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## From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts

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# FROM ORPHANS TO FAMILIES IN CRISIS: PARENTAL RIGHTS MATTERS IN MAINE PROBATE COURTS

*Deirdre M. Smith*

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## FROM ORPHANS TO FAMILIES IN CRISIS: PARENTAL RIGHTS MATTERS IN MAINE PROBATE COURTS

*Deirdre M. Smith\**

### ABSTRACT

This Article examines the sources of the contemporary problems associated with the adjudication of parental rights matters in Maine's probate courts and identifies specific reforms to address both the structural and substantive law problems. The Article first reviews the development of Maine's probate courts and their jurisdiction over parental rights matters. It traces the expansion of jurisdiction over children and families from a limited role incidental to the administration of a decedent's estate to the current scope—a range of matters that may result in the limitation, suspension, or termination of the rights of living parents. Maine probate courts now adjudicate questions implicating parental rights in a wide range of scenarios. However, the basic structure of Maine's probate courts has remained unchanged since 1855. Maine law assigns exclusive jurisdiction of these often complex and contentious matters to a non-centralized group of county-based courts, each of which has limited resources and a single, part-time elected judge who usually has a busy law practice as his or her primary job.

This Article provides a close examination of the central issues involved in the parental rights matters currently adjudicated in the probate courts under the Maine Probate Code. It analyzes the challenges presented by the probate courts' exclusive jurisdiction of these matters, including the incidence of conflicts and confusion when the Maine District Court has addressed a parental rights issue involving a child who is also the focus of a probate court proceeding, as well as the limitations presented by the probate courts' structure and operation. Finally, this Article discusses potential reforms aimed at improving the adjudication of parental rights matters under the Maine Probate Code (MPC) including eliminating the "split jurisdiction" between probate and district courts, structural changes to probate courts to ensure fairness and due process for all participants, and substantive reforms to the MPC provisions concerning parental rights so that the law will better reflect the contexts in which these cases arise today and address the needs of the families involved in these cases. Combined, these proposed reforms would mitigate the acute problems described in the Article to better serve both the

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courts that must adjudicate these difficult cases and the families at the center of them.

## I. INTRODUCTION

Probate courts are primarily associated with death, and specifically with the administration of decedents' estates,<sup>1</sup> but they have an important role with respect to children's interests as well. Since their establishment in 1821, Maine probate courts' jurisdiction has included matters addressing the property and care of a decedent's surviving children.<sup>2</sup> The Maine Legislature enlarged slightly the courts' authority with respect to children during the 19<sup>th</sup> century to include exclusive jurisdiction over adoptions and name changes when it enacted those statutes.<sup>3</sup> Over time, these courts have overseen an increasing number of cases involving the care, support, and custody of children who have living parents. Most significantly, during the last thirty-five years, the scope and use of Maine's minor guardianship laws have expanded substantially, and the Maine Legislature has granted probate courts the jurisdiction to determine paternity and terminate parents' rights in the context of adoption proceedings.<sup>4</sup> At the same time, pressures on Maine's child protection system have led to the frequent use of minor guardianships to address concerns about child welfare and an increasing number of adoption and related proceedings.<sup>5</sup>

As a result of this combination of factors, Maine probate courts now adjudicate questions implicating parental rights in a wide range of scenarios. However, the basic structure of Maine's probate courts has remained unchanged since 1855. Maine law assigns exclusive jurisdiction of these often complex and contentious matters to a non-centralized group of county-based courts, each of which has limited resources and a single, part-time elected judge who usually has a busy law practice as his or her primary job.<sup>6</sup> These courts have a very limited relationship to the state court system, and they are entirely unconnected with the Maine Judicial Branch's Family Division. The Maine Legislature established the Family Division in 1997 to "provide a system of justice that is responsive to the needs of families and the support of their children" and to oversee all divorce, child protection, parental rights and responsibilities, juvenile, and other matters concerning children.<sup>7</sup> Maine's split jurisdiction system, perhaps unique in the country,<sup>8</sup> precludes coordination and consolidation of matters involving the same child in the

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1. According to *Black's Law Dictionary*, the term "probate" refers to: "The judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court." *Probate*, BLACK'S LAW DICTIONARY (10th ed. 2014). The word "probate" derives from the Latin *probare* meaning "to try, test, approve, prove." *Probate*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1806 (2002). For a history of probate courts generally, stemming from their origins in English Ecclesiastical Courts' jurisdiction over decedents' estates, see Eugene M. Haertle, *The History of the Probate Court*, 45 MARQ. L. REV. 546 (1962).

2. See *infra* notes 25–48 and accompanying text.

3. See *infra* notes 49–55 and accompanying text.

4. See *infra* notes 56–101 and accompanying text.

5. See *infra* notes 159–162, 213–214 and accompanying text.

6. 4 M.R.S.A. § 301 (Supp. 2014); ME. CONST. art. VI, § 6 (1855).

7. 4 M.R.S.A. § 183 (Supp. 2014).

8. See *infra* notes 233–234 and accompanying text.

Family Division of the Maine District Court and a county probate court—a judge in one court system cannot adopt, modify, or terminate an order from the other system. This common scenario leads to confusion, conflicting orders, inefficiencies, and additional stress on a child and family that are already in crisis.<sup>9</sup>

In addition to these structural and jurisdictional problems, the Maine Probate Code (MPC) provisions addressing parental rights—specifically guardianship, change of name, and adoption (including related petitions to establish or terminate parental rights)—do not reflect the contemporary use of these laws as private “child protection” remedies; that is, to intervene in a parent-child relationship based on concerns of potential parental abuse, neglect, or other forms of “unfitness.” Rather, the MPC still reflects the “orphan model” of guardianships and adoptions, where there is little need to consider the rights of living parents or broader policy goals of preserving parent-child relationships.<sup>10</sup> For these reasons, the probate courts adjudicating these MPC matters implicating parental rights can fall short of ensuring due process and protecting the fundamental rights of parents.

This Article examines the sources of the contemporary problems associated with the adjudication of parental rights matters in Maine’s probate courts and identifies specific reforms to address both the structural and substantive law problems. The Article first reviews the development of Maine’s probate courts and their jurisdiction over parental rights matters.<sup>11</sup> It traces the expansion of jurisdiction over children and families from a limited role incidental to the administration of a decedent’s estate to the current scope—a range of matters that may result in the limitation, suspension, or termination of the rights of living parents. Next, in Part III, the Article provides a closer examination of the central issues involved in the parental rights matters currently adjudicated in the probate courts under the MPC. I then analyze some of the challenges presented by the probate courts’ exclusive jurisdiction of these matters. These include the incidence of conflicts and confusion when the District Court has addressed a parental rights issue involving a child who is also the focus of a probate court proceeding, as well as the limitations presented by the probate courts’ structure and operation.<sup>12</sup>

In Part IV, I discuss potential reforms aimed at improving the adjudication of parental rights matters under the MPC. First, the Article will advocate, as an initial step, eliminating the “split jurisdiction” of family matters between district and probate courts by expanding the District Court’s jurisdiction over MPC parental rights matters and requiring that court to hear all matters concerning parental rights

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9. See *infra* notes 232–270 and accompanying text.

10. See *infra* notes 127–208 and accompanying text. Briefly, I use the term “orphan model” herein to refer to guardianship and adoption laws that assume that the child at the center of such matters has no living parents, and therefore the child’s primary need is for a permanent legal tie to a nonparent caregiver, rather than maintaining a relationship with one or both living parents.

11. I have avoided using the term “family law” in this Article, as there are of course many types of proceedings that involve legal disputes between family members. Indeed, most of the matters that Maine probate courts address could be seen as family law, defined broadly, such as a conflict among a decedent’s heirs regarding disposition of an estate or where a family member seeks to be appointed the guardian or conservator of an allegedly incapacitated adult family member. 18-A M.R.S.A. §§ 5-301 to 5-614 (2012 & Supp. 2014). However, the focus of this Article is on those matters that concern the care, support, and custody of minor children and other associated parental rights.

12. See *infra* notes 210–300 and accompanying text.

of a child.<sup>13</sup> In addition, I identify a number of necessary, specific changes to the probate courts' structure and operations to improve the handling of parental rights matters that remain in those courts and to ensure fairness and due process for all participants.<sup>14</sup> Finally, I outline a number of potential substantive reforms to the MPC provisions concerning parental rights so that the law will better reflect the contexts in which these cases arise today and address the needs of the families involved in these cases.<sup>15</sup> Combined, these proposed reforms would mitigate the acute problems described in the Article to better serve both the courts that must adjudicate these difficult cases and the families at the center of them.

## II. A SHORT HISTORY OF MAINE'S PROBATE COURTS AND THEIR JURISDICTION OVER PARENTAL RIGHTS MATTERS

The current jurisdictional alignment of state and probate courts regarding parental rights matters is highly problematic in several important respects.<sup>16</sup> However, such alignment is not by design. Rather it is the consequence, largely unintended, of two distinct developments: (1) the gradual expansion of the county probate courts' jurisdiction beyond those matters directly associated with estate administration to include a range of cases directly or indirectly implicating parental rights; and (2) substantial reforms to the other Maine courts leading to their unification in the Maine Judicial Branch, and the ongoing reorganization within the Judicial Branch to eliminate fractured jurisdiction, create efficiencies, and develop systems to meet the needs of judges and litigants. This section will focus primarily on telling the first story; the history of Maine's state courts is complex and has been explored by others,<sup>17</sup> but I will mention important developments as they bear on the central questions considered here.

### A. Probate Courts' Early Statutory Authority Regarding Minors

The Maine Legislature established the basic structure for Maine's county-based probate courts, with each court having a single judge and a register, in 1821, soon after the state's founding.<sup>18</sup> It modeled the courts on the probate courts of Massachusetts (of which Maine was a part until achieving statehood in 1820).<sup>19</sup>

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13. See *infra* notes 352–371 and accompanying text.

14. See *infra* notes 372–387 and accompanying text.

15. See *infra* notes 388–451 and accompanying text.

16. See Part III, *infra*.

17. See, e.g., DAVID Q. WHITTIER, HISTORY OF THE COURT SYSTEM OF THE STATE OF MAINE (MAINE STATE ARCHIVES) (1971); ROBERT TREAT WHITEHOUSE, THE CONSTITUTIONAL JUDICIAL AND COMMERCIAL HISTORY OF MAINE. The history of Maine courts is remarkable for the number of courts (e.g. town, police, municipal, Common Pleas, Sessions, Commissioners, District, Superior, etc.) established and abolished during the State's first 150 years. *Id.* at 4–29. See also EDWARD F. DOW, COUNTY GOVERNMENT IN MAINE: PROPOSALS FOR REORGANIZATION (submitted to Maine Legislative Research Committee) 17–18, 28–35 (1952) (describing county and municipal courts in operation at that time).

18. WHITTIER, *supra* note 17, at 6–8 (citing Ch. LI (1821) Me. Laws 191).

19. WHITEHOUSE, *supra* note 17, at 1153. The Massachusetts county-based probate courts were established in 1691 with the founding of the Massachusetts Bay province and the grant of new powers to the governor. Thomas E. Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425, 440–41 (1943). Although most colonial courts were part of a centralized judicial authority,

Maine probate judges were appointed by the Governor until 1855, when, pursuant to a constitutional amendment, the office of probate judge became a part-time position elected by the citizens of the county.<sup>20</sup> The basic structure of the probate court system has remained remarkably unchanged since the mid-nineteenth century. It still features sixteen part-time elected judges, one per county, who operate independently and with no central administrative authority. Appeals are taken to the Maine Supreme Judicial Court.<sup>21</sup>

Maine probate courts' jurisdiction has always been "special and limited" to those matters specifically granted pursuant to statute.<sup>22</sup> Accounts of the early development of the Massachusetts probate courts discuss their jurisdiction only in terms of administration of decedents' estates and disposition of their property, which was consistent with the law and practice of the Colonial era.<sup>23</sup> Maine adopted that narrow scope for its probate courts as well. For this reason, Maine's probate courts' involvement with minors has, for most of Maine's history, almost exclusively concerned the property of partially or fully orphaned children.<sup>24</sup>

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requiring citizens to travel to a single centralized location for the administration of all estates was not ideal. Accordingly, the colonial governor appointed a "deputy or surrogate" in each county as "'judge of probate of wills and the granting of letters of administrations,' sometimes-particularly later-called simply 'judge of probate.'" *Id.* at 441; *see also* WHITEHOUSE, *supra* note 17, at 1149. The position of "register" was created to conduct the clerical work and maintain the records of such offices. *Id.* After Massachusetts became a state, the legislature established the Probate Court in 1784, setting its jurisdiction and providing that all appeals would go to the Supreme Judicial Court, which would serve as the Supreme Court of Probate. Atkinson at 447; WHITEHOUSE, *supra* note 17, at 1151. *See also* Peters v. Peters, 62 Mass. 529, 539-44 (1851) (describing history of Massachusetts probate courts).

