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Testimony of Deirdre M. Smith, Esq. in support of
LD 1766, An Act to Incorporate Probate Judges into the Maine Judicial Branch
submitted to the Joint Standing Committee on Judiciary, January 7, 2026.

Good afternoon, Senator Carney, Representative Kuhn, and other members of the Joint Standing Committee on Judiciary. My name is Deirdre M. Smith, and I am the Director of Litigation for Pine Tree Legal Assistance ("Pine Tree Legal"). Pine Tree Legal is a statewide nonprofit organization that provides free legal services to low-income and working-class people throughout Maine. Our mission is to ensure that state and federal laws affecting poor people are upheld, while also addressing the systemic barriers to justice faced by Mainers with low incomes. Pine Tree Legal was asked by Senator Carney to share our perspective on LD 1766. My comments this afternoon in support of this bill are informed by the experiences of my colleagues at the Pine Tree Legal as well as my own experience with the Probate Courts when I served as Director of the University of Maine School of Law's legal aid clinic ("the Clinic") for over 18 years. My testimony will focus on the specific issue of part-time Probate Judges.

The reorganization of the Probate Courts proposed in LD 1766 reflects the recommendations of the Legislature's Commission to Create a Plan to Incorporate the Probate Courts into the Judicial Branch in its December 15, 2021, Report. LD 1766 would also implement, at long last, the constitutional amendment approved by Maine voters in 1967[1] to ensure that all probate matters, including those involving estates, guardianships, and conservatorships, are overseen by full-time judges who can devote their time, skill, and energy to the work of judging. Because Probate Judges would become full-time judges and would be paid the same as other state court judges, they would no longer need to maintain separate employment as an attorney to have sufficient income. They can immerse themselves fully in their judicial role rather than having their attention divided by maintaining a separate law practice and small business. They will not have individuals and entities as clients to whom they owe a lawyer's duties of professional conduct, including the duty of loyalty. The full-time appointments would also increase dignity of and respect for the Probate Courts and Judges and their function. This reform is especially important because the role of Probate Judges today is primarily one of overseeing litigation, much of it complex and implicating the substantial rights of litigants, including constitutional rights.

The new Probate Court system of appointed full-time judges proposed in LD 1766 would eliminate other problems resulting from Probate Judges dividing their time between judging and practicing law. The practice of law by these judges requires different treatment under the Maine Code of Judicial Conduct ("the Code"). By exempting Probate Judges from the broad prohibition on law practice that applies to all other Maine judges, the Code allows Probate Judges to appear in all Maine courts except the county court in which they are the sole judge. This means that Maine Probate Judges are free to practice any kind of law before any judge in the state, including adversarial litigation before other Probate Judges and state court judges sitting in the same

[1] Resolves 1967, ch. 77 (amending ME. CONST. art. VI, § 6).

county where they sit as Probate Judges. This practice gives rise to a range of actual or potential conflicts. At a minimum, it creates an appearance of impropriety that diminishes respect for our system of justice and increases the risk that opposing counsel will not meet their duty to zealously represent their client. [2]

The Maine Supreme Judicial Court observed in the Introductory note of the 2017 version of the Code: "This Code has been adopted by the Court after consideration of comments and suggestions from members of the bench, bar, and public. Issues concerning Probate Court judges' part-time status, particularly their representation of clients in probate court matters, generated *substantial negative comments*. That issue, however, is a matter that *can only be addressed by legislative action*." [3] In other words, the ethical problems arising from part-time Probate Judges practicing law will disappear as soon as the Legislature replaces our current system with appointed full-time Probate Judges. LD 1766 would do just that.

As a member of the Clinic faculty, I had direct experience with the problems the practice of law by Probate Judges presents for the judges and the attorneys who appear before or against them in matters. In fact, I found this practice so troubling that I decided to research why Maine has permitted and maintained this exception from the prohibition on the practice of law by judges. My research resulted in two published articles on the subject: *From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts*, 68 Me. L. Rev. 45 (2016); and *Judges as Lawyers*, 37 Geo. J. Legal Ethics 277 (Spring 2024).

