes; and other matters.
- The number of county-paid, court-appointed attorney and visitor hours in county Probate Courts in the following categories of cases: wills, trusts, and estates; minor guardianships; adult guardianships; terminations of parental rights and adoptions; and other matters.
- Whether court-appointed visitors in adult guardianship and other proceedings who are paid by the county and not from the proceeds of the respondent's estate are paid on a per-hour or per-case basis and an estimate of the number of hours or cases in which appointments are made;
- The annual budget of each county Probate Court in 2019 and 2020, including: a breakdown of the salary and benefits for the Probate Judge; Register of Probate and any additional registry staff; court-appointed professional expenses; facility, equipment and supply expenses; security expenses; technology expenses; and other expenses as well as a breakdown of the sources of revenue for county Probate Courts, including court fees, taxes and other revenue sources.

- An inventory of courtroom and registry facilities in each county and estimate of the rental cost if such space were to be leased by the state Judicial Branch;
- Information on the percentage of probate registry records scanned to an electronic format to date;
- The annual personnel costs, including salary and benefits, for a new state trial court judge; and
- An estimate of the cost to convert county Probate Court electronic records into a format that could be utilized by the Judicial Branch's case management system.

B. Second Meeting - November 1, 2021¹²

The second meeting of the commission was held on November 1, 2021, and began with commission member introductions, followed by a review of the responses received to the requests for information compiled during the first meeting, a public comment period and a preliminary discussion of commission members' recommendations for a restructured probate court system.

1. Information from the Maine Association of Registers of Probate

After the first commission meeting, commission member Kathy Ayers, Kennebec County Register of Probate, requested information from the Maine Association of Registers of Probate on court case loads, court-appointed professional expenses and court budgets. Although Register Ayers was unable to attend the second commission meeting, she asked Catherine Moore, Lincoln County Register of Probate, to attend the meeting to present the information compiled by the association. Register Moore first provided data that had been retrieved from the ICON electronic case management system in each county detailing each Probate Court's caseload, by subject-matter category, both in 2018, prior to the COVID-19 pandemic, and in 2020, the most recent calendar year. (Copies of these detailed case load data are included in Appendix F.¹³) Register Moore additionally provided, in chart format, information from nearly all registers of probate on their county's probate court budget as well as information provided by a few registers regarding court-appointed attorney, guardian *ad litem* and visitor fees in their counties. Commission members understood that, given the short allotted for compilation of this information, it was not possible to collect all of the requested data from each county.¹⁴ (A copy of the chart detailing probate court budgets and court-appointed professional costs is included in Appendix F.) Although not discussed

¹² A recording of this meeting is available at the following link:
<https://www.youtube.com/watch?v=BAAdEmFofkLw>.

¹³ During the meeting, questions arose whether the 2018 and 2020 Probate Case Load data includes new petitions filed during 2018 and 2020 in cases that began in earlier years or whether each year's data only includes proceedings assigned an initial docket number in that calendar year. After the meeting, Jean Guzzetti, Sagadahoc County Register of Probate, clarified that all petitions filed during either 2018 or 2020, including new petitions in cases that were previously opened and assigned docket numbers in previous years, are included in the 2018 and 2020 Probate Case Load data. For example, if a petition to terminate an adult guardianship was filed in 2018, it would appear in the 2019 Probate Case Load data even if the adult guardianship case originally commenced in 2002 and bears a 2002 docket number. She further clarified that a case originally filed and assigned a docket number in either 2018 or 2020 may be reported more than once in that year's data if more than one petition was filed in the case—for example, if a will was filed for informal probate in 2018 and a will contest arose later in 2018, the case would be counted under both the informal testate and formal testate categories in the 2018 data. Similarly, if a petition for guardianship of a minor was filed in 2018 and a petition to terminate the guardianship was filed later that same year, the case would be counted both under the Guardianship-minor and Guardianship Termination categories in the 2018 P data.

¹⁴ Detailed county Probate Court budget information was also provided by Aroostook County Administrator Ryan Pelletier and Piscataquis County Manager Michael Williams; in addition, legislative staff received additional county budget information from the registers of probate for Lincoln, Penobscot and Washington Counties during the meeting. All of this information was sent electronically to commission members and posted on the commission's website. See <https://legislature.maine.gov/commission-to-create-a-plan-to-incorporate-the-probate-courts-into-the-judicial-branch-meeting-november-1-2021>.

at the meeting, the association also provided the commission with a chart outlining the results of a survey of county probate court facilities and the status of electronic scanning of historic probate records. (A copy of this chart is also included in Appendix F.)