20. Chapter 273 of the Resolves of 1855 (codified as Me. Const. art. VI, § 6):

Section 6. 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.

The Resolve provided for the mode of election of several different public offices: "Shall the Constitution be Amended as Proposed by a Resolve of the Legislature Providing that the Judges of Probate, Registers of Probate, Sheriffs and Municipal and Police Judges shall be Chosen by the People, and also Providing that Land Agent, Attorney General and Adjutant General Shall be Chosen by the Legislature . . ." *Id.* (<http://legislature.maine.gov/9203/>). Professor Dow credited "the spirit of Jacksonian democracy" sweeping through the country during the second quarter of the 19th century as the basis for moving away from "centralized control" and providing for more "direct election." DOW, *supra* note 17, at 5. *See also* MARSHALL TINKLE, THE MAINE CONSTITUTION 10 (2013) (noting that the effect of this amendment was to curtail the Governor's appointment power).

21. 4 M.R.S.A. § 7 (1989); 18-A M.R.S.A. § 1-308 (2012). From 1929 until 1979, the Superior Court sat as the "Supreme Court of Probate," with jurisdiction to conduct de novo review of probate court decisions. P.L. 1929, ch. 141, § 7 (codified originally at R.S. ch. 75 § 31 (1930) and later as 4 M.R.S.A. § 401). The Supreme Judicial Court's direct appellate jurisdiction was restored as part of the enactment of the Maine Probate Code. P.L. 1979, ch. 540, § 7-B (effective Jan. 1, 1981).

22. 4 M.R.S.A. § 251-252 (1989); Appeal of Waitt, 140 Me. 109, 34 A.2d 476, 477 (1943); Overseers of Poor of Fairfield v. Gullifer, 49 Me. 360, 361 (1860).

23. *See generally* Atkinson, *supra* note 19.

24. This focus was consistent with national trends. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 64-68

The Maine Legislature made appointing and supervising the guardians of minors an explicit part of probate courts' authority at the time of their establishment.<sup>25</sup> A "guardian" is a person appointed by a court to serve as a "substitute parent"<sup>26</sup> by exercising, as described in a 1921 treatise, "custody and control of the person or estate, or both of an infant, whose youth, inexperience, and mental weakness disqualify him for acting for himself in the ordinary affairs of life."<sup>27</sup> However, the purposes and scope of minor guardianships from that initial enactment until the adoption of the MPC in 1979<sup>28</sup> were far different from those of most guardianships today. The pre-MPC statutory provisions regarding the appointment and duties of such guardians established their primary role consistent with what the MPC today refers to as a "conservator": to oversee the property inherited by the minor children of a decedent.<sup>29</sup> Indeed, before reforms improved women's status and property rights, a father could, through testamentary appointment, name a male guardian to oversee a surviving child's property, even if the father was survived by the child's mother.<sup>30</sup>

This limited focus of a "guardian of the estate" is distinct from that of a "guardian of the person," who was appointed to provide care for the minor, a position that was quite rare in the early days of American probate law.<sup>31</sup> Orphaned children without estates were cared for by others pursuant to informal

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(1994). Indeed, in some jurisdictions, the court assigned jurisdiction of minor guardianships was (and often still is) referred to as an "orphans' court." HASSELTINE BYRD TAYLOR, *LAW OF GUARDIAN AND WARD* 19 (1935); *see, e.g., The History of the Orphans' Court*, PHILADELPHIA COURT OF COMMON PLEAS, ORPHANS DIVISION, <http://courts.phila.gov/common-pleas/orphans/> (last visited Aug. 25, 2015) (noting 1682 statute establishing the court "to inspect and take care of the estates, usage, and employment of orphans, which shall be called the Orphans' Court . . . that care may be taken for those, that are not able to take care for themselves."). In Colonial America, most laws defined an "orphan" as a "child whose father had died, even if the child had a surviving mother." MASON *supra* at 18.

25. P.L. 1821, ch. 51, § 1 (including in probate courts' jurisdiction "appointing guardians to minors and other persons").

26. TAYLOR, *supra* note 24, at 3. The terms "guardian" and "guardianship" can have a range of meanings in different contexts, and they are sometimes used interchangeably with the legal concept of "custody," including with reference to parental rights. *Id.* at 165; *see also* BLACK'S LAW DICTIONARY, *supra* note 1, at 822-23 (describing the many different legal meanings of the term "guardian."). In this Article, I use the term to refer to a nonparent who has been appointed by a court to oversee certain or all aspects of the care and/or property of a minor. The person, adult or minor, who is the subject of a guardianship is commonly referred to as the "ward" of the guardian. *Id.* at 1720.

27. TAYLOR, *supra* note 24, at 3 (quoting JAMES SCHOULER, *DOMESTIC RELATIONS* § 283 (1921)).

28. P.L. 1979, ch. 540.

29. P.L. 1821, ch. 51, §§ 46-48. Until the enactment of the MPC in 1979, Maine law did not distinguish between "guardians" and "conservators" for minors. Me. Probate Law Revision Comm'n, Report of the Commission's Study and Recommendations Concerning Maine Probate Law 45, 511 (1978) [hereinafter MPLRC 1978 Report]. Under the MPC, a conservator's role is limited to overseeing the property of the ward, whether the person is a minor or an incapacitated adult. 18-A M.R.S.A. §§ 5-401-5-432 (2012). A court can appoint a person as both a guardian and conservator of a minor. MITCHELL & HUNT, *MAINE PROBATE PROCEDURE: GUIDE TO OFFICIAL AND RECOMMENDED FORMS* § 5-33 at § 5.06 (2014); Maine Probate Form PP-106, *available at* <http://www.cumberlandcounty.org/DocumentCenter/View/925>.

30. MASON, *supra* note 24, at 19, 54-66.

31. *See id.* at 66 (noting the development of two forms of guardianship in the 19<sup>th</sup> century); TAYLOR, *supra* note 24, at 26, 110, 168 (noting that, from the Colonial era through to the publication of that study in 1935, courts generally only appointed guardians for orphaned minors with property).



arrangements; formal appointments as guardians in such circumstances were unusual (and occurred only when the petitioner had the funds to pursue such appointment).<sup>32</sup> The early reported opinions of the Maine Supreme Judicial Court reflect this largely property-oriented role for guardians as well.<sup>33</sup>

Because guardianships were primarily limited to overseeing children's property, any living parent of a minor ward retained most of her parental rights.<sup>34</sup> The common law view is that parents are the "natural guardians" of their children.<sup>35</sup> Thus, guardianship statutes provided that, even if another person were appointed to oversee a minor's property, the "care of the person and education of the minor" were expressly left to the minor's father "if alive and competent to transact his own business," and, if not, to the mother "while unmarried and thus competent."<sup>36</sup> As the Maine Supreme Judicial Court noted in a 1924 opinion: "To the natural guardians the law commits the child's care and custody, even if he has a guardian appointed by the probate court. The probate guardian as such (and other than in exceptional cases) has to do only with the ward's property."<sup>37</sup>

While the guardianship statute granted probate courts the authority to assign care and custody rights to the guardian "if [the judge] deems it for the welfare of

32. TAYLOR, *supra* note 24, at 157 (noting that, in 19th century United States, unless a child inherited property, a guardian would not have been formally appointed by a court; rather, the child would be cared for through family arrangements); *id.* at 26, 168 (noting that matters concerning "guardianship of the person" were not usually the subject of petitions unless there was a dispute between two people who wanted custody of the child, in part because of the significant expense of bringing such petitions). Alternatively, abused, neglected, or abandoned children (generally from poor families) could become "wards of the court" pursuant to dependency proceedings; *id.* at 167, often ending up in public or charity-based orphanages. LEROY ASHBY, *ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY* 23–30 (1997). From the Colonial era through the 19<sup>th</sup> century, a dependent child could also be "bound" or "put out" to a master. *Id.* at 10–11, 37–51. Any of these outcomes were possible even where the child's mother survived the father, if the mother had insufficient financial means or was found to be "incompetent" to care for the child. MASON, *supra* note 24, at 20.

33. *See, e.g.*, *Drinkwater v. Gray*, 2 Me. 163, 164 (1822); *Haskell v. Haskell*, 2 Me. 157 (1822); *Bailey v. Rogers*, 1 Me. 186 (1821). Similarly, probate courts have long had the authority to appoint, "upon the application of his friends, relatives or creditors, a guardian, 'to take care of the person and estate' of one said to be an idiot, lunatic or distracted person." *Hovey v. Harmon*, 49 Me. 269, 273 (1861) (citing R.S. ch. 51, § 49 (1821)). In 1879, the Maine Legislature reworked the original laws regarding minor guardianships to set out some additional guidance for the probate courts' authority in making such appointments. The guardianship law still referred primarily to the management of the ward's estate rather than exercising parental rights. *See* P.L. 1879, ch. 102 (codified as R.S. ch. 67, § 1 (1883)).

34. Guardianship of children with living parents became less common once the statute provided widows the right to oversee their minor children's property. R.S. Ch. 67, § 3 (1883). The history and evolution of women's ability to control their and their children's property on the death of a husband is beyond the scope of this Article, but it does bear on the development of minor guardianship law, particularly with respect to testamentary guardianships when a parent names a guardian in his will. *See* MASON, *supra* note 24, at 18–21, 50–54, 65–67; TAYLOR, *supra* note 24, at 25.

35. *Legault v. Levesque*, 150 Me. 192, 193, 107 A.2d 493, 495 (1954); MASON, *supra* note 24, at 18; TAYLOR, *supra* note 24, at 31; R.S. ch. 67, § 3 (1883) (providing that a parent may act as a guardian as long as he or she is "competent").

36. R.S. Ch. 67, § 3 (1883). This provision was revised in 1895 to apply the same standard to both fathers and mothers; it provided that fathers and mothers jointly retained the rights to care and education if they were alive and competent and to the surviving parent if one had died. P.L. 1895, ch. 43, § 1 (codified in R.S. ch. 69, § 3 (1903)).

37. *Shaw v. Small*, 124 Me. 36, 36, 125 A. 496, 498 (1924).

the minor,”<sup>38</sup> such authority was, as the court observed, only used “in exceptional cases.”<sup>39</sup> The paucity of reported guardianship cases applying the language about assigning authority for the “care of the person and education” of minor children to a non-parent confirms that such authority was rarely used and remained undefined. This is not surprising since the practice of state intervention in a family to remove a child from one or both parents on the basis of parental abuse and neglect did not begin until the Progressive era.<sup>40</sup> Such “dependency” proceedings generally only took place in juvenile courts.<sup>41</sup> As one scholar noted in 1935: “The probate court has been traditionally interested in property, not child welfare.”<sup>42</sup> Indeed, prior to the enactment of the MPC, there are few references in Maine case law to appointment of a guardian for children with one or more living parents, as there was no clear statutory basis for a non-parent to seek such appointment unless a child had substantial property in need of control, which few non-orphans did.

For example, in the 1871 case *Peacock v. Peacock*, the Maine Supreme Judicial Court noted that appointment of a guardian for a two-year-old girl may be appropriate where her father was deceased and her mother lived out of state; it reasoned: “an infant of the tender age of two years, a resident of this State, should not be left a mere waif without any one to care for and protect it.”<sup>43</sup> The Law Court nonetheless noted that the child’s mother was entitled to notice before the court could grant the petition appointing her uncle as guardian.<sup>44</sup> That case was cited as the primary authority more than eighty years later in the 1954 opinion in *Legault v. Levesque*, in which the Law Court held that a grandmother’s petition for guardianship of a minor could not proceed unless it “allege[d] the incompetency of the [surviving father]” as a basis to overcome the father’s parental rights to care for his children.<sup>45</sup>

In the only reported opinion dating prior to the enactment of the MPC in which a court appointed a guardian for a minor with living parents on the basis of a child’s welfare, the Law Court regarded such decision as being within a court’s “sound judgment and discretion” and that “the welfare of the child is the main and

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38. R.S. Ch. 69, § 3 (1903).