My most disconcerting experience with probate judges practicing law arose from a minor guardianship proceeding. The Clinic was appointed as counsel for the child's mother, who objected to the petition for guardianship filed by the child's paternal grandparents. I described what transpired in *Judges as Lawyers*:

> The attorney for the guardianship petitioners, the child's paternal grandparents, was also a candidate for the office of probate judge for the court in which our case was pending. The election took place a few months into the case, and the opposing attorney won. Because he was now also the probate judge, and only one probate judge sits in each Maine county, our case had to be transferred to another county, requiring additional travel for all parties, including our low-income client, the witnesses, and her counsel.

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[2] This problem has been documented for decades. Most recently, they were noted in the award-winning series of articles published by the Maine Monitor about the Probate Courts. One attorney reported that she found it "awkward" and "uncomfortable" to have a probate judge as an opposing counsel in a case because she did not want to "anger him in a way that could affect a future client" appearing before him in a case/ Samantha Hogan, *Vulnerable People May Be at Risk in Maine's Part-Time Probate Courts*, THE MAINE MONITOR (June 4, 2023), https://themainemonitor.org/vulnerable-people-may-be-at-risk-in-maines-part-time-probate-courts. In a report about the probate courts published in 1967, "One attorney interviewed, expressed dissatisfaction with the existing system because he discovered that the opposing attorney in a contested will case was a prominent judge of probate from an adjoining county." Bureau of Pub. Admin., Univ. of Me., Report of the Preliminary Analysis of the Feasibility of a Probate District Court System for Maine 23 (1967). *See also In re* Estate of McCormick, 765 A.2d at 559 n.4; Peter L. Murray, *Maine's Overdue Judicial Reforms*, 62 ME. L. REV. 631, 640–41 (2010) (noting potential for "serious scandal" from permitting probate judges to practice law).

[3] Me. Code of Judicial Conduct, Introductory Note (emphasis added).

The consequences of this person's double role, however, were not only financial and practical, but, as in other cases, went to the heart of judicial integrity. Although the opposing attorney was a sitting judge, he was able to maintain his law practice without restrictions and continued to represent the child's paternal grandparents in the matter for several months. During this time, as he acknowledged, he attended probate judge meetings with the judge who was presiding over our case, meetings at which matters of procedure and substantive law were discussed. The opposing attorney eventually withdrew from our case shortly before the final testimonial hearing, and another attorney represented his former clients. Soon thereafter, in a separate matter but with significant implications for our client, this lawyer-judge entered his appearance as counsel for the child's father and filed a motion to reduce the parental rights of our client in the Maine District Court in the same county where he was sitting as probate judge. Our client, the child's mother, lost her case in the guardianship matter in the probate court.

Our client and her clinic counsel were distressed to have a sitting judge as the opposing counsel in the two cases. The clinic was distressed to be obliged to practice before a judge who was also our opposing counsel and who appeared as our adversary both in matters before another probate judge and also in matters before District Court judges in a courthouse just a few miles from the one where he sat as judge. Given the exemption in place, however, there was no basis, not even a due process challenge, on which our client and her counsel could object to this lawyer-judge's participation in both cases. Because he sat as a part-time judge in a county probate court, everything that he did was permissible under Maine law and the state's code of judicial conduct.

The lawyer-judge withdrew from the guardianship case before the hearing specifically because, as he told me, he thought it would be improper for him to appear in a contested hearing before a fellow probate judge in the next county. After that case concluded, the Clinic continued to appear in probate court cases before the lawyer-judge and as opposing counsel to him in District Court cases in the county where he sat as judge.

The second experience that stood out for me was when the Clinic represented the wife in a contentious divorce case, and her husband was represented by the probate judge for the same county where we were litigating the divorce in District Court. The Clinic had pending probate court matters before the lawyer-judge before, during, and after the divorce case. At a mediation in the divorce case, the lawyer-judge took a highly aggressive approach to negotiation. We advocated for our client throughout the mediation, but it felt deeply uncomfortable and surreal to negotiate against a person I had appeared (and would continue to appear) before while he wore a black robe and decided the outcome of other clients' legal matters.