2. Information from the Maine Probate Judges Assembly

Commission member Jarrod Crockett, Oxford County Probate Judge, presented the information he received from his fellow county Probate Judges regarding the hours each judge spends presiding over hearings; preparing for cases, including by conducting legal research; writing decisions; and on other tasks, including scheduling and administrative duties. Judge Crockett observed that few Probate Judges spend less than 20 hours per week on their judicial duties; indeed, the population and unique circumstances in some counties—for example, the presence of a mental health facility that accepts involuntary commitments—cause the judges in those locations to work much more than a part-time schedule. After reviewing the numbers, Judge Crockett and Judge Avantaggio posited that several Probate Judges may have underreported their hours. When one considers the low salaries paid to many Probate Judges, Judge Crockett believes the existing Probate Court system represents a good deal for the taxpayer.

Judge Crockett provided additional information from the county Probate Judges estimating the percentage of their time spent on traditional probate matters (wills, trusts and estates), family matters (guardianships, conservatorships, terminations of parental rights and adoptions and name changes) and other matters. Their estimates demonstrate that, in all except one county with a new judge whose data Judge Crockett suggested may be skewed by one or two outlier cases, Probate Judges spend the majority of their time on guardianship matters. This time demand is partly due to the recent changes in guardianship law but largely the result of the opioid crisis and its impact on families in the State. Judge Crockett then presented a list of tasks that demonstrate the unique nature of the Probate Judge's role in comparison to the role of a state court judge, emphasizing: the flexibility of part-time judges and their ability to schedule additional matters on an emergency basis; that because cases are uniquely assigned to their courts, a single Probate Judge may be able to follow a case over several years; Probate Judges have been known to use the resources of their private law offices, including paralegal research time, to perform court tasks at no cost to the taxpayer; and the ability of Probate Judges to reallocate the register's work to other individuals if it is not being completed, with an attendant reallocation of pay by the county. (A copy of the information presented by Judge Crockett is included in Appendix F.)

3. Information from the Maine Judicial Branch

Although not discussed during the meeting, the Administrative Office of the Courts also provided the commission a detailed breakdown of the cost of a state District Court judge and Superior Court justice, including the cost of law clerk and security support, as well as an explanation of the difficulty of estimating the cost to convert probate court records to the new Odyssey case management and e-filing system. (A copy of this information is included in Appendix F.)

4. Public Comment

The Commission, which had invited members of the public and the bar to provide input on the commission's duties, next turned to the receipt of public comments. The commission heard from and asked questions of the following individuals during the meeting: Martha Greene, Esq. of Brann & Isaacson, Elizabeth Stout, Esq. of the Maine Volunteer Lawyers Project, Christopher Berry, Esq. of Berry Law P.A., and Susan Loboscos, LCSW. In addition, although they did not speak during the meeting, written comments were submitted by: Penny Collins, LCSW, Nathan Dane, Esq., Camille Desoto,

Gregory Farris, Esq. and Robert Mittel, Esq.¹⁵ The public commentators raised the following sentiments, sometimes contrasting, sentiments for the commission's consideration:

- There is no good reason to change the Probate Court system, which is working well in the State.
- Self-represented litigants do not understand the separation between the county Probate Court and state court systems; having all court services available through one clerk's office would increase court accessibility.
- Candidates for Probate Judge are not required to specialize in probate law before assuming their judicial responsibilities and the amount of time they spend on their judicial duties differs between counties in part due to differences in pay across the State.
- The system of review by a judicial screening panel, appointment by the Governor and confirmation by the Senate ensures that judges have sufficient relevant experience and has worked well for state court judges.
- Maine deserves a Probate Court system comprised of full-time judges who are not burdened by an appearance of impropriety when they engage in the part-time practice of law.
- It is difficult for an attorney to know how to manage opposing counsel in a high-conflict case if that counsel is the local Probate Judge who will preside over a case the attorney is scheduled to litigate the following week.
- There are inherent ethical issues related to the election of judges, political campaigning and the solicitation of financial contributions to campaigns.
- In some counties, the delay caused by inconsistent and irregular schedules and inconsistent application of the law costs Maine residents thousands of dollars in unnecessary legal fees.
- While the state court process can be very slow, the Probate Courts are an order of magnitude more delayed in resolving matters.
- Systematic scheduling of cases through the Judicial Branch should ensure that cases are not delayed due to any particular county's budget and staffing difficulties.
- Pre-reservation of court dates before an adoption action is filed in cases where a birth parent will consent to an adoption—*i.e.*, before the child is born—is normal in the Probate Court. By contrast, it is unusual to have a hearing in District Court even two to four months after filing. These delays and the attendant uncertainty are not only detrimental to birth mothers and adoptive parents, but also the delayed processing of birth mother consents and resulting delay in subsequent notification to putative fathers may count against the fathers in termination actions.
- Children, even infants, bond with their caretakers and it is of utmost importance that the legal risks associated with an adoption by consent be resolved quickly to provide stability for the child.
- If private adoption becomes unmanageable in Maine, birth mothers and adoptive parents will choose to conduct adoptions in other states, limiting their options and increasing their expenses.
- It might be possible to address some of the delays in District Court adoption hearings through statute and rule changes—including use of a putative birth father registry—but this must be coupled with training for Judicial Branch court clerks on how to handle these cases.
- The worst outcome, relative to adoption proceedings, would be to transfer Probate Court matters to the District Court without sufficient additional funding, making adoptions just one more case type for District Court Judges who have inadequate resources. Appointment of several full-time state Probate Judges who handle only probate matters on a specialized docket would be ideal.
- Domestic infant adoption is a very specialized area of the law and it is important that judges handling these cases be educated and possess the requisite expertise to handle these cases.
- While some county registers are experienced and excellent resources for the public and their colleagues, there is no requirement that registers have prior knowledge of the law or the skills

¹⁵ The written public comments are posted on the commission's website at <https://legislature.maine.gov/commission-to-create-a-plan-to-incorporate-the-probate-courts-into-the-judicial-branch-meeting-november-1-2021>.

required for the position nor is specific training required after an individual is elected. This results in inconsistent application of the procedural rules and the law between counties. Registers would benefit from the ongoing training that would be available in the Judicial Branch.

- Less variation in practice between counties would increase the fair administration of justice. Attorneys have difficulty explaining to clients how their cases will be handled in Probate Court, unlike in state court, which has more consistent procedures.
- The variation in practice between counties makes it difficult to find attorneys from southern Maine's urban areas who are willing to provide remote assistance to clients in rural counties, where local Probate Court practices may be quite different.
- Registers should continue to function as they do now but receive regular continuing education, allowing probate practitioners to receive uniform answers and services across the state.
- Incorporating the Probate Courts in the Judicial Branch will increase critically needed oversight.
- For more than 50 years, the Constitution has provided for a change to the system as soon as the Legislature might act; now is the time for the Legislature to act.

5. Information from legislative staff

After a lunch break, legislative staff presented research regarding an issue raised by commission members during the first commission meeting: Whether the elected or appointed nature of a Probate Judge impacts the judge's ability to supervise or provide oversight of an elected Register of Probate. As the memorandum included in Appendix G explains, staff were unable to discern any legal barrier¹⁶ to oversight of an elected Register of Probate by a Probate Judge, regardless of whether the judge is appointed by the Governor or elected by county voters. An appointed or elected judge may not, however, remove a register from office. Because the office of Register of Probate is currently established in Article VI, section 6 of the Constitution of Maine, pursuant to Article IX, section 6 of the Constitution of Maine a register may only be removed from office by impeachment or through the action of the Governor on the address of both chambers of the Legislature.