39. *Shaw v. Small*, 124 Me. at 36, 125 A. at 498.

40. MASON, *supra* note 24, at 100–05; ASHBY, *supra* note 32, at 79–83; see TAYLOR, *supra* note 24, at 35 (“The acknowledgement of child welfare as a state responsibility, although relatively new, now colors the concept of natural rights of parents in their children.”).

41. TAYLOR, *supra* note 24, at 167–70.

42. *Id.* at 170.

43. *Peacock v. Peacock*, 61 Me. 211, 214 (1871).

44. *Id.* The Law Court referenced the statutory provision at R.S. ch. 67, § 3 (1883) granting a mother oversight of the “care of the person and education of the minor” where the child’s father has died, and the court clearly regarded this as conferring a right that could not be removed without affording due process of law. *Id.*

45. *Legault v. Levesque*, 150 Me. 192, 195, 107 A.2d 493, 495 (1954) (“Sec. 3, Chapter 145, R.S.1944 . . . declares ‘the care of the person and the education of the minor shall be jointly with the father and mother, if competent, or if one has deceased, with the survivor, if competent,’ and the Justice hearing the case must, in addition, do what ‘he deems . . . for the welfare of the [child].’”); see also TAYLOR, *supra* note 24, at 33–35 (discussing early 20<sup>th</sup> century courts’ approach to claims for custody or guardianship by nonparents where “either or both parents have, through necessity, convenience, or indifference, left their children in the care of another and wish to regain them after a period of time.”).

controlling consideration.”<sup>46</sup> In the 1905 opinion *In re Dunlap*, the Maine Supreme Judicial Court affirmed the appointment of a child’s grandfather as guardian “with the care and custody of his person.”<sup>47</sup> Pursuant to the procedure at that time, the appeal before the Law Court was on “exceptions” from the Supreme Court of Probate, which held a hearing on the appeal from the Probate Court. The Law Court concluded that the Supreme Court of Probate justice’s factual findings supporting such appointment—namely that “the welfare of the minor demanded his removal from the influences surrounding him while in the custody of his parents, and that they were incompetent to discharge their duty in that regard”—were not subject to review on appeal and there was no basis to revisit the appointment.<sup>48</sup>

The probate courts’ jurisdiction regarding children expanded to include adoptions beginning in 1855, when Maine law first established legal adoption.<sup>49</sup> That legal process was also largely limited to orphans at first. At the time of the original enactment, adoptions could occur only if a child’s parents were deceased, “hopelessly insane or intemperate” (in which case the court could proceed as if they were dead), or consented to the adoption.<sup>50</sup> The standards for adoption changed gradually to expand the circumstances under which a court could grant an adoption in the absence of consent by a living parent. In 1867, the provision regarding adoption of a minor eliminated the requirement for consent by a parent who had not been awarded custody of the minor in a divorce or if the judge determined that such non-consenting parent is “unfit to have custody of the child.”<sup>51</sup> However, there are no reported court opinions applying this language to provide insight into how frequently and in what contexts courts used it.<sup>52</sup>

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46. *In re Dunlap*, 100 Me. 397, 397, 61 A. 704, 704 (1905).

47. *Id.*

48. *Id.*

49. P.L. 1855, Ch. 189, § 1. Massachusetts had adopted its first adoption statute only five years earlier, which served as a leading model for other states. PETER CONN, *ADOPTION IN AMERICA: A BRIEF SOCIAL AND CULTURAL HISTORY* 73–74 (2013). Until that time, most adoptions in the United States were either informal or made through private laws. *See id.*; *see also* MASON, *supra* note 24, at 73; Christine Adamec, *Introduction: A Brief History of Adoption*, in *THE ENCYCLOPEDIA OF ADOPTION* xxi, xxiv (3d ed. 2007).

50. P.L. 1855, ch. 189, §§ 2, 8. The consent of the minor was also required if he or she were over the age of 14. *Id.* § 3. If a minor did not have living parents to give consent, then a probate court could appoint someone to act as the minor’s “next friend” for the purpose of granting or withholding consent. *Id.* § 2. *See also* MASON, *supra* note 24, at 74.

51. *See* P.L. 1867, ch. 87 § 1 (codified at R.S. ch. 67, § 29 (1871)). The affected statute also indicated that consent was not required from a parent who had abandoned and failed to support the child. *See* R.S. ch. 67, § 29 (1871). Professor Mary Ann Mason has described the distinction, at least as developed during the rise of child welfare laws during the Progressive era, between the concepts of “parental incompetence”—“not properly caring for the everyday needs of a child”—and “parental unfitness”—“usually immoral behavior on the part of the mother or drunkenness on the part of either mother or father.” *See* MASON, *supra* note 24, at 104. Today, Maine case law (but not statutory law) uses the term “unfitness” to encompass a range of concerns about a parent’s ability to care for a child. *See, e.g., In re Guardianship of Jewel M.*, 2010 ME 80 (*Jewel II*), ¶ 11, 2 A.3d 301; *In re Cody T.*, 2009 ME 95, ¶ 25, 979 A.2d 81.

52. *Cf. Blue v. Boisvert*, 143 Me. 173, 181, 57 A.2d 498, 502 (1948) (vacating contested adoption on basis that mother’s consent was required because she had been awarded custody in divorce proceeding notwithstanding finding that she was unfit and had abandoned child); *Taber v. Douglass*, 101

A related but distinct form of jurisdiction concerning children reserved for probate courts is the authority to change a minor's name. From its initial enactment, Maine's adoption law permitted petitioners to seek to change the name of a child as part of that proceeding.<sup>53</sup> In 1876, the Maine Legislature authorized probate courts to approve petitions to change the name of a minor outside of the adoption context, so long as the person "having the legal custody of such minor" had filed the petition.<sup>54</sup> The scope and language of the name-change statute with respect to minors has changed little since that law's enactment.<sup>55</sup>

*B. The Maine Legislature Expands Probate Courts' Role over Parental Rights Matters*

Beginning with the enactment of the MPC in 1979, the Maine Legislature passed a series of laws that collectively had the effect of substantially expanding the role of probate courts in adjudicating questions directly implicating parental rights. This expansion is perhaps most significant with respect to minor guardianships. As the previous section explained, Maine guardianship law served primarily as a mechanism to ensure that a minor's inherited property was appropriately managed until she achieved majority. During the past thirty-five years, the Maine Legislature transformed this mechanism into a route for a nonparent to obtain parental rights of another person's child, without formal involvement of the state child welfare system. It achieved this expansion through a series of changes to the standards for appointment of a guardian where one or both of a child's parents are still alive. At the same time, the Maine Legislature expanded probate courts' jurisdiction to terminate a parent's rights in the context of an adoption proceeding, thus conveying power to these courts to substantially and even permanently transform the legal status of parent-child relationships.

The Maine Probate Law Revision Commission (MPLRC) noted in its 1978 report regarding the proposed adoption of the Uniform Probate Code (UPC) in Maine that, at that time, the Maine statute granting authority to probate courts to appoint guardians for minors provided "[n]o statutory criteria . . . for determining when a guardian should be appointed for a minor."<sup>56</sup> Rather, probate courts assumed they had discretion to appoint guardians "under the very general criteria of the welfare of the child."<sup>57</sup> Thus, the MPC introduced into Maine law the first statutory criteria for appointment of guardians and thereby limited the discretion of probate courts in making such appointments.

The guardianship provisions of the MPC, when initially enacted in 1980, permitted appointment of guardians for minors outside of the testamentary

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Me. 363, 370, 64 A. 653, 656 (1906) (vacating contested adoption based in part on fact that that probate court never considered fitness of nonconsenting mother as required by statute).

53. See P.L. 1855, ch. 189, § 9.

54. See P.L. 1876, ch. 59, § 1. The Legislature had enacted the basic name change statute three years earlier but that original law did not make explicit reference to name changes for minors. See P.L. 1873, ch. 97, § 1.

55. See *infra* Part III.A.3 (summarizing current change of name law).

56. See MPLRC 1978 REPORT, *supra* note 29, at 504.

57. *Id.* (citing *In re Dunlap*, 100 Me. 397, 61 A. 704 (1905)). By contrast, Maine statutory law specified the criteria for appointment of a guardian of an adult. *Id.* at 505.

appointment context only “if all parental rights of custody have been terminated or suspended by circumstances or prior court order.”<sup>58</sup> This standard, which the Maine Legislature derived from the UPC,<sup>59</sup> was designed to encourage testamentary appointments because any such nomination took precedence over other potential guardians.<sup>60</sup> It also recognized that a child’s living parents were that child’s natural guardians and “the proper persons to be responsible for an unemancipated minor” unless their rights had been terminated by a prior court action or other event.<sup>61</sup>

The MPC changed existing Maine law by having a guardianship order grant a guardian full care of the minor, including her “person and education,” as the default; previously, the parents retained such rights unless a court specifically awarded some or all such authority to the guardian.<sup>62</sup> In drafting those provisions, the MPLRC assumed that courts could allow parents to retain some rights through provisions authorizing “limited” guardianships or permitting courts to order “any other disposition of the matter that will best serve the interest of the minor.”<sup>63</sup> In addition, the MPC created a distinction between a “guardian,” which was a person who stepped in the role of legal custodian with some or all of the powers of a parent (including overseeing the child’s education and health and providing a home), and a “conservator,” which was solely responsible for overseeing the management of a minor’s property, the role that had been assigned to pre-MPC guardians.<sup>64</sup>

The effect of the MPC standard for appointment of a guardian where a parent retained parental rights was to preclude appointment even where a parent consented to a co-guardianship with another person.<sup>65</sup> In cases where a parent contested the appointment of a guardian, the appointment language sometimes required litigation of the question of whether a parent’s rights had been “suspended by circumstances.”<sup>66</sup> Courts interpreted such language as allowing appointment only on a finding that the parent had abandoned the child or was “unfit,” using as guidance the standard for termination of parental rights (“TPR”) under the child protection statute in Title 22.<sup>67</sup>

The Maine Legislature revised the guardianship appointment provision in 1995

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58. See P.L. 1979, ch. 540, § 1 (codified as 18-A M.R.S.A. § 5-204 (1981)); *In re Krystal S.*, 584 A.2d 672, 675 (Me. 1991).

59. See MPLRC 1978 REPORT, *supra* note 29, at 520–21.

60. *Id.*

61. *Id.* at 521–22.

62. *Id.* at 522.

63. *Id.* at 522–23 (quoting UNIF. PROBATE CODE § 5-207 (b) (1975)).

64. *Id.* at 522 n.2, 555 (discussing enactment of UPC §§ 5-401 to -432). See also *supra* text accompanying note 29.

65. See, e.g., *In re James John L.*, 601 A.2d 630, 631 (Me. 1992) (affirming Probate Court’s refusal to appoint child’s mother’s boyfriend as limited guardian for purposes of obtaining medical insurance where mother’s parental rights had not been terminated or suspended).

66. See 18-A M.R.S.A. § 5-204 (1981).

67. See, e.g., *Conservatorship of Justin R.*, 662 A.2d 232, 234 (Me. 1995) (holding that mother’s agreement to give primary residence to father in divorce agreement did not amount to “abandonment” of the children and suspension of her parental rights under 22 M.R.S.A. § 4002(1-A) (1992)); see also *Guardianship of Zachary Z.*, 677 A.2d 550, 553 (Me. 1996); *In re Krystal S.*, 584 A.2d 672, 674 (Me. 1991); MITCHELL & HUNT, *supra* note 29, § 5.01.5 at 5-22.

in direct response to the Law Court opinions holding that “suspended by circumstances” had a fairly narrow reach;<sup>68</sup> the amendment expressly permitted the appointment of a guardian even where a parent unquestionably still held all rights.<sup>69</sup> Such appointment could occur if the parent gives consent and the appointment was in the child’s best interests.<sup>70</sup> A parent could, for example, consent to a co-guardianship with her partner to provide that partner with some form of parental rights, especially in instances where adoption was not possible under Maine law.<sup>71</sup> Parties could also use a consented-to guardianship to establish a child’s legal residence if she is living apart from her parents, such as for purposes of school attendance.<sup>72</sup>

The 1995 amendment also provided a specific basis to appoint a guardian over the objection of a parent with intact parental rights by authorizing a court to appoint a guardian where:

[T]he court finds by clear and convincing evidence that the person or persons have failed to respond to proper notice or *a living situation has been created that is at least temporarily intolerable for the child* even though the living situation does not rise to the level of jeopardy required for the final termination of parental rights, and that the proposed guardian will provide a living situation that is in the best interest of the child.<sup>73</sup>

This new standard clearly established minor guardianship as a legal route for a third party to acquire parental rights of a child where the biological parents fell short of providing adequate care, even if the situation did not rise to a level requiring intervention by the State’s child welfare system.