Like the Law School's Clinic, Pine Tree Legal provides legal help to individuals with low incomes throughout Maine. This assistance includes representing individuals with matters in county probate courts, as well as matters in the state courts in which probate judges sometimes appear as our opposing counsel. Pine Tree believes our current system of part-time probate judges who are permitted to practice law undermines judicial integrity and effectiveness and therefore the reforms reflected in LD 1766 should be implemented.

The practice of law by Maine's part-time judges has long been the specific focus of criticism. Every study of Maine's probate courts has highlighted the significant problems arising from part-time Probate Judges, and eliminating such problems was one of the primary aims of the 1967 amendment to the Maine Constitution approved by Maine voters. At the end of my testimony, I provide an Appendix summarizing more than 70 years of reports and other criticisms of the current system of part-time Probate Judges.

LD 1766 represents one of the single most important opportunities in recent years for the Legislature to improve Maine's justice system; namely, to ensure that *all* legal matters of critical importance to Maine individuals and families are overseen by full-time dedicated jurists. The Maine Legislature should fulfill the mandate issued to it by Maine's electorate and create a Probate Court system with full-time Probate Judges, and LD 1766 would at long last set the process in motion. I urge you to vote Ought-to-Pass on LD 1766 to allow Maine to take this important step forward to improving our system of justice for all Maine people.

Thank you very much.

Sincerely,

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APPENDIX

A Brief History of Maine's Probate Courts and Prior Attempts at Reform

Maine's Probate Courts were created in 1821, shortly after the start of Maine's statehood, and they were modeled after Massachusetts' probate courts. Unlike the Maine Supreme Judicial Court, which sat in "terms" around the state, the Probate Courts were located in each county seat and open year-round to ensure that people would not need to travel too far or wait too long to administer a deceased person's estate. The "judges of probate" were appointed by the Governor, and the nature of their work at that time was more akin to a county official than what we'd think of as a judge today.

In 1855, the voters of Maine amended the Maine Constitution to take away the Governor's power to appoint county officials--including Probate Judges and Registers and Sheriffs--and shift it to county voters, ensuring that control over the Probate Courts would remain with county government. As a result, each county has a single Probate Judge elected by the voters. And because these judges work in the court on only a part-time basis, they have been permitted to practice law on days when they were not presiding over the Probate Court. No other judges in Maine may engage in legal practice.

From the 1950s to today, there have been multiple attempts to reform Maine's probate courts. Each of the proposals advanced during this period suggested eliminating the courts in their present form and merging them into the state court system, which itself has undergone rapid development and unification during the last century.[4] These efforts were launched in 1952, when Edward F. Dow, Chair of the University of Maine's Department of History and Government published his study ***County Government in Maine*** on behalf of the Maine Legislative Research Committee.[5] Professor Dow made several recommendations regarding the organization of local courts, including that the Probate Courts should be integrated into the state court system and their judges should be appointed.[6] The reports that followed struck similar themes and made similar proposals.

The Maine Legislature authorized two studies of Maine's Probate Courts in the 1960s,[7] and the

[4] The statewide District Court was established in 1961, replacing numerous county courts and created a unified system. P.L. 1961, ch. 386. The Legislature established the present Superior Court system, which had been county-based, in 1930. P.L. 1929, ch. 141.

[5] Edward F. Dow, *County Government in Maine: Proposals for Reorganization* (submitted to Maine Legislative Research Committee) 17–18, 28–35 (1952).

[6] He also recommended that the number of probate judges, courts, and registers be reduced statewide.