At the request of the commission co-chairs, legislative staff next outlined the potential models for a Probate Court system with full-time judges that had been raised during the first commission meeting.¹⁷ First, the commission might recommend retaining the county Probate Courts, registries and their jurisdiction, perhaps achieving full-time Probate Judge positions by combining lower-caseload counties. As a second option, the commission could, in addition to maintaining the county Probate Courts and registries as described in the first model, recommend reducing the overlap in jurisdiction among trial courts in the State by transferring jurisdiction over specific categories of probate matters to the Superior Court and the District Court. Third, the commission might choose to recommend elimination of the county Probate Courts and an allocation of their current jurisdiction to the Superior Court and District Court, either maintaining the registries in each county or also merging the registries' functions into the Judicial Branch. As an alternative, a fourth approach discussed at the first commission meeting would combine elimination of the county Probate Courts and transfer of their jurisdiction to the state court system with either the establishment of a special trial court division to handle specific types of probate matters within the Superior Court, the District Court or both courts or the establishment of a separate state Probate Court to handle some or all of the county Probate Court's current jurisdiction. As with the other models, the commission would have to decide whether to maintain the county-based registries or to merge their functions into the Judicial Branch if the fourth model were adopted. While the commission's

¹⁶ Legislative staff did not comment on whether political or administrative considerations militate against creation of a system that includes appointed state Probate Judges and elected county Registers of Probate.

¹⁷ A chart distributed to the commission that briefly summarizes these models and identifies several of the issues that must be addressed for each is available at the following link: <https://legislature.maine.gov/doc/7364>.

discussions at the first meeting had identified these four possibilities, legislative staff reminded commission members that they were not restrained by the options presented to date and were free, under the legislation authorizing the commission, to propose any other model for the establishment of a Probate Court system with full-time judges. The commission is also charged with identifying appropriate funding for the model it recommends.

In addition, to facilitate commission discussions, legislative staff distributed a chart outlining the current statutory jurisdiction of Probate Courts and the statutory duties and authority of Registers of Probate, in a format that afforded members the opportunity to note their recommendations for restructuring or for preserving each of these aspects of the current Probate Court system. (A copy of the chart summarizing Probate Court jurisdiction and register duties is included in Appendix H.¹⁸)

6. Discussion and development of a preliminary proposed model

After a break to afford members time to review the information and materials they had received, commission co-chair Senator Anne Carney invited each commission member to comment on that member's preferred model for restructuring the Probate Court system, to identify any barriers or concerns regarding adoption of the member's proposed model, and to raise any other issues that the member deemed important for the commission to consider. After a lengthy discussion, the members who remained in attendance reached a preliminary consensus on the following aspects of a potential model for reforming Maine's Probate Court system:

- Create a Probate Court within the Judicial Branch as a state trial court distinct from the District Court and Superior Court with a certain number (perhaps 8) of full-time appointed judges who have statewide jurisdiction but are each assigned to a specific geographic region. These judges should be supported by new Judicial Branch staff including, at a minimum, 2 law clerks.
- State Probate Court proceedings should be held in existing county Probate Court courtrooms and, to the extent necessary in some counties, state trial courtrooms should also be made available for state Probate Court proceedings.
- Emergency matters appearing on the state Probate Court docket should be prioritized and addressed expediently, to the same extent that those matters are prioritized in the existing county Probate Court system.
- The county registry system should be preserved and registers and their staff should retain their existing statutory duties and authorities.
- State Probate Courts should continue to utilize the ICON electronic case management system, with a possible long-term goal of developing compatibility with the electronic case management system utilized by the state Judicial Branch.
- To increase uniformity among registers, the Maine Advisory Committee on Probate Rules should be charged with adopting a manual for use by county Registers in processing Probate Court matters.
- The new Probate Court system should be thoroughly reviewed three years after implementation, including, at a minimum, an evaluation of whether the number of supported state Probate Judge positions is appropriate and whether additional steps should be taken to enhance the compatibility of the state Probate Court system with the other courts within the state Judicial Branch.

¹⁸ The copy of the chart included in Appendix H has been amended from the version presented at the November 1, 2021 meeting to include information on an issue raised by commission members—*i.e.*, the relative authority of the register and Probate Judge over the selection of a deputy register—as well as to include citations to the Maine Rules of Probate Procedure that describe the duties of registers.