With these changes to the standard for appointment, the number of guardianship petitions increased substantially. One probate judge noted a 300% increase in minor guardianship filings within the first eight years after the 1995 amendments.<sup>74</sup> Moreover, the character of many of these cases changed to focus

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68. P.L. 1995, ch. 623, § 1; Testimony of Rep. Elizabeth Mitchell, L.D. 1765, 117th Legis. 2d Reg. Session.

69. P.L. 1995, ch. 623, § 1 (codified as 18-A M.R.S.A. § 5-204(b)(1995)).

70. *Id.*

71. *See, e.g., In re Guardianship of I.H.*, 2003 ME 130, 3, 834 A.2d 922 (describing petitioners for co-guardianship of a child as “the natural mother of I.H., age one, and the mother’s domestic partner . . . who state that they have a committed relationship as lesbian partners.”). Prior to *In re Adoption of M.A.*, 2007 ME 123, 930 A.2d 1088, many Maine probate courts interpreted Maine law to preclude two unmarried people from petitioning jointly to adopt a child, *see id.* at ¶ 5, and therefore such couples, particularly same-sex couples who, at the time, were also prohibited from marrying, sought these co-guardianships.

72. *See MITCHELL & HUNT, supra note 29, § 5.01.5 at 5-21* (“Courts should be wary, however, of being made parties to sham guardianships by consent. There should be a real change of residence and a real change of custodial authority to support a guardianship by consent.”). Such measures are often not necessary if the two school districts reach an agreement regarding a child’s attendance at a school outside of her local district. 20-A M.R.S.A. § 5205(6)(A) (Supp. 2014).

73. P.L. 1995, ch. 623, § 1 (emphasis added) (codified as 18-A M.R.S.A. § 5-204(c) (1995)).

74. *See Hon. Robert M.A. Nadeau, Maine’s Probate Courts: The Other Family Law*, 18 ME. B.J. 32, 36 (2003).

increasingly on child welfare concerns.<sup>75</sup> The probate judge observed that many petitioners were family members (grandparents, aunts, etc.) who were filing at the insistence or encouragement of the Maine Department of Health and Human Services (DHHS), whose child protection caseworkers often appeared at guardianship hearings.<sup>76</sup>

A further expansion of the guardianship appointment standard by the Legislature in 2005 permitted appointment of a “de facto” guardian where the petitioner could prove by a preponderance of the evidence that there has been a “lack of consistent participation” by the non-consenting parent or legal guardian.<sup>77</sup> This is a distinct concept from “de facto” parent, a status recognized by the Maine Supreme Judicial Court but reserved for a fairly narrow set of circumstances.<sup>78</sup> Thus, through these amendments during the twenty-five years after the enactment of the MPC, the Maine Legislature authorized probate courts to appoint guardians solely to provide care of custody of children in a wide range of settings, regardless of the fact that a child’s parents were alive and had full parental rights at the time of the appointment.

Shortly after the enactment of the MPC, the Legislature also expanded the kinds of matters included within the probate courts’ jurisdiction of adoption petitions. In 1981, Maine’s adoption law was amended to allow probate courts to terminate the parental rights of a non-consenting parent on petition of the person seeking the adoption.<sup>79</sup> The “Emergency Preamble” to that enactment states that, under the then-current law, it was “difficult, if not impossible, to process an adoption without the written consent of both parents.”<sup>80</sup> At that time, judicial termination of parental rights could only occur in District Court, “requiring two separate court actions.”<sup>81</sup> The Legislature also noted that the adoption consent provisions for putative fathers lacked certain “due process requirements and equal protection requirements.”<sup>82</sup>

To address those deficiencies, the emergency law provided that a petition for termination of parental rights could be brought in a probate court as part of an adoption petition and that the termination standards of the child protection statute

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75. See e.g., *In re Amberley D.*, 2001 ME 87, ¶¶ 2–6, 775 A.2d 1158 (describing circumstances leading to guardianship petition including child’s unstable housing, inconsistent school attendance, sexual abuse, and mother’s substance abuse).

76. See Nadeau, *supra* note 74, at 36.

77. See *In re Guardianship of Kean R. IV*, 2010 ME 84, ¶¶ 8-10, 2 A.3d 340 (reversing appointment of guardian pursuant to § 5-204(d) when the grounds for such appointment were neither pleaded nor litigated). However, the Law Court recently held that the lower standard of proof set forth in § 5-204(d) is unconstitutional. *In re Guardianship of Chamberlain*, 2015 ME 76, ¶¶ 32-35, 118 A.3d 229.

78. *Pitts v. Moore*, 2014 ME 59, ¶ 27, 90 A.3d 1169 (internal citations omitted) (holding that an individual seeking parental rights as a de facto parent must show that (1) he or she has undertaken a “permanent, unequivocal, committed, and responsible parental role in the child’s life,” and (2) that there are exceptional circumstances sufficient to allow the court to interfere with the legal or adoptive parent’s rights). This definition has been superseded by the enactment of the Maine Parentage Act. P.L. 2015, ch. 296, § A-1 (codified as 19-A M.R.S.A. § 1891 (2012)).

79. P.L. 1981, ch. 369 (emergency, effective August 3, 1981) (codified at 19 M.R.S.A. § 533-A).

80. *Id.*

81. *Id.*

82. *Id.*

would apply to such proceedings, with some minor exceptions.<sup>83</sup> It also provided a basis for finding that a “natural” father’s consent was not required if it could be proven that he was unwilling or unable to protect the child from jeopardy or had abandoned or refused to take responsibility for the child.<sup>84</sup> These changes shifted the authority of the probate court from determining whether a parent’s consent to the adoption was required under the statute to severing a parent’s rights through its own termination proceeding thereby eliminating the need for the parent’s consent.<sup>85</sup>

The enactment of the MPC and the subsequent amendments discussed above reflected national trends in the evolution of minor guardianship law as part of the overall development of child protection and child welfare laws, as well as a broader transformation of the role of courts in adjudicating questions of children’s interests, including who was responsible for provided their care. At the turn of the twentieth century, public agencies and departments were sometimes appointed as guardians of children in need of “proper care and supervision” through so-called public guardianships, which did not take place in probate courts.<sup>86</sup> In 1934, Hasseltine B. Taylor, a graduate student in social work, published her Ph.D. thesis, *Law of Guardian and Ward*, in which she advocated the extension of the role of “private guardian” to address children without property as a component of child welfare laws.<sup>87</sup> She argued that any child who was without adequate care due to a parent’s death, absence, abuse, or neglect should be able to receive the protection of a legal guardianship.<sup>88</sup>

A 1964 study commissioned by the U.S. Children’s Bureau proposed that states replace the informal system of “passing along children to the informal custody of relatives, friends, and neighbors” with a regulated system of judicially-appointed guardians.<sup>89</sup> Two years later, Taylor published a follow-up essay in

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83. *Id.* at § 8 (enacting 19 M.R.S.A. § 533-A). In the same enactment, the Legislature expanded the bases to terminate a parent’s rights from a finding that the parent was “unwilling or unable to protect the child from jeopardy” to alternatively find that the parent “has willfully abandoned the child or has refused to take responsibility for the child.” *Id.* at § 16. Such a standard could have particular applicability in the adoption context where a long-term caregiver for a child seeks to establish a legal relationship with a child.

84. *Id.* at § 6 (enacting 19 M.R.S.A. § 532-C). Although the adoption laws were not initially made part of the MPC in 1979, they have always been under the exclusive jurisdiction of the probate courts. The Maine Adoption Act was moved from 19 M.R.S.A. § 1101 *et seq.* (where it was located with other family and parentage laws) to Article IX of the MPC in 1995. P.L. 1995, ch. 694, § C-7.

85. As a practical matter, a court’s determination that a parent’s consent is not required, thereby permitting the adoption to go forward, has the legal effect of terminating the parent’s rights since the adoption itself divests such rights. *See, e.g.*, R.S. ch. 67, § 35 (1883); *New England Trust Co. v. Sanger*, 151 Me. 295, 303, 118 A.2d 760, 764 (1955) (citing R.S. ch. 158, § 40 (1954)); GEORGE A. WILSON, MAINE PROBATE LAW 444 (1896). However, there is a distinction between the two inquiries, and the 1981 amendment placed questions of parental fitness and rights more squarely before probate courts.

86. Mark F. Testa & Jennifer Miller, *Evolution of Private Guardianship as Child Welfare Resource*, in CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICE, POLICIES, AND PROGRAMS 406 (Gerald Mallon & Peg McCart Hess eds., 2005).

87. TAYLOR, *supra* note 24, at 164–71. *See also* Testa & Miller, *supra* note 86, at 406.

88. *See* TAYLOR, *supra* note 24, at 168–69.

89. Testa & Miller, *supra* note 86, at 406–407 (citing Irving Weissman, *Guardianship: Every Child’s Right*, in 355 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 134–39 (1964)).



which she refined and explained her model for minor guardianship.<sup>90</sup> She noted that there were a great number of children who were “in need of parents” but, for one reason or another, were not likely to be adopted,<sup>91</sup> and she explained the advantages of achieving permanency with court-appointed guardians for such children.<sup>92</sup>

In the 1970s and 1980s, the child welfare practices in courts usually resulted in either preservation of children’s relationships with their biological parents (i.e. “natural guardians”) or adoption; private guardianship was not yet regarded as a child welfare tool.<sup>93</sup> However, by the late 1980s and 1990s, state child welfare agencies, with overwhelming numbers of children in long-term foster care after unsuccessful attempts at reunification and relatively few children being adopted, began to look at “kinship” placement—children in state custody residing with extended family—as an alternative to traditional foster care.<sup>94</sup> At the same time, commentators urged consideration of private guardianships as an alternative to foster care, adoption, or even formal state custody, and as a way to preserve some familial ties while also ensuring care and stability for the child.<sup>95</sup> While many of these discussions were largely about children who were formally in the child welfare system, they no doubt shaped the perception of guardianship by extended family members as a resource for children in need due to their parents’ limited ability to provide care, as distinguished from the traditional “probate guardianship.”<sup>96</sup>

During the latter third of the 20<sup>th</sup> century, the notion of legal intervention in “child custody” became commonplace.<sup>97</sup> Increasing divorce rates, a greater role of the state as “superparent,” and specifically in removing children from their parents’ homes, expanded courts’ role beyond their prior focus on “orphans or children of

90. Hasseltine B. Taylor, *Guardianship or “Permanent Placement of Children,”* in *THE LAW OF THE POOR* 417 (Jacobus tenBroek ed. 1966).

91. *Id.* at 417–18. For example, some living parents may be unable to provide care for their children but may nonetheless be unwilling to consent to adoption. Also, the number of children in foster care far exceeded the number of families seeking to adopt children. *Id.*

92. *Id.* at 419–21. A person may be more willing to be a guardian than a foster parent since the former position provides the person “the dignity in law as well as fact [the status of being] a substitute parent” without having to answer to a child welfare agency. *Id.* at 419. At the same time, the person would not need to make the same commitment to a child, such as providing financial support, as required by an adoption. *Id.* at 420.

93. Testa & Miller, *supra* note 86, at 407–408.

94. *Id.* at 410–11; Mark F. Testa, *When Children Cannot Return Home: Adoption and Guardianship*, 14 *THE FUTURE OF CHILDREN: CHILDREN, FAMILIES, AND FOSTER CARE* 115, 116 (2004).

95. Testa & Miller, *supra* note 86, at 412–13; Testa, *supra* note 86, at 120–21; Carol W. Williams, *Expanding the Options in the Quest for Permanence*, in *CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE* 266, 276–82 (Joyce Everett, Bogart Leshore, & Sandra Stukes Chipungu, Eds. 1992) (noting that “guardianship complements the social and cultural reality of many African American children”); Bogart R. Leashore, *Demystifying Legal Guardianship: An Unexplored Option For Dependent Children*, 23 *J. FAM. L.* 391, 393–97 (1985). In the 1990s, a number of states adopted subsidized guardianship programs; Maine was not among them. Testa & Miller, *supra* note 86, at 414–15; Testa, *supra* note 94, at 121.