[7] The Institute of Judicial Administration, *The Desirability of Integrating Activities of the Probate Courts of Maine into the Superior Court* 1–2 (1969) (citing S.P. No. 710 (July 8, 1967)); Bureau of Public Administration, University of Maine, *Report of the Preliminary Analysis of the Feasibility of a Probate District Court System for Maine* 1–3 (citing SP 254) (May 10, 1967).

reports describe a situation that closely resembles the current system.[8] The second, more comprehensive study, conducted by the **Institute of Judicial Administration** ("IJA"), was commissioned on the heels of the 1967 statewide referendum, in which Maine voters approved an amendment to the Maine Constitution repealing the 1855 amendment that provided for the election of probate judges by the residents of each county.[9] However, there was no set effective date for the repeal. Rather, it would become effective "at such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges." The purpose of that contingency was, as described later by the Maine Supreme Judicial Court, "to give the Legislature discretion to study and determine the best system for administering and adjudicating matters traditionally within the jurisdiction of the Probate Courts. *The intent was to open the way for change in the system*."[10]

The Maine Legislature has not yet fulfilled the condition of the amendment, although it has considered numerous court restructuring proposals in the years since its passage. The 1969 IJA Report recommended that the Legislature assign jurisdiction of the various matters then heard before the probate courts to the Superior Court as part of a simple "three-tier court structure."[11] The IJA favored this approach because it reflected the Superior Court's familiarity with Probate Court matters as it then sat as the Supreme Court of Probate. The IJA also noted that the "modern trend" among states was "to make the probate judge a full-time judicial officer – free of the administrative work that can be done as well or better by a trained and supervised register."

In 1980, pursuant to a mandate from the Maine Legislature, the **Maine Probate Law Revision Commission** ("MPLRC") issued a report also recommending that the Legislature transfer the entire jurisdiction of Maine Probate Courts to the Superior Court.[12] The MPLRC based this recommendation on reasoning similar to that in the IJA's 1969 recommendations, as well several changes that were necessary as a result of the adoption of the Uniform Probate Code in Maine. One reason it gave for recommending transferring all jurisdiction to Superior Court was to eliminate the part-time judges (increasing the number of Superior Court Justices by three to accommodate the extra work) because of the ethical concerns presented by probate judges who continued to practice law. It also proposed retaining the county-based probate registers but

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[8] BPA Report at 7–9. The jurisdiction of probate courts included wills, estates, adoptions, changes in legal name, the appointment of guardians; the judges were part-time and members of the bar; other than appellate review, there was no oversight of probate judges and little central rule-making; and there was little coordination with other courts. As that report noted: "each of the 16 probate courts is, in essence, a court unto itself . . . ." *Id.* at 8.

[9] Resolves 1967, ch. 77 (amending Me. Const. art. VI, § 6 (repealed 1967)). Approximately 55% of the voters approved the amendment in the November 7, 1967 vote. (http://www.state.me.us/legis/lawlib/const.htm). The Maine Legislature authorized a study of the Probate Court System with the aim of specifically examining the possibility of establishing a "Probate District Court System with full-time judges appointed by the Governor." The Legislative Research Committee retained the Institute of Judicial Administration, based in New York, to undertake the study. IJA Report at 1–2.

[10] Opinion of the Justices, 412 A.2d 958, 982 (Me. 1980) (emphasis added).

[11] IJA Report at 16–18.

[12] Maine Probate Law Revision Commission, *Report to the Legislature and Recommendations Concerning the Probate Court Structure* (Feb. 21, 1980).

making them part of the state judicial system.

That same year, the Maine Senate sought an opinion from the Maine Supreme Judicial Court as to the constitutionality of a bill, "An Act to Transfer Probate Jurisdiction to the Superior Court," then pending before it.[13] The Justices responded that the bill was constitutional and would, among other things, "carr[y] out the broad purpose of the operative language of the 1967 [constitutional] amendment," by replacing the county-based system with a different probate court system. Nonetheless, the Legislature never enacted the bill.

Efforts to study and reform Maine's Probate Courts continued in the 1980s, and the focus shifted specifically to their jurisdiction over parental rights matters. In 1985, the "**Committee for the Study on Court Structure in Relation to Probate and Family Law Matters**" issued its Report to the Maine Judicial Council.[14] The committee is commonly referred to as the "**Cotter Committee**" after its chair William R. Cotter, then President of Colby College.[15] The Judicial Council created the Cotter Committee to study the probate court structure and system of part-time elected judges.