At the close of the meeting, commission co-chair Senator Carney proposed that commission members reflect on whether they support this model and any additional details that may need to be added to the model in preparation for a robust conversation and potential vote on commission recommendations at the third commission meeting.¹⁹

C. Third Meeting - November 15, 2021²⁰

At the third commission meeting, held on November 15, 2021, commission members received updated information regarding the 2021 salaries and benefits of county Probate Judges obtained by commission member and Oxford County Probate Judge Jarrod Crockett from the Maine County Commissioners Association. (A copy of this salary and benefit information is included in Appendix F.) Commission members also received copies of additional written public comments submitted by Camille Desoto, retired Cumberland County Commissioner and Probate Judge Joseph Mazziotti, and Stephen Gorden, chair of the Cumberland County Board of County Commissioners and President of the Maine County Commissioners Association after the November 1, 2021 meeting.²¹ These commentators asked the commission to consider the following, sometimes contradictory, issues:

- Incorporating the Probate Court system into the Judicial Branch will protect the most vulnerable members of our society by increasing oversight of these courts; the State's Probate Court system should be focused on compassion and fairness.
- It is difficult for part-time Probate Judges, who also maintain private law practices, to reconcile these roles. In addition, there is a perception in the general public, among probate attorneys and parties in probate proceedings that a judicial system that allows sitting judges to appear before their peers in contested cases is not impartial and unbiased.
- The Registers of Probate and their staff, who have frequent contact with families in crisis, sharing their knowledge, understanding of the process, and professionalism, have earned the public's confidence. Yet, more should be done to promote uniformity in these offices.
- Significant concerns arise if the registers and their staff remain within the county government but the Probate Judges are moved to the Judicial Branch, including whether an appointed state official may exert supervisory authority over an elected county official.
- Part-time Probate Judges are adept at flexible scheduling for handling emergency hearings. This flexibility may be lost with full-time judges who have larger caseloads.
- Creating state Probate Judges will subject the system to the whims of legislative appropriations, placing the system at risk of not remaining fully funded.
- Integration of the county and state databases, which is essential for the proposed model to succeed, would be a costly and complicated undertaking.
- The State's courts are overwhelmed and understaffed, a situation that will only be exacerbated by the proposed reorganization of the Probate Courts. Yet, the proposed reorganization will not guarantee any tangible benefits to the people of Maine.

During the meeting, the commission received a presentation from Justin Andrus, Executive Director of the Maine Commission on Indigent Legal Services (MCILS), who had been invited to speak about the

¹⁹ Legislative staff prepared and distributed to all commission members a summary of the proposed model, identifying the outstanding issues that had not yet been addressed, in advance of the third meeting. A copy of that summary is available on the commission website through the following link: <https://legislature.maine.gov/commission-to-create-a-plan-to-incorporate-the-probate-courts-into-the-judicial-branch-meeting-november-15-2021>.

²⁰ A recording of this meeting is available at the following link: https://youtu.be/ByCbcnE9_hc.

²¹ These public comments are posted on the commission's website at <https://legislature.maine.gov/commission-to-create-a-plan-to-incorporate-the-probate-courts-into-the-judicial-branch-meeting-november-15-2021>.

possibility of transferring responsibility to MCILS for establishing the qualifications, training, assignment and payment of court-appointed counsel in Probate Court proceedings. Director Andrus began by explaining that he was speaking in his capacity as the Executive Director of MCILS, but that his remarks did not represent a formal position taken by MCILS. MCILS, he explained, is an independent commission comprised of individuals appointed by the Governor and confirmed by the Senate. MCILS staff implement policies established by MCILS regarding the identification, training and appointment of counsel to provide high-quality representation to indigent defendants and other parties entitled to court-appointed counsel at public expense under state statute or the state or federal constitutions. Counsel are provided not only to indigent defendants in criminal proceedings but also to parents in child protection proceedings, the subjects of involuntary mental health commitment hearings and defendants in juvenile court proceedings. A great deal of overlap exists between the types of cases within MCILS's jurisdiction currently and the cases in which counsel are appointed at public expense in Probate Court proceedings. Indeed, many of the attorneys who accept Probate Court appointments are also rostered by and trained by MCILS.

Director Andrus suggested that it would make sense to employ consistent practices and qualification criteria when attorneys are appointed to represent parents in child protective proceedings in District Court or in guardianship proceedings in Probate Court, given that the same fundamental parental rights are at issue in these cases. Currently, attorneys who wish to receive state court appointments submit applications to MCILS, whose staff screens those applicants for compliance with the training and experience criteria established for the types of cases in which the attorney wishes to accept appointments. MCILS provides additional trainings and also assists attorneys who lack sufficient experience by arranging for those attorneys to appear as co-counsel in relevant cases. Once an attorney achieves the required training and experience, MCILS designates the attorney as eligible to receive court appointments by placing the attorney on the relevant roster. Criminal defendants who wish to receive court-appointed counsel are typically evaluated by MCILS's financial screeners, who determine whether they are eligible to receive counsel fully paid by the State or for reduced-fee counsel partially paid by the state. The state courts also identify individuals in child protective, mental health and juvenile cases who are similarly eligible for appointed counsel. Once an individual is designated as eligible to receive a court-appointed attorney, a court clerk typically assigns one of MCILS's rostered attorneys to represent that individual.