96. Leashore, *supra* note 95, at 393 (“Typically, probate guardianship over a child occurs if a child’s parents die or become incapacitated and someone assumes legal control of the child.”).

97. MASON, *supra* note 24, at 121–22.

parents who could not care for them.”<sup>98</sup> An increasing awareness of and concern about child abuse swept the United States in the 1970s,<sup>99</sup> followed by both an explosion of foster care placements and intense controversies regarding the appropriate legal responses to abuse in the 1980s and 1990s.<sup>100</sup> During this same period, a growing preoccupation with the legal concepts of “parent” and “custody” raised new questions regarding the status of those raising children who were not their biological offspring.<sup>101</sup> All of these developments likely played a role in the expanded use of guardianships and adoptions to remove children from allegedly unfit parents in the absence of action by the state.

### *C. Probate Courts’ Concurrent Jurisdiction, Past and Present*

While the primary focus of this Article is the probate courts’ adjudication of parental rights through guardianship and adoption proceedings, such courts have at times had jurisdiction over other matters pertaining to parental rights, usually, although not always, concurrently with other types of courts in Maine. Their role in these other kinds of parental rights matters, however, has been limited and has narrowed over the years. Since 1895, probate courts have had jurisdiction, concurrent with other courts, to address questions of care and support of children whose parents were living apart.<sup>102</sup> In 1905, the Legislature enacted a law authorizing courts to order a man to financially support his wife and children.<sup>103</sup> A separate provision enacted in 1903 permitted either parent to petition for an order concerning the “care or custody” of their children.<sup>104</sup>

In 1915, the Legislature granted probate courts exclusive jurisdiction over judicial separations.<sup>105</sup> That statute primarily concerned a spouse’s property and

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98. *Id.* at 121, 149–50. See *Santosky v Kramer*, 455 U.S. 745 (1982) (addressing the constitutional rights of biological parents implicated in a termination of parental rights proceeding).

99. ASHBY, *supra* note 32, at 135–37, 146–47.

100. *Id.* at 150–78. These trends reached Maine. According to a 1985 report of a working group studying the Maine child protection system, the number of child protective services investigations of alleged child abuse and neglect in 1983 represented a 13.4% increase over the number from the year before, and the report anticipated that there would be a further 23% increase in investigations in 1984. GOVERNOR’S WORKING GROUP ON CHILD ABUSE AND NEGLECT LEGAL PROCEEDINGS, PROTECTING OUR CHILDREN: NOT WITHOUT CHANGES IN THE LEGAL SYSTEM iii–iv (1985). There was a 32% increase from 1982 to 1983 of substantiated child sexual abuse cases. *Id.* at iv. Although the report provided a comprehensive survey of civil and criminal proceedings involving child abuse and neglect, and made extensive recommendations for reforms at all levels, there is no mention of a role for guardianships or the probate courts.

101. MASON, *supra* note 24, at 122, 133–35, 168–69. See *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down Washington State’s “Grandparents Rights” law as an unconstitutional interference with parents’ constitutionally-protected rights).

102. P.L. 1895, ch. 43, § 2 (codified as R.S. ch. 61, § 40 (1903)). This provision was described in a treatise in the guardianship section, and it appears that the statute was applied to provide that one parent or the other could exercise the full rights of a guardian when the parents were living apart, since without such order both parents would be the “natural guardians” of their children. WILSON, *supra* note 85, at 97–98.

103. P.L. 1905, ch. 123 § 6 (codified at R.S. ch. 66, § 9 (1916)).

104. P.L. 1895, ch. 43 § 2 (codified as R.S. ch. 61, § 40 (1903)).

105. P.L. 1915, ch. 328, § 1 (codified as R.S. ch. 66, §§10–13 (1916)). The Supreme Judicial Court, and eventually the Superior Court, P.L. 1929, ch. 141 § 7 (1930), had exclusive jurisdiction over divorces. R.S. ch. 65, § 2 (1916).

inheritance rights when abandoned by the other spouse,<sup>106</sup> but it did grant probate courts the authority to issue orders pertaining to the “care, custody, and maintenance” of a couple’s minor children.<sup>107</sup> When the Legislature established the District Court in 1961, it granted that court concurrent jurisdiction with the Superior Court over divorces and annulments and with the Probate Court in actions for separation.<sup>108</sup> With the enactment of the MPC, jurisdiction over actions for separation was transferred from the probate courts to the Superior Court, concurrent with the District Court.<sup>109</sup> By 2001, the Superior Court’s remaining jurisdiction over family law matters had been eliminated by the Legislature, leaving the District Court as the true “family court” in the state court system.<sup>110</sup>

The concurrent jurisdiction set forth in the early laws granting state and county courts authority to address custody and support of children whose parents live apart continues to this day.<sup>111</sup> However, such actions are rarely if ever initiated in probate courts today,<sup>112</sup> and this jurisdiction is likely exercised only when a parental rights determination may be necessary or appropriate in the context of a guardianship proceeding.<sup>113</sup> Indeed, the language of these provisions is somewhat in conflict with the statute describing the District Court’s original jurisdiction over a range of family matters as being “not concurrent with the Superior Court” and silent on whether it is concurrent with any other court.<sup>114</sup>

For a period of time,<sup>115</sup> the probate and municipal (later state) courts had

106. R.S. ch. 66, §§ 10–12 (1916). These actions for separation were quite different from today’s “legal separation” akin to divorce. They were gender-based and required a showing of good cause as a prerequisite to the relief sought. *See, e.g.,* *Chivvis v. Chivvis*, 158 Me. 354, 358, 184 A.2d 773, 775 (1962). A man might seek such an order so that he could dispose of certain property as if he were unmarried, *id.* at 357, 184 A.2d at 774, or to limit other “restraint upon his liberty.” *Lausier v. Lausier*, 123 Me. 530, 530, 124 A. 582, 584 (1924).

107. P.L. 1915, ch. 328, § 1 (codified at R.S. ch. 66, § 10 (1916)); *see also* Appeal of D’Aoust, 146 Me. 443, 443, 82 A.2d 409, 409 (1951) (addressing parental rights matter decided in Probate Court).

108. WHITTIER, *supra* note 17, at 29-30; P.L. 1961, ch. 386, §§ 1, 2.

109. P.L. 1979, ch. 540, § 37 (codified at 19 M.R.S.A. § 588 (1979), *repealed by* P.L. 1995, ch. 694, § B-1 (effective Oct. 1, 1997)). The jurisdiction language was subsequently modified, P.L. 1997, ch. 224, §§ 1–2, and eventually the District Court was granted exclusive jurisdiction of legal separation actions as part of its overall jurisdiction of family law matters. P.L. 1999 ch. 731, § ZZZ-4 (codified at 4 M.R.S.A. § 152(11) (Supp. 2014)).

110. *See* P.L. 1999, ch. 731, §§ ZZZ-3, ZZZ-4, ZZZ-5 (effective Jan. 1, 2001) (revising jurisdiction of District and Superior Court with respect to divorce, separation, annulment, and support to place such matters in exclusive jurisdiction of District Court).

111. 19-A M.R.S.A. §§ 1652, 1654 (2012).

112. Telephone Interview with Amy Faircloth, Esq., Pelletier & Faircloth, Bangor, ME (Aug. 4, 2015). A survey of all Maine Probate Court filings in 2013 did not reveal any petitions for such determinations.

113. *See* Maine Family Law Advisory Commission, Report to the Maine Legislature Joint Standing Committee on Judiciary on L.D. 376, “An Act to Remove Domestic Relations Cases from the Probate Court,” 124th Legislature (2009). However, I have heard anecdotally that, notwithstanding this statutory language, probate judges decline to adjudicate determinations of parentage and parental rights in the context of a guardianship matter and instead refer the parties to the District Court for such determinations.

114. *Compare* 4 M.R.S.A. §§ 152(11)–(12) (Supp. 2014), *with* 4 M.R.S.A. § 152(8) (Supp. 2014) (“Original jurisdiction, concurrent with that of the Probate Court, to grant equitable relief in proceedings” regarding consent for a minor’s abortion).

115. *See* R.S. ch. 64, § 53 (1916).

concurrent jurisdiction over initial protective custody petitions when the State sought authority to remove a child from his or her parents in cases of abuse or neglect.<sup>116</sup> When the comprehensive “Child and Family Services and Child Protection Act” was enacted in 1980, it granted the district court jurisdiction over all child protection petitions, with concurrent jurisdiction in the probate courts to hear initial petitions and discretion to transfer a child protection case filed in that court to the District Court on its own motion or that of a party.<sup>117</sup> In 1989, the Legislature further amended the statute to its present language, which permits probate courts (as well as Superior Courts) to hear only petitions for preliminary protection orders alleging a “serious risk of immediate harm to the child”<sup>118</sup> and requires these other courts to immediately transfer the matter to the District Court after issuing such order.<sup>119</sup>

When the Legislature established the Family Law Advisory Commission in 1995, it included a “Current Probate Judge” among the membership, a further recognition that Probate Judges oversee matters that are properly characterized as “family law.”<sup>120</sup> However, as described above, in nearly all respects, such role is one that probate judges today carry out in isolation from each other and from state courts. Even where the Legislature expanded the jurisdiction of either the District or Probate Courts regarding certain parental rights matters, such laws have

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116. Maine Probate Law Revisions Commission, Report to the Legislature and Recommendations Concerning Probate Court Structure 5 (Feb. 1980); 25 M.R.S.A. § 249 (1954) (municipal and probate courts); P.L. 1963, ch. 171, § 1 (codified as 22 M.R.S.A. § 3792 (1964)), *repealed by* P.L. 1979, ch. 733, § 15 (effective July 3, 1980) (probate and district courts).

117. P.L. 1979, ch. 733, § 18 (codified as 22 M.R.S.A. § 4031(1)(B) (2004)). The original bill granted far more limited jurisdiction to the probate courts. The language would have permitted a probate court to hear petitions for preliminary protection orders only if a District Court judge was not available and then it would have to transfer the case to the District Court as soon as possible. L.D. 1906 § 18 (109th Legis. 1980). It was amended in committee to “continue[] the present jurisdiction of the Probate Courts in child protection proceedings.” Comm. Amend. A to L.D. 1906 § 18 (109th Legis. 2009). Given the absence of reported opinions in child protection cases on appeal from probate courts, it appears that such courts’ role has been generally limited to petitions for initial protection orders.

118. 22 M.R.S.A. § 4034(1), (2) (2004) (providing that a petitioner in a child protection action may also seek a preliminary protection order as part of or separately from a child protection petition brought under section 4032).

119. P.L. 1989, ch. 270, § 11 (codified at 22 M.R.S.A. § 4031(1)(B) (2004 & Supp. 2014)). The child protection statute now provides that, “as soon as action is taken by the Probate Court or the Superior Court, the matter shall be transferred to the District Court.” *Id.* Presumably, the concurrent jurisdiction in all Maine courts for the preliminary protection order remains to ensure that DHHS has a large pool of judges to contact for such emergency action when there is an “immediate risk of serious harm.” 22 M.R.S.A. § 4034(2) (2004).

120. P.L. 1995, ch. 694, Pt. B, § 352 (codified as 19-A M.R.S.A. § 352(1)(C) (2012)). There are a few other matters reserved to the jurisdiction of probate judges which may be characterized as relating to “family law.” They are given the authority to review a “caution” filed with the probate court by a petitioner who “believes that parties are about to contract marriage when either of them can not lawfully do so.” 19-A M.R.S.A. § 653(1) (2012). If such a caution is filed, the town clerk may not issue a license until the county probate judge has (after giving the parties notice and opportunity to be heard) “approved the marriage.” *Id.* §§ 1–2. Probate judges may also grant consent to the marriage of a minor in the absence of the consent of the minor’s parents, and the probate judge’s consent is required for any marriage by a person under the age of 16. 19-A M.R.S.A. §§ 652(7)–(8) (2012 & Supp. 2014). The probate and District Courts have concurrent jurisdiction to authorize a minor’s abortion. 22 M.R.S.A. § 1597-A(6) (2004).

maintained a sharp separation between the courts' realms.