The Cotter Committee noted that, as a result of the enactment of the Maine Probate Code in 1979, the nature of the work done by Probate Judges had shifted away from the administration of estates to the remaining areas of its jurisdiction, particularly guardianships and adoptions, with an overall reduction of the judicial workload. Its survey found that Probate Courts were also taking on an increasing number of "family" matters including guardianship, adoption, and name changes and that the promulgation of new rules regarding notice and other aspects of more formal proceedings have increased that part of the courts' workload. The vast majority of traditional probate matters, by contrast, were routine and uncontested. The Cotter Committee noted that the allocation of judicial resources across the state for family matters between the state and Probate Courts was the result of "historical development" rather than planning, and that it was not a "rational allocation of resources."

The Cotter Committee noted in its conclusion that the practice of law by Probate Judges was a "point of serious complaint" and raises "the serious appearance of impropriety," and it recommended extending the prohibition on law practice to Probate Judges.

The Cotter Committee recommended several potential changes. One proposal was to transfer jurisdiction of estate and trust matters to the Superior Court, as other studies had recommended. Jurisdiction over family matters, however, would be transferred to the District Court, which had become "by far Maine's predominant court for the handling of family disputes or other disputes

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[13] Opinion of the Justices, 412 A.2d 958, 982 (1980) (citing 2 Me. Legis. Doc. 3425 (1967) (remarks of Senator Lund)).

[14] Committee for the Study on Court Structure in Relation to Probate and Family Law Matters, *Report to the Judicial Council* (1985) ("Cotter Report"). The Legislature created the Judicial Council in 1935 to make a "continuous study of the organization, rules, and methods of procedure and practice in the judicial system of the State . . . ." 4 M.R.S.A. § 451 (now repealed).

[15] Lauren McArthur, "Debate Renewed Over Probate Reform," *Lewiston Daily Sun* 1, 1 (Mar. 5, 1985).

that have a significant impact on families." The Committee recommended concurrent jurisdiction in the District and Superior Courts over guardianship, conservatorship, and other protective proceedings. This shift would "help further consolidate family matter jurisdictions (adoptions and name changes) within the court where all other family matters are primarily handled." The concurrent jurisdiction over protective proceedings would recognize the dual nature of these proceedings (part "estate law" and part "family law") and would increase the number of judges available to address requests for emergency relief in those cases. The probate judges would be replaced by appointment of four additional state court judges, which would eliminate the ethical concerns from the practice of law by probate judges that were discussed extensively in the report.[16]

The following year, yet another report made similar observations regarding the Probate Courts' jurisdiction over family matters. In 1986, the **Commission to Study Family Matters in Court** ("CSFMC") studied the question of the creation of a "Family Court System."[17] Among its findings, the CSFMC's report noted that, at that time, "Maine … has several family courts" including the District Court, Superior Court, and probate courts, each of which exclusively or concurrently exercised jurisdiction over particular kinds of family law cases.[18] "This scattered jurisdiction," the report continued, "prevents the most efficient use of Maine's judicial resources in serving troubled parents and children." The CSFMC concluded: "Consolidation of jurisdiction over family matters within one Maine court can address those problems." "However," it also noted, "before this consolidation can occur, Maine's current probate court system must be revamped." It recommended that the Probate Courts be absorbed into the state judicial department, as the current structure of the system prevented them from being integrated into a "unified approach to family matters in the Maine courts."[19]

In 1987, **the Judicial Council submitted a letter to the Joint Committee on the Judiciary** noting its "'continuing concern' for the necessity of probate reform" and the lack of progress in the Legislature to adopt recommendations regarding such reform. [20] In the letter, the Council noted that the Council and others had studied the Probate Courts since 1966, with several

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[16] There were two alternative proposals to address the part-time practice issue and to provide for appointment or creation of a Probate and Family Division within the state court system.

[17] Commission to Study Family Matters in Court, *Final Report to the 112th Legislature* (March 1986).

[18] Specifically, the District Court handled juvenile matters, divorces and annulments, child protection petitions, and parental rights and responsibilities cases. The Superior Court heard divorces, annulments, parental rights and responsibilities matters, as well as actions under the Uniform Reciprocal Enforcement of Support Act. The Probate Courts acted on adoptions and minor guardianships, as well as emergency child protection petitions.

[19] Under this recommended reform, the Probate Courts would retain jurisdiction (which would become concurrent with the state courts) over guardianships and adoptions because such matters had traditionally been part of the probate courts' jurisdiction and they were most familiar with the "specialized procedures" in such cases. The CSFMC also noted that consolidation of jurisdiction within the state court system "may be appropriate at a later date."

[20] Legis. Rec. 112 (1987), Letter from the Judicial Council to the Judiciary Committee (Jan 29, 1987) (available at http://lldc.mainelegislature.org/Open/LegRec/113/Senate/LegRec_1987-02-02_SP_p0110-0113.pdf).

recommendations made for reform and particularly the elimination of part-time elected Probate Judges. The Cotter Committee recommendations had been included in a bill before the Legislature the prior year, which was carried over.[21] The Council also noted the findings and recommendations regarding the Probate Courts in the CSFMC report, which were reflected in a bill that was defeated on the floor. The following session the Legislature considered LD 976 "An Act to Consolidate Family Cases in a Family Court within the District Court and to Establish Full-time Appointed Probate Judges," which was withdrawn.[22]

In short, despite the consistent findings and recommendations of three reports issued within a six-year period, and the urging of both the Judicial Council and the Chief Justice of the Maine Supreme Judicial Court, [23] the Maine Legislature enacted none of the reports' recommendations.

The 2014 Report of the **Maine Judicial Branch's Family Division Task Force** ("Task Force")[24] also recommended changes to the probate courts. The Task Force undertook an "intensive and concentrated review of the current family matters process." Its findings concerning the significant problems caused by the allocation of jurisdiction of the various cases involving children led to a discussion among the Task Force members regarding whether "the best result would be to consolidate the county probate courts into the Judicial Branch."

Most recently, in 2021 the Maine Legislature established **Commission To Create a Plan To Incorporate the Probate Courts into the Judicial Branch**.[25] The 15 members who comprised the Commission, ably supported by two experienced members of the Office of Policy and Legal Analysis, had precisely the right knowledge, experience, and perspectives to design a different probate court system. The Commission's detailed and comprehensive December 15, 2021, Report reflects its careful, thoughtful, and hard work. The Commission's recommendations were specifically aimed at addressing the problem of part-time judges practicing law, due to "the potential for conflicts of interest and the appearance of impropriety attendant to these situations." The move to full-time judges was an integral part of the 1967 constitutional amendment, but the Commission also took note of the consensus of reports about Maine's probate courts. *Id.* The Report's proposed plan is reflected in LD 1766, which would at long last implement the will of Maine's voters in 1967 and in a way that reflects Maine's current needs.

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[21] *Id.* (citing LD 1250 (112th Legis. 1987) (resulting in "Leave to Withdraw" status on April 3, 1986)).

[22] *Id.* at 113 (citing LD 2402 113th Legis. (1987) Uniform Maine Citations requires a year),

[23] Chief Justice Vincent McKusick, State of the Judiciary Address, A Report to the Joint Convention of the 112th Legislature 2480 (Feb 6, 1985), http://lldc.mainelegislature.org/Open/Laws/1985/Laws1985v2_p2475-2481_State_of_Judiciary_1985.pdf ("I transmit to you the proposal of the Maine Judicial Council that the present 16 county-funded probate courts with part-time elected judges be phased out, in the same way as the old part-time municipal courts and trial justices were phased out by the Legislature in the early Sixties.").

[24] Maine Judicial Branch, Family Division Task Force, *Final Report to the Justices of the Maine Supreme Judicial Court* (2014) *available at* http://www.courts.maine.gov/maine_courts/supreme/comment/fdtf/ftdf_notice.shtml.

[25] Resolve 2021, ch. 104.