Accordingly, if MCILS were tasked with overseeing the appointment of attorneys in Probate Court matters, it would first identify the requisite eligibility criteria and then establish a roster of attorneys possessing sufficient experience, education and training to appear in guardianship, conservatorship, adoption, mental health and other Probate Court proceedings where indigent litigants have a statutory or constitutional right to counsel at public expense.

Director Andrus next explained that, in an attempt to estimate the cost of transferring to MCILS the responsibility for payment of appointed counsel in Probate Court proceedings, he examined the 2018 and 2020 Probate Case Load information presented at the November 1st commission meeting as well as the limited information presented on court-appointed counsel costs in these cases. As he reviewed the data, Director Andrus developed an impression that, if MCILS were responsible for court-appointed attorneys fees in these matters, more attorneys would be appointed than are appointed currently and the number of hours appointed attorneys spend on each case would also likely increase. To calculate his cost estimate, Director Andrus identified the "nearest equivalent" MCILS case type for each category of cases in which Probate Courts currently appoint attorneys—for example, he identified an involuntary mental health commitment proceeding as the nearest equivalent to an adult guardianship proceeding—and multiplied the average attorney cost for that the MCILS case type by the number of Probate Court proceedings brought in 2018 and 2020. Using this approach, Director Andrus calculated that transferring responsibility for the payment of court-appointed in Probate Court proceedings would cost approximately

\$3.7 million to \$4.3 million per year. These costs cannot be absorbed in the current MCILS budget and would require specific, additional Legislative appropriations.

In response to questions from commission members, Director Andrus clarified that his calculations assume that each individual entitled to counsel in Probate Court proceedings is eligible for counsel at public expense. Commission member and Kennebec County Register of Probate Kathy Ayers cautioned that these calculations may not be entirely accurate, not only because respondents in adult guardianship and conservatorship cases sometimes have sufficient means to pay for their attorneys but also because the 2020 Probate Court case load numbers were affected by the coronavirus pandemic, which led to increases in some types of proceedings, including adult guardianships, and decreases in other types of proceedings, including adoptions. Director Andrus further clarified that his calculations do not include the cost of hiring additional financial screeners or new MCILS staff to establish qualification criteria and to conduct screening, training and rostering of attorneys for Probate Court proceedings. In addition, his figures do not include the costs of court-appointed guardians *ad litem* or visitors, because those types of professionals are not currently part of the MCILS system for state court proceedings.

After discussing the information received by Director Andrus, the commission co-chairs asked legislative staff to provide an overview of the potential financial impact of the preliminary model for a new Probate Court system proposed during the November 1st commission meeting. Legislative staff explained the difficulties attendant to calculating the fiscal impact of the proposal without further detail regarding, for example: the precise number of state Probate Judges and the number and types of Judicial Branch support staff to be established; the rate of attorney appointments in the newly established state Probate Court system and hours spent by those attorneys on court-appointed cases; the rate of guardian *ad litem* appointments at public expense in the newly established state Probate Court system and a decision whether those professionals, not all of whom are attorneys, will be paid the MCILS rate that the Judicial Branch currently pays to attorney guardians *ad litem* in District Court child protection proceedings; the number of visitor appointments that will be made by the state Probate Court system in adult guardianship and conservatorship proceedings involving indigent respondents, average number of hours spent by visitors on those proceedings and the payment rate for visitors; and the cost to the Judicial Branch for state Probate Court facilities, including courtroom lease, maintenance and utilities expenses as well as the cost of Probate Court supplies, equipment, mailing and technology support costs. On the other side of the balance sheet, legislative staff observed, county government expenses will likely decrease if the preliminary proposal developed during the November 1st commission meeting is adopted. Although it is not possible to fully calculate those savings at this time, they will include, for example, an elimination of county Probate Judge salaries and benefits; potential reductions in the personnel costs for other county positions, including IT and custodial staff; and the elimination of county payments for court-appointed attorneys, guardians *ad litem* and visitors.