For example, in recent years the Legislature has expanded the jurisdiction of the District Court to include some guardianships and adoptions, but such matters are distinct from those heard in the probate courts. In 2005, the Legislature granted the District Court authority to appoint a "Permanency Guardian" for a child in a child protection matter, who has the same powers and duties as a guardian appointed pursuant to the MPC.<sup>121</sup> This is the only context in which the District Court may appoint a guardian, and, because a probate court has no jurisdiction over child protection cases, such appointments may only occur in the District Court.<sup>122</sup> The child protection statute, as amended by the Legislature in 2011, also grants the District Court the jurisdiction to grant a petition for adoption of the child by the permanency guardian, a narrow exception to the probate courts' exclusive jurisdiction over adoptions, including those resulting from the child protection process.<sup>123</sup>

Probate courts and the District Court may both consider a petition for termination of parental rights, but they have exclusive realms in these matters as well. The District Court may consider such a petition if brought as part of a child protection matter,<sup>124</sup> whereas probate courts may only adjudicate a petition in a case where there is no pending child protection proceeding and where the petitioner has already brought a petition to adopt the child.<sup>125</sup>

This survey of the allocation of jurisdiction reveals that, while probate courts today adjudicate a wide range of parental rights matters, they do so wholly apart from the District Court with essentially no overlapping jurisdiction. In 1997, the Maine Legislature enacted the Family Division of the Maine Judicial Branch with the mission of providing "a system of justice that is responsive to the needs of families and the support of their children."<sup>126</sup> Notwithstanding the probate courts' expanded jurisdiction—resulting from the MPC amendments—over matters involving central questions about the care and custody of children, the Legislature has left these courts outside of that "system of justice" with highly problematic results. As described below, the current, fragmented jurisdiction isolates several types of cases—including those where substantial rights and interests are at stake—with lasting implications for the children and families involved.

### III. PARENTAL RIGHTS MATTERS IN PROBATE COURTS TODAY

This Part examines more closely the types of parental rights determinations that Maine's probate courts adjudicate today within the context of guardianship,

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121. 22 M.R.S.A. §§ 4038-C(2), (5) (Supp. 2014).

122. 22 M.R.S.A. § 4031(1)(A) (2004 & Supp. 2014); 22 M.R.S.A. § 4038-C(5) (Supp. 2014).

123. 2011 P.L. ch. 402 § 15 (codified as 22 M.R.S.A. § 4038-E (Supp. 2014)). The probate courts' exclusive jurisdiction over all other adoptions is set forth at 18-A M.R.S.A. § 9-103(a)(1) (2012).

124. 22 M.R.S.A. § 4051 (2004); *cf. In re Austin T.*, 2006 ME 28, ¶¶ 9-10, A.2d 946 (holding that a child protection order is not a prerequisite to a petition to terminate a parent's rights under 22 M.R.S.A. § 4052 if custody of the child has already been removed from that parent pursuant to 19-A M.R.S.A. § 1653). However, such TPR (termination of parental rights) proceedings between parents are highly unusual in District Court.

125. 22 M.R.S.A. § 4051 (2004); 18-A M.R.S.A. § 9-204(a) (2012).

126. *See* 4 M.R.S.A. § 183 (Pamph. 2014).

adoption, and name change matters. For each kind of matter I review the key statutory provisions that govern court decisions that limit, suspend, or terminate parental rights, along with the leading Maine Supreme Judicial Court cases interpreting such provisions.

The MPC, by and large, still follows an “orphan model” with respect to minor guardianships and adoptions, meaning that its provisions reflect an assumption that the child at the center of the proceedings has no living parents with intact rights and that her foremost need is a permanent substitute parent. Although the grounds for appointment of guardians for minors have been expanded to allow appointments where a child still has living parents, the overall structure and other specific provisions do not reflect policy goals of preserving parent-child relationships and family reunification, which have no application to orphans. Further, the Law Court has taken, particularly in recent years, an active role in analyzing the MPC’s parental rights provisions and has occasionally gone to great lengths to interpret such laws (and to direct probate courts’ application of them) in ways that ensure that probate courts adequately protect parents’ statutory and constitutional rights.

After reviewing these substantive provisions, I explain the benefits, challenges, and other implications of adjudicating parental rights matters in the probate courts as they are structured and administered today.

#### *A. Parental Rights Determinations under the Maine Probate Code*

##### *1. Guardianship of Minors*

###### *a. The Statutory Bases for Appointment of a Guardian of a Minor*

Nearly all cases in which a person seeks guardianship of a minor are under the exclusive jurisdiction of the Probate Courts.<sup>127</sup> A petition for guardianship can arise in a wide range of contexts. Regardless of the circumstances of appointment, a guardian has all of the powers of a parent including primary residence and sole decision-making rights regarding the child’s education, medical care, and other matters, unless such authority is specifically limited.<sup>128</sup>

One category of guardianship cases comprises what the MPC refers to as “testamentary appointments,” where parents who had intact parental rights are deceased, and the Probate Court appoints an adult to serve as the legal guardian of the surviving minor children of such parents, usually according to the deceased

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127. 18-A M.R.S.A. § 5-102(a) (2012). As discussed in the prior Part, one narrow exception to this exclusive jurisdiction is appointment of Permanency Guardians in child protection matters. *See* 22 M.R.S.A. § 4038-C (Supp. 2014); *see In re Dustin C.*, 2008 ME 89, ¶ 12, 952 A.2d 993 (Levy, J., dissenting).

128. *See* 18-A M.R.S.A. § 5-209 (2012) (“A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of a minor and unemancipated child, except that a guardian is not legally obligated to provide from the guardian’s own funds for the ward and is not liable to 3rd persons by reason of the parental relationship for acts of the ward.”); *In re Guardianship of Chamberlain*, 2015 ME 76, ¶ 29, 118 A.3d 229 (“A guardian, once appointed, has almost all decision-making responsibilities for the child, which removes from the parent even the right to determine how or where the child should be raised.”).

parents' wishes as set forth in a valid will.<sup>129</sup> Such appointments usually grant unlimited rights to a guardian to enable him or her to address the child's full needs, and there is little reason to revisit the appointment itself or its scope since there are no living parents with legal standing to challenge the continuation of the appointment or the specific actions of a guardian. These are generally uncontested matters (unless competing petitions are filed) which can often be handled appropriately and efficiently through the informal proceedings of the Probate Court, as a part of overall management of a deceased parent's estate.<sup>130</sup>

Under current Maine law, there are four contexts in which a probate court may appoint a guardian for a minor where the parent did not make a testamentary nomination.<sup>131</sup> First, a parent may consent to such appointment, and the court may make the appointment if it finds that "the consent creates a condition that is in the best interest of the child."<sup>132</sup> Second, if a parent's parental rights have been terminated, no consent is necessary.<sup>133</sup> Approximately three-quarters of the guardianship petitions filed in Maine each year fall under one of these aforementioned categories and are therefore uncontested matters.<sup>134</sup>

The remaining guardianship cases involve disputes between the person (or persons, in the case of joint or multiple petitions) seeking appointment as a child's guardian and one or both of a child's parents regarding whether a guardian should be appointed. If a parent with intact parental rights objects to the guardianship petition, then the parties must litigate the question of the appointment to determine if the situation falls under one of the two remaining contexts for appointment. Specifically, a probate court must determine if the petitioner has met the standard for appointment in either section 5-204(c) ("at least temporarily intolerable" living situation)<sup>135</sup> or section 5-204(d) (a de facto guardian and a "demonstrated lack of consistent participation" by the nonconsenting parent).<sup>136</sup> Under section 5-204(c),

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129. 18-A M.R.S.A. § 5-202 (2012). This language permits the appointment of a guardian without a specific action by a probate judge. MPLRC 1978 REPORT, *supra* note 29, at 518.

130. Interview with Hon. Joseph Mazziotti, Cumberland County Probate Court, Portland, ME (August 20, 2015). Judge Mazziotti also noted that guardianship appointments necessitated by a minor's parents' deaths are fairly uncommon, comprising only a fraction of all minor guardianships.

131. While there is no specific provision for appointment of a guardian where both parents are deceased, but left no will or other testamentary document, such authority is implicit from the language of section 5-204. *See* 18-A M.R.S.A. § 5-204(b) (2012) (referring to requirement for consent of "each living parent whose parental rights and responsibilities have not been terminated.").

132. 18-A M.R.S.A. § 5-204(b) (2012). There are also contexts in which a parent asks another adult, often a family member, to exercise certain parental rights because the parent's current situation (military service, illness, etc.) limits his or her ability to parent the child. *Id.* § 5-104 (2012). In this context, the delegation of powers through a power of attorney does not suspend the parent's rights, can be revoked by the parent at any time, and lasts only up to twelve months (but may be renewed). *Id.*

133. 18-A M.R.S.A. § 5-204(a) (2012). This provision of the statute does not make reference to making a finding that the appointment would be in a child's best interest. However, § 5-207(b), which applies to all appointments made under § 5-204, requires the court to find that "the welfare and best interests of the minor will be served by the requested appointment" as a condition for such appointments. *See id.* § 5-207(b).

134. Data on file with author.

135. 18-A M.R.S.A. § 5-204(c) (2012).

136. 18-A M.R.S.A. § 5-204(d) (2012). The definition of "demonstrated lack of consistent participation" is set forth at § 5-101(1-C):

the petitioner bears the burden of proving parental unfitness by clear and convincing evidence,<sup>137</sup> and the petitioner must also prove that his or her appointment as guardian would be in the child's best interests.<sup>138</sup> The standard of proof set forth in section 5-204 is preponderance of the evidence.<sup>139</sup>

Imposing a guardianship over the objection of a parent implicates that parent's constitutional rights, and the Law Court has held, based upon U.S. Supreme Court precedent, that absent a showing of "unfitness," parents retain a fundamental liberty interest with respect to the care, custody, and control of their children.<sup>140</sup> For this reason, the Law Court has held that a probate court must apply a high standard for determining unfitness in the context of a contested guardianship. Specifically, in order to appoint a guardian pursuant to section 5-204(c), a court must find "the parent is currently unable to meet the child's needs and that inability will have an effect on the child's well-being that may be dramatic, and even traumatic, if the child lives with the parent."<sup>141</sup>

In the recent opinion *Guardianship of Chamberlain*, the Law Court noted that an order appointing a guardian is "more final than a jeopardy order in a child protection proceeding, and parental rights are transferred to the guardian almost in their entirety."<sup>142</sup> Accordingly, the risk of error in such cases triggers extensive due process protections for objecting parents.<sup>143</sup> For this reason, the Law Court held that, although section 5-204(d) provides that the burden of proof on a petition for appointment as a de facto guardian is only a preponderance of the evidence, applying this lower standard in a contested matter would be unconstitutional.<sup>144</sup> The Law Court explained: "[A]n order appointing a guardian pursuant to section 5-204(d)—like other orders that terminate or severely constrain the fundamental right to parent—can be entered only after a court has made findings applying the standard of proof by clear and convincing evidence."<sup>145</sup> Thus, the Law Court has interpreted the guardianship statute as one akin to a child protection law, and has effectively re-drafted some of its key provisions to bring it in line with the same due process requirements.

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[R]efusal or failure to comply with the duties imposed upon a parent by the parent-child relationship, including but not limited to providing the child necessary food, clothing, shelter, health care, education, a nurturing and consistent relationship and other care and control necessary for the child's physical, mental and emotional health and development.

*Id.* § 5-101(1-C). That provision also includes five factors that a court must consider in making such determination. *See id.*; *In re Guardianship of Chamberlain*, 2015 ME 76, ¶ 12, 118 A.3d 229.

137. 18-A M.R.S.A. § 5-204(c) (2012); *Jewel II*, 2010 ME 80, ¶ 12, 989 A.2d 726.

138. 18-A M.R.S.A. § 5-204(c) (2012).

139. *See id.* § 5-204(d).

140. *See In re Guardianship of David C.*, 2010 ME 136, ¶¶ 5-6, 10 A.3d 684; *Jewel II*, 2010 ME 80, ¶¶ 6, 7, 9, 2 A.3d 301; *In re Guardianship of Jewel*, 2010 ME 17, ¶ 12, 989 A.2d 726 (*Jewel I*); *In re Guardianship of Jeremiah T.*, 2009 ME 74, ¶ 27, 976 A.2d 955; *see also Troxel v. Granville*, 530 U.S. 57, 72-73 (2000); *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972).

