James Libby, Ph.D.
Senator, District 22

THE MAINE SENATE
131st Legislature

3 State House Station
Augusta, Maine 04333

Testimony of Senator James D. Libby

Sponsor of LD 1459

"An Act to Reduce Abuse of the Civil Ex Parte Attachment and Trustee Processes"

Public Hearing, Tuesday, April 24, 2023

Senator Carney, Representative Moonen, and esteemed members of the Joint Standing Committee on Judiciary,

My name is Jim Libby, and I am a State Senator representing Senate District # 22, comprised of the towns of Naples, Sebago, Baldwin, and Standish in Cumberland County; Hiram and Porter in Oxford County; and, Limington, Limerick, Cornish, Parsonsfield, Newfield, Acton, and Shapleigh, in the County of York.

It is my honor to bring to your attention the contents of *LD 1459* "An Act to Reduce Abuse of the Civil Ex Parte Attachment and Trustee Processes."

Sometimes in litigation a plaintiff will deem it necessary to secure a possible monetary award from a defendant who may hide assets during the lawsuit. In such circumstances the law provides a plaintiff's lawyer the opportunity to attach a defendant's assets through a legal process known as attachment or attachment through trustee process. (For simplicity I refer to the process generally as "attachment" as opposed to attachment and trustee process.)

In an attachment process the plaintiff's lawyer files a motion with the court and serves it upon the defendant and the court holds a hearing on the matter with all parties present. The judge determines if the attachment can proceed based upon several legal criteria. If it does proceed the plaintiff's lawyer will then serve the court papers granting attachment upon various institutions (such as banks). The papers inform the institution that it must freeze the defendants accounts until further notice. At that point the defendant no longer has access to the frozen accounts. In the initial hearing on the plaintiff's motion the judge may put limits on the order attaching assets so that the defendant may continue to have access to cash to pay for essentials such as food, shelter and clothing for the defendant and the defendant's family.

The Legislature through current law also provides an extraordinary remedy to a plaintiff's lawyer seeking to freeze a defendant's assets in secret without letting the defendant know that it is happening. This is called "ex parte attachment." The phrase ex parte (pronounced ex par-tay) is "Latin meaning 'for one party,' referring to motions, hearings or orders granted on the request of and for the benefit of one party only. This is an exception to the basic rule of court procedure that both parties must be present at any argument before a judge, and to the otherwise strict rule that an attorney may not notify a judge without previously notifying the opposition." See

the www.law.com definition of ex parte at https://dictionary.law.com/default.aspx?selected=696 as of March 24, 2023.

In ex parte attachment, before the complaint against the defendant has even been served on the defendant, the plaintiff's lawyer can have a secret meeting with the judge without the defendant or a lawyer present and give the judge the plaintiff's facts only. Based upon those facts and applicable court rules a judge usually must approve the request and enter an order for ex parte attachment. The plaintiff's lawyer will then serve the court papers upon various institutions holding the defendant's money without telling the defendant. At that point the defendant no longer has access to the frozen accounts and only finds out when they attempt to use their debit card or withdraw money. The defendant does not even know they have been sued, let alone that the plaintiff's lawyer was able to have a secret meeting with a judge to freeze their accounts.

Typically the plaintiff's lawyer will freeze all accounts because the ex parte order has no restrictions meaning that the defendant will have no money to pay for essentials.

To remove an ex parte attachment the defendant must hire a lawyer (if they can afford one) and file a motion with the court and ask for a hearing to explain that certain assets should not be attached or that the plaintiff's lawyer overreached in the attachment. Many times the judge will indeed remove the attachment from certain cash accounts so that the defendant may continue to pay for essentials such as food, shelter and clothing for the defendant and the defendant's family during the litigation. Since the pandemic Maine's judiciary has been working hard to catch-up on many backlogged cases and often is unable to schedule a hearing on the attachment for many months. In the meanwhile a defendant may be unable to pay rent or a mortgage, buy groceries or generally provide for their family's well-being until such time as a judge is able to modify the attachment. In addition credit ratings can be ruined, evictions commenced and foreclosures threatened even if eventually the judge finds that the plaintiff's lawyer did in fact overreach. In such a case there is no punishment for the overreaching plaintiff unless the defendant has the wherewithal to commence an entirely new lawsuit for abuse of process against the plaintiff after the first lawsuit is over.

This bill does not prohibit ex parte attachment but instead gives the plaintiff's lawyers incentive to carefully apply the power granted to them by this extraordinary privilege to secretly freeze a person's assets. By choosing to have the secret meeting with a judge to obtain this ex parte attachment (as opposed to the open hearing with all parties) this bill provides the defendant the ability to have their attorney paid for by the plaintiff if the plaintiff does in fact overreach. Also, the plaintiff will have to pay interest on any cash assets that the judge removes from the attachment if, for instance, the judge allows access to cash so that the defendant may continue to pay for essentials such as food, shelter and clothing for the defendant and the defendant's family during the litigation. To avoid the penalties in this bill, a plaintiff's lawyer could simply not overreach by leaving a defendant access to some form of household operating account while attaching all other assets. In sum, the scope of this bill is not only limited to abuse of ex parte attachment but also may be further mitigated by a lawyer's careful application of this extraordinary privilege.

Thank you for your consideration of this legislation.