Commission co-chair Senator Carney reminded commission members that more detailed and exact cost estimates will be prepared during the legislative process that follows submission of the commission's report to the Joint Standing Committee on Judiciary. The Office of Fiscal and Program Review will develop a detailed fiscal note assessing the financial impact to the State of any Probate Court reform model or models encapsulated in a bill in or an amendment or amendments to a bill that receive favorable votes by Judiciary Committee members. The commission co-chairs asked legislative staff to provide a rough financial analysis in order to increase commission members' basic understanding of the financial considerations attendant to the various Probate Court systems that the commission might recommend.

The commission spent the balance of the meeting reviewing and debating the merits of the preliminary model for the establishment of a Probate Court system with full-time judges that had been developed at the end of the commission's November 1st meeting. During the discussion and debate, commission members addressed several issues that had not been resolved in that preliminary proposal, including:

- The number of state Probate Judge positions that should be established, whether those judges should be assigned to the Judicial Branch's current court regions or other geographic regions, whether those judges should be available for cross-assignment to preside over District and Superior Court dockets, and what additional Judicial Branch staff would be necessary to support those new state Probate Judges;
- How to increase uniformity of procedure in the new Probate Court system, including whether to recommend establishment of a Chief Judge for the state Probate Court;
- Who should be responsible for establishing state Probate Court fees and whether to recommend that all or a portion of these fees continue to be retained by the counties;
- Who should bear responsibility for the selection and payment of attorneys, guardians *ad litem* and visitors appointed by state Probate Judges;
- Whether any portion of the current county Probate Courts' jurisdiction should be reallocated to the District Court or Superior Court;
- Whether to identify specific future changes to be made to the new Probate Court system in phases, or whether to identify specific aspects of the new system that should be evaluated as potential targets for further reform by the commission that will review the new system three years after it is implemented.

Ultimately, commission members voted 11-1²² in support of a new Probate Court system with full-time judges comprised of the recommendations described in Part III, sections A through E of this report. Senator Carney and Representative Cardone, the commission co-chairs, announced that the three absent commission members would be permitted to register their votes in this package of recommendations within the 24 hours following the conclusion of the meeting. In addition, the co-chairs agreed to consult with legislative staff in order to develop a proposal for transitioning from the existing county Probate Court system to the state Probate Court and county registry system contained in the commission's recommendations and to present that model to the commission for its consideration at the final commission meeting.

D. Fourth Meeting - November 30, 2021²³

This section will be drafted after the meeting.

III. Recommendations

- A. The Commission recommends a long-term goal of fully incorporating the Probate Court system into the state Judicial Branch, although the Commission does not believe it is feasible to accomplish this goal immediately.**

Insert rationale here - as agreed to by Commission members voting in favor of this recommendation. Explain the rationale of any opposing commission members, if provided.

- B. At this time, the Commission recommends creating a Probate Court within the Judicial Branch with 9 full-time, appointed judges. Although state Probate Judges will have statewide jurisdiction, at least one Probate Judge will be assigned to each of the 8 court**

²² Senator Carney, Representative Cardone, Representative Sheehan, Tudor Goldsmith, Register Ayers, Leo Delicata, Justice Gorman, Julie Howard, Judge Martin, Katharine Wiltuck, and Judge Mitchell voted in favor and Judge Crockett voted against the proposal.

²³ A recording of this meeting is available at the following link: <https://www.youtube.com/watch?v=716z18re0rc>.

regions and one Probate Judge will be designated by the Chief Justice of the Supreme Judicial Court to serve as the Chief Judge of the Probate Court. The Chief Judge will have administrative responsibilities in addition to judicial responsibilities that include, but are not limited to: creating the statewide Probate Court schedule (i.e., the number of days of judicial hearing time in each region or court location); preparing annual reports; working toward enhancing the uniformity of Probate Court processes and procedures across the State; and working with the Supreme Judicial Court to ensure both the accessibility of Probate Court facilities as well as the safety of all members of the public and staff in those facilities. It is anticipated that new Judicial Branch staff will be required to support the state Probate Judges, likely to include two law clerks, two judicial administrative assistants, 8 judicial marshals, a facilities manager and an Information Technology support person. The Commission also recommends that state Probate Court proceedings be held in existing county Probate Court courtrooms, with arrangements to be made between the counties and the Judicial Branch regarding the use of those facilities. To the extent necessary in certain counties, state trial court courtrooms may also be used to conduct state Probate Court proceedings. Emergency matters appearing on the state Probate Court docket will continue to be prioritized and addressed expediently, to the same extent that those matters are prioritized under the existing county Probate Court system.