141. *Jewel I*, 2010 ME 17, ¶ 12, 989 A.2d 726.

142. *See In re Guardianship of Chamberlain*, 2015 ME 76, ¶ 30, 118 A.3d 229.

143. *See id.* ¶¶ 31-32.

144. *See id.* ¶ 33.

145. *Id.* ¶ 33.



*b. The Imperfect Fit of the MPC for Guardianship as “Private Child Protection”*

Contested guardianship cases are often acrimonious and protracted, and they can involve difficult issues such as abandonment, allegations of abuse and neglect, substance abuse and mental illness, incarceration, teen parents, alienation and interference with parent-child relationships, and complex and contentious family dynamics.<sup>146</sup> In some instances, more than one relative seeks appointment as a child’s guardian, requiring a probate court to determine not only if a parent is unfit but also which (if any) of the competing petitioners should be appointed as guardian.<sup>147</sup> Probate courts also have jurisdiction to enter child support orders against biological parents in guardianship proceedings.<sup>148</sup> Accordingly, cases in this category of guardianship matters resemble, in all pertinent respects, family matters regarding parental rights and responsibilities that typically proceed in the Family Division of the Maine District Court.<sup>149</sup> However, despite the Legislature’s expansion of the standards for appointment of guardians for minors, other provisions of the MPC, as well as the practices of the probate courts, do not reflect the role of these proceedings in addressing difficult issues of child welfare and parental rights.

Probate courts generally issue full, rather than limited, guardianship orders,

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146. See, e.g., *In re Guardianship of Johnson*, 2014 ME 104, ¶ 20, 98 A.3d 1023 (mental illness); *In re Guardianship of Stevens*, 2014 ME 25, ¶ 4, 86 A.3d 1197 (substance abuse and mental illness); *In re Guardianship of LaBree*, 2013 ME 82, ¶¶ 5–6, 76 A.3d 386 (substance abuse and “unstable personal life”); *Jewel I*, 2010 ME 17, ¶¶ 3–6, 989 A.2d 726 (substance abuse and domestic violence); see generally Jill Kaufman, *Grandparents Step in When Parents Get Hooked on Opiates*, NPR NEWS (Aug. 4, 2015) (discussing how grandparents are increasingly seeking guardianship and adoption of their grandchildren due to their children’s addiction to opiates), <http://www.npr.org/2015/08/04/429385912/grandparents-step-in-when-parents-get-hooked-on-opiates>; *An Act to Ensure a Continuing Home Court for Cases Involving Children: Hearing on L.D. 890 Before the Judiciary Committee*, 127th Leg., (Me. 2015) (statement of Kathryn Ayers, President, Maine Probate Registers Assn.), available at <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=29270>.

147. Mazziotti, *supra* note 130. Judge Mazziotti indicated that competing petitions are a common occurrence.

148. 18-A M.R.S.A. § 5-204(d) (2012). This may require a paternity determination as part of the guardianship proceeding. Nadeau, *supra* note 74, at 36. However, the MPC does not expressly state how such child support awards are to be determined. Judge Mitchell has written that the best practice is to apply the child support guidelines under Title 19-A, chapter 63. MITCHELL & HUNT, *supra* note 29, § 5.01.3.B at 5-14.

149. See Nadeau, *supra* note 74, at 34 (“These cases involve numerous attorneys and parties, motion hearings, conferences, child support determinations, contempt hearings, and post-judgment reviews and petitions that the Maine Legislature certainly did not fully contemplate and address from a financial perspective.”). Probate courts may also be required to determine whether to appoint a conservator for a child. 18-A M.R.S.A. § 5-401 (2012). However, such matters rarely involve questions of “parental rights” as they nearly always arise in the estate context when a child may have a “significant amount of money.” MITCHELL & HUNT, *supra* note 29, § 5.01.3 at 5-14; see also Nadeau, *supra* note 74, at 36–37. A guardian need not be appointed as conservator in order to receive and use funds payable for the ward’s benefit (such as support, benefits, trust funds, etc.) so long as the funds are used for the ward’s support. See 18-A M.R.S.A. § 5-209(b) (2012). Indeed, petitions for conservatorship of a child comprise a very small percentage of probate courts’ work. In 2013, out of the total 612 “protective proceedings” filed in Maine probate courts regarding children, only 30 were for conservatorships and 5 for joint guardianship-conservatorships. Data on file with author. Accordingly, I will not be addressing conservatorship matters in this article.

meaning that the parents retain no specific rights.<sup>150</sup> Nothing in the text of the MPC suggests that they should do otherwise; a “limited guardianship” is presented as the exception, not the standard practice.<sup>151</sup> If an order is silent as to a parent’s rights, the effect is to provide a guardian complete discretion regarding whether and if to allow any parent-child contact.<sup>152</sup> In fact, the form orders for appointing guardians of minors used by many probate courts do not have a designated space for specifying such contact.<sup>153</sup> Absent language in a guardianship order limiting the guardian’s powers by setting the time, place, conditions, and frequency of parent-child contact, a parent has no basis to ask the court to order a guardian to allow contact with his or her child.<sup>154</sup> Many guardians exercise this implied discretion reasonably, and they facilitate and encourage visits between the parent and child to move the family towards reunification.<sup>155</sup> However, if a guardian does not allow contact, such actions may entirely cut a parent out of the child’s life, potentially causing lasting damage to the relationship or at least making reunification far more challenging, if not impossible.<sup>156</sup> There is no provision in the MPC authorizing modifications to a guardianship order to change its scope or to expand the rights retained by a parent.

The practice of appointing “full guardians” reflects the origins of guardianship

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150. The practice varies among judges and has, in some courts, changed over time. For example, one long-time practitioner has noted that the probate courts before whom she practices now issue more limited guardianships than in years past (although full guardianships are still common). Faircloth, *supra* note 112. Our experience at the Cumberland Legal Aid Clinic indicates that many probate courts still routinely issue full guardianships in contested matters.

151. The primary authority for appointing a limited guardian is in Title 18-A § 5-105, which applies to guardians for minors or adults. See 18-A M.R.S.A. § 5-105 (2012) (“[T]he judge may appoint a limited guardian with fewer than all of the legal powers and duties of a guardian.”). Perhaps because the language in that provision makes it more applicable to adult guardianships (i.e. “A person for whom a limited guardian has been appointed retains all legal and civil rights except those which have been suspended by the decree or order.”), *see id.*, the minor guardianship statute at § 5-204 includes language specifying which parental rights and responsibilities are retained by parents where a limited guardian is appointed, *see id.* § 5-204.

152. See *In re Guardianship of Johnson*, 2014 ME 104, ¶ 15, 98 A.3d 1023 (noting that the order appointing grandparents as full guardians of child “effectively stripped the parents of their parental rights”).

153. Probate courts may use any of several different forms to make such appointment: PP-104 (“Appointment of Guardian of Minor”); PP-104 (used for temporary appointments of a guardian); PP-106 (“Appointment of Guardian and Conservator of Minor”); PP-108 (“Order on Petition for Appointment of Guardian of Minor Alleging Intolerable Living Situation”). See MAINE PROBATE FORMS (Rev’d ed. 2014). These forms provide a space to indicate the limitations on the appointment, but do not indicate what such limitations may include. Compare MAINE JUDICIAL BRANCH: SCHEDULE OF PARENTAL RIGHTS AND RESPONSIBILITIES FORM, FM-140, available at <http://ptla.org/sites/default/files/FM-140.pdf> (revised in Sep., 2015). A probate judge may also create his or her own order when making an appointment.

154. 18-A M.R.S.A. §§ 105, 204 (2012). One “kinship families” advocate serving on a legislative task force reported: “I do not think that there is agreement within the Probate Court system about whether Probate judges can determine whether visits are appropriate between the parent and the child, and, if so, set up a contact schedule for parents within a guardianship order.” TASK FORCE ON KINSHIP FAMILIES: STATEMENT OF BARBARA KATE, MAINE KIN-KIDS PROGRAM (2007), available at <http://www.maine.gov/legis/opla/kinshipfamResponsesToInfoReq.pdf>.

155. Faircloth, *supra* note 112; Mazziotti, *supra* note 130.

156. Faircloth, *supra* note 112; Mazziotti, *supra* note 130.

law, including Maine's statute, as an "estate" matter rather than a "parental rights" matter, and therefore there was no need to preserve a parent-child relationship or move towards reunification. Rather, what orphans need is a permanent arrangement to ensure that all of their needs will be met for the remainder of their childhoods.<sup>157</sup> However, as the new standards for appointment allow, guardianships today frequently function as private child protection cases, in that the court intervenes in a parent-child relationship out of concern for the child's welfare based on a petition brought by a private individual, rather than the State. In many such instances, a grandparent or other family member seeking guardianship may not want to become the child's permanent substitute parent but is merely responding to an urgent, present need.<sup>158</sup>

As compared with their "public" counterparts in the District Court, one of the notable implications of these private child protection matters is the differing role and responsibilities of the Maine DHHS. Child protection cases brought in District Court are generally initiated by DHHS Office of Child and Family Services after a child abuse or neglect investigation.<sup>159</sup> By contrast, in minor guardianship proceedings brought in probate court, DHHS is not directly involved as a party and may not be involved at all. It may have some engagement with a family prior to the filing of a guardianship petition in probate court, including encouraging a relative to file for guardianship as part of a "safety plan" for the child based on DHHS's concerns regarding a parent's fitness.<sup>160</sup> Even in those cases, however, DHHS is not a party to the guardianship case, nor does it usually remain involved with the family to provide services such as supervision of visitation, transportation, housing assistance, parenting support, or any of the other services that it may be required to provide the family in a child protection case to preserve the family

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157. In addition, it was not until Congress enacted the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, codified at 42 U.S.C. §§ 670-679c, that the public policy goal of family reunification became clearly established law throughout the United States. 42 U.S.C. § 671(a)(15) (2014) (requiring, as a condition for receipt of federal funding for adoption and foster care programs, that states ensure that "in each case, reasonable efforts will be made . . . to prevent or eliminate the need for removal of the child from his home, and . . . to make it possible for the child to return to his home . . ."); see also *Suter v. Artist M.*, 503 U.S. 347, 358 (1992); Barbara A Pine, et al., *Defining and Achieving Family Reunification* in MALLON & HESS, *supra* note 86, at 378, 379; Fred Wulczen, *Family Reunification*, 14 CHILDREN, FAMILIES, AND FOSTER CARE 95, 97 (2004). Thus, Maine child welfare law did not reflect such goal at the time of the MPC's enactment, and the federal law only required changes to public child protection matters where the state became involved with a family.

158. See Kaufman, *supra* note 146.

159. See generally 22 M.R.S.A. §§ 4031-4039 (2004 & Supp. 2014). A child protection petition may also be initiated by a police officer or "three or more persons" as well as DHHS, *id.* § 403(1), but once the case is underway the State, through DHHS, is a party; this is a far less common way for a child protection matter to begin. See *In re M.M.*, 2014 ME 15, ¶ 5, 86 A.3d 622.

160. Faircloth, *supra* note 112; Mazziotti, *supra* note 130; FAMILIES AND CHILDREN TOGETHER, A LEGAL GUIDE FOR GRANDFAMILIES 19 (2011), available at [http://www.familiesandchildren.org/uploads/2/4/6/9/24696876/legal\\_guide\\_for\\_maine\\_grandfamilies\\_2011.pdf](http://www.familiesandchildren.org/uploads/2/4/6/9/24696876/legal_guide_for_maine_grandfamilies_2011.pdf); MAINE LEGISLATURE, FINAL REPORT OF TASK FORCE ON KINSHIP FAMILIES 5 (2010) (hereinafter "TFKF Report") <http://www.maine.gov/legis/opla/kinshiprpt.pdf>; Maine Department of Health and Human Services Regs. IV.L ("Care of Child Outside of Home/Emergency Informal Care"). Petitioners are responsible for their own legal fees.

relationship and to facilitate and support reunification.<sup>161</sup> Indeed, it is ironic that parents involved with guardianship matters, who as a group show *more* promise at being fit and capable parents in the future than do parents involved in child protection proceedings, whose alleged abuse and neglect rose to a level necessitating the initiation of such proceedings, have *fewer* guarantees under Maine law that they will be reunited with their children.<sup>162</sup>

A particularly confusing aspect of the current guardianship law is the role of temporary guardianships.<sup>163</sup> Under the statute, a temporary guardianship can be in place for only six months, but the language is silent on whether there can be successive appointments.<sup>164</sup> The practices among probate judges regarding these appointments vary enormously. Some see their authority as limited to making a single appointment, whereas others see the statute's silence as providing an opportunity to apply "common sense" and renew temporary guardianships where appropriate.<sup>165</sup> The latter approach provides probate courts the opportunity to use temporary guardianships much as District Courts employ interim orders, particularly where the circumstances are likely to change in a way difficult to anticipate and accommodate in a "permanent" appointment.<sup>166</sup>

Parents whose parental rights have not been terminated are allowed to petition the probate court to terminate the guardianship, although the standards for seeking and prevailing on such petitions are not well-defined in the statute.<sup>167</sup> As the Law

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161. Mazziotti, *supra* note 130; 22 M.R.S.A. § 4041(1-A) (Supp. 2014); *In re* Guardianship of Chamberlain, 2015 ME 76, ¶ 27, 118 A.3d 229 ("[I]n contrast to the consequences of a jeopardy order, neither the appointed guardian nor the State is obligated to provide services or make efforts to reunify the parent and child to prevent a permanent deprivation of the right to parent."); *see also* *In re* Amberley D., 2001 ME 87, ¶ 23, 775 A.2d 1158 (noting biological mother's arguments that her due process rights were violated when guardians were appointed for her daughter over her objection in a proceeding in which her parental rights have "effectively been terminated" yet "no home study was made, and no agency or individual will work with [the mother] towards reunification.").

162. *Chamberlain*, 2015 ME 76, ¶ 30, 118 A.3d 229 (noting that an order appointing a guardian is "more final than a jeopardy order in a child protection proceeding."). *See also* Williams, *supra* note 95, at 282 (noting that children involved in legal guardianship "may have periodic crises that can be resolved or minimized with access to social services.").

163. 18-A M.R.S.A. § 5-207 (2012).

164. MITCHELL & HUNT, *supra* note 29, § 5.01A.4 at 5-30.

165. *Id.* at 5-31. Faircloth, *supra* note 112 (noting that some probate courts now see their authority as limited to issuing single 6-month guardianships in light of recent Law Court opinions on the subject, whereas they issued more serial temporary guardianships in the past).

166. *Id.* The Law Court has never squarely addressed this issue but frowned on the practice in its opinion in *Johnson*, at least in contexts where it is unclear whether the probate court had ensured that it followed the standards in section 5-204 in making each appointment. *In re* Guardianship of Johnson, 2014 ME 104, ¶17 n.6, 98 A.3d 1023 ("[T]he Probate Code does not support the Probate Court's interpretation of the statute as permitting serial temporary guardianships as stop-gap measures while the petition for permanent guardianship is proceeding."). In this respect, it emphasized, courts should not treat a temporary guardianship like a temporary protection from abuse order, which is in place until a hearing on a final order can occur. *Id.* (citing 19-A M.R.S.A. § 4006(2) (Supp. 2014)).

167. 18-A M.R.S.A. §§ 5-210, 5-212 (2012). Section 5-210 is titled "Termination of appointment of guardian" but it only refers to external events (such as the ward's adoption, marriage, or death) as having an automatic effect on the continuation of the appointment. Section 5-212 ("Resignation or removal proceedings") makes no reference to the ward's parents but states that "[a]ny person interested in the welfare of the ward" (or the ward herself, if over fourteen) may petition "for removal of the

Court has observed: “[O]nce a guardianship is established, there is, by statute, ‘a presumption in favor of continuing it.’”<sup>168</sup> Specifically, in 2005, the Maine Legislature amended the MPC to shift the burden of proof on a petition to terminate from the guardian to the petitioning parent.<sup>169</sup> However, the Law Court has held that the guardianship should be terminated if the situation that gave rise to a guardianship (i.e. parental unfitness) has ended and that parents are entitled to a *presumption* of fitness during such termination proceeding.<sup>170</sup> In *In re Guardianship of David C.*, the Law Court clarified: “Because a parent has a fundamental right to parent his or her child, the party opposing the termination of the guardianship bears the burden of proving, by a preponderance of the evidence, that the parent seeking to terminate the guardianship is currently unfit to regain custody of the child.”<sup>171</sup> The Law Court explained that, if the opposing party does not meet its burden, “the guardianship must terminate for failure to prove an essential element to maintain the guardianship.”<sup>172</sup> As a practical matter though, termination is difficult to obtain where the original appointment was made on a judicial finding of unfitness.<sup>173</sup>

However, another amendment by the Legislature provided an important reversal in the trend of limiting parents’ rights in the guardianship context. In 2011, the Maine Legislature amended the MPC to allow probate courts to order “transitional arrangements for the minor if the court determines that such arrangements will assist the minor with a transition of custody and are in the best interests of the child.”<sup>174</sup> The Law Court has interpreted this legal change as having a significant impact on guardianship termination determinations. In *In re Zacharia*, a probate court’s refusal to order “transitional arrangements” was not “in the interests of justice” because it effectively precluded the child’s mother from becoming a fit parent and operated as de facto termination of her parental rights.<sup>175</sup>

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guardian on the ground that the removal would be in the best interest of the ward.” It also provides that the guardian may seek permission to resign. *Id.* § 5-212(a).

168. *In re Guardianship of Chamberlain*, 2015 ME 76, ¶ 28, 118 A.3d 229 (quoting *In re Guardianship of Jeremiah T.*, 2009 ME 74, ¶ 21, 976 A.2d 955).

169. P.L. 2005, ch. 371, § 5.

170. *In re Guardianship of David C.*, 2010 ME 136, ¶¶ 6–7, 10 A.3d 684.

171. *Id.* ¶ 7.

172. *Id.* See also *Jeremiah T.*, 2009 ME 74, ¶¶ 24–28, 976 A.2d 955 (applying prior law which required that a guardianship “must be terminated unless the guardian proves that the mother is an unfit parent for the child and that continuation of the guardianship is in the child’s best interests.”).

173. MITCHELL & HUNT, *supra* note 29, § 5.06B.4 at 5-32.10. In 2001, in *In re Amberley D.*, the Law Court held, applying the MPC provisions in effect at that time, that a mother’s “right to regain custody” through termination of a guardianship meant that fewer procedural safeguards were required for the initial appointment. 2001 ME 87, ¶¶ 12, 23, 775 A.2d 1158. The rationale (which has not appeared in recent Law Court opinions) is of dubious validity today, particularly in light of the Law Court’s recent opinion in *Chamberlain*. There the Law Court characterized both the process for terminating a guardianship and the accompanying need for heightened due process protections quite differently: “The process for a parent to re-enter the child’s life through a contested motion to terminate the guardianship also demonstrates the *significant potential for a permanent interference with a parent’s fundamental rights.*” 2015 ME 76, ¶ 28, 118 A.3d 229 (emphasis added).

174. 18-A M.R.S.A. § 5-213 (2012). The Legislature based the amendment on a recommendation made in the November 2010 Report of Legislature’s Task Force on Kinship Families. The Report is available at: <http://www.maine.gov/legis/opla/kinshiprpt.pdf>.

175. *In re Guardianship of Stevens*, 2014 ME 25, 86 A.3d 1197.

The purpose of the new law was to “give the Probate Courts another tool in fashioning an appropriate plan for the restoration of custodial care to the parents.”<sup>176</sup> If a parent follows all guardian *ad litem* (GAL)<sup>177</sup> recommendations, is physically capable of providing care to the child, and is willing to participate in transitional arrangements, it is an abuse of discretion not to order such arrangements.<sup>178</sup>

By ordering such “transitional arrangements,” a probate court can take a step toward having a minor guardianship case operate as a private child protection matter, where a court and (usually) extended family members, operating wholly outside of the State’s child welfare system, address a child’s safety and care.<sup>179</sup> However, in nearly all other respects, the MPC falls far short of providing courts and litigants the statutory tools they need to address the difficult questions that arise in these cases and parents the protections they need throughout the litigation in accordance with their constitutional rights.

## 2. Adoption, Termination of Parental Rights, and Paternity Proceedings

The Maine Adoption Act, which is now located in Article IX of the MPC, vests most adoptions in the exclusive jurisdiction of probate courts, even if the adoption proceeds after a District Court has issued a TPR order and determined that adoption is the most appropriate permanency plan for a child.<sup>180</sup> As noted above, the only narrow exception, adopted by the Maine Legislature in 2011 and not reflected in the MPC itself, is the jurisdiction granted to the District Court to approve adoptions (and accompanying name changes) by Permanency Guardians in child protective proceedings, but these are uncommon.<sup>181</sup>

As part of their adoption jurisdiction,<sup>182</sup> probate courts review a biological parent’s “surrender and release” of parental rights to a child,<sup>183</sup> as well as a parent’s consent to an adoption.<sup>184</sup> The parent must execute such surrender or consent in the presence of a probate court judge,<sup>185</sup> and the adoption statute imposes requirements for a judge to meet before he or she can approve such surrender or consent.<sup>186</sup>

The MPC also provides probate courts exclusive jurisdiction over proceedings

176. *Id.* ¶ 18.

177. A “Guardian *ad litem*” in parental rights matters is a person appointed by the court to investigate a child’s circumstances and make recommendations regarding his or her best interests. 18-A M.R.S.A. § 1-112 (2012); 19-A M.R.S.A. § 1507 (2012).

178. *Stevens*, 2014 ME 25, ¶ 20, 86 A.3d 1197.

179. *See, e.g., In re Guardianship of Gionest*, 2015 ME 154, ¶ 6, \_\_ A.3d \_\_ (describing court’s order for transitional arrangements as part of a temporary, limited guardianship order designed to enable the child to eventually return to his mother’s custody).

180. 18-A M.R.S.A. § 9-103 (2012).

181. 22 M.R.S.A. § 4038-E (Supp. 2014).

182. 18-A M.R.S.A. § 9-103 (2012).

183. *Id.* § 9-202 (2012).

184. *Id.* §§ 9-202, 9-302 (2012).

185. *Id.* § 9-202(a) (2012).

186. *Id.* § 9-202(b). For example, the Probate Court must explain certain matters to the parents, such as their parental rights and responsibilities and the effect of the consent or surrender, and it must determine that the parents freely gave consent or surrender after they were informed of their rights. *Id.* § 9-202(b)(2), (3).

in which an adoption petitioner asks the court to terminate the parental rights of a non-consenting biological parent to clear the way for the adoption.<sup>187</sup> The rights at stake for such parents are even more substantial than those implicated in guardianship proceedings because the TPR severs the parent-child legal relationship completely and permanently.<sup>188</sup> Although the *result* of such pre-adoption TPR proceedings can be the same as a TPR order in a District Court child protection proceeding and the same basic standard for termination applies,<sup>189</sup> the course of proceedings and protections afforded to the biological parents are far different in each court.<sup>190</sup> Most significantly, in a public child protection proceeding, DHHS must establish and implement a family reunification plan, and the District Court may allow a TPR petition to proceed to hearing only after the State has demonstrated that such reunification efforts should be abandoned.<sup>191</sup>

By contrast, although TPR proceedings in a probate court can also be characterized as a kind of child protection matter, much like contested guardianship cases, nothing in the MPC (or those sections of Title 22 incorporated by reference) authorizes the Probate Court to order DHHS, or the petitioners, to provide services to the child or parents or to require attempts at reunification as a prerequisite to the TPR.<sup>192</sup> Rather, the petitioner(s) (who may be the child's other biological parent, joined by his or her new spouse or partner<sup>193</sup>) need only offer evidence to support a finding that the grounds for termination<sup>194</sup> have been met to obtain an order permanently ending a parent's legal relationship with the child. Given the

187. *See id.* § 9-103(a)(4) (2012).

188. *See id.* § 9-204 (2012). *See also* Santosky v. Kramer, 455 U.S. 745, 759, 102 S. Ct. 1388, 1397, 71 L. Ed. 2d 599 (1982) (“When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.”); *In re Adoption of L.E.*, 2012 ME 127, ¶ 16, 56 A.3d 1234 (noting that TPR proceedings in probate court in the context of adoptions should “[r]ecogniz[e] the [child’s] need for stability and permanency.”).

189. *Id.* § 9-204(b) (2012); *In re Jacob B.*, 2008 ME 168, ¶ 13, 959 A.2d 734, 737.

190. Compare 18-A M.R.S.A. § 9