Insert rationale here - as agreed to by Commission members voting in favor of this recommendation. Explain the rationale of any opposing commission members, if provided.

- C. At this time, the Commission also recommends preserving the system of county Registers of Probate, through which elected county registers and their staff will continue to serve as county officers and employees. Registers will retain their existing statutory duties and authorities, including but not limited to their roles in docketing; scheduling Probate Court proceedings in conjunction with the Probate Court Judges; assisting parties in filling out Probate Court forms; and performing quasi-judicial functions in informal probate matters. State Probate Court matters should initially continue to be entered into the ICON electronic case management system. The Commission also recommends that Probate Court fees continue to be retained by the counties to offset the costs of funding the county registries and their staff.

Insert rationale here - as agreed to by Commission members voting in favor of this recommendation. Explain the rationale of any opposing commission members, if provided.

- D. The Commission recommends that the Maine Commission on Indigent Legal Services establish the minimum experience, training and other qualifications for attorneys appointed by Probate Court Judges to represent indigent individuals who are entitled to counsel at public expense in probate court proceedings under the U.S. or Maine Constitution or under Maine statutes and that the State, through new legislative appropriations to MCILS, pay the costs of such counsel. The Judicial Branch, which already establishes the minimum experience, training and other qualifications for guardians *ad litem*, should additionally establish the minimum experience, training and other qualifications for court-appointed visitors. It should also pay the cost of court-appointed guardians *ad litem* and court-appointed visitors in Probate Court proceedings where the parties are indigent or the court is directed by law to pay such costs, and the Legislature should provide sufficient new appropriations to cover the costs to the Judicial Branch of these appointments.

Insert rationale here - as agreed to by Commission members voting in favor of this recommendation. Explain the rationale of any opposing commission members, if provided.

- E. The Commission recommends that the new Probate Court system be thoroughly reviewed three years after it has been implemented by a 15-member study group comprised of the same categories of members appointed to the current Commission—*i.e.*, two Senators; three Representatives; four members appointed by the Chief Justice, including one judicial branch clerk; one member of the Maine Probate Judges Assembly; one register of probate; one member of the Probate and Trust Law Advisory Commission; one member of the Family Law Advisory Commission; and two members of the Maine State Bar Association, one of whom is a member of a nonprofit organization providing statewide free legal services. The three-year review conducted by this new study group must include, but is not limited to, evaluating whether the number of supported state Probate Judge positions is appropriate or should be adjusted; whether the case management systems used by Probate Court and the remainder of the state Judicial Branch should be made compatible; whether any changes or adjustments should be made to the jurisdiction of the state Probate Court, District Court and Superior Courts; whether the Chief Justice should be authorized to cross-assign state Probate Court judges to preside over District Court or Superior Court dockets; and whether additional opportunities exist to move toward the ultimate goal of fully incorporating the Probate Court system into the Judicial Branch, including, for example, by incorporating the county registries and their staff into the Judicial Branch.

****Need to pin down date of 3-year review****

Insert rationale here - as agreed to by Commission members voting in favor of this recommendation. Explain the rationale of any opposing commission members, if provided.

F. Transition Plan

This could either be presented as a final commission recommendation (for example, if a vote is taken) or it could be presented as a recommendation of the commission's co-chairs in a new section of the report

Other items to include in the report:

- More discussion that additional cost estimates will have to be performed by AOC—facilities costs, maintenance costs, etc.—as legislation implementing these recommendations is developed?
- An expression of the commission's gratitude for the members of the public who submitted public comments and to the Maine Association of Registers of Probate, the Maine Probate Judges Assembly, the Maine County Commissioners Association and the Administrative Office of the Courts for the information each compiled and provided to the commission, especially given the short time frame of the commission's requests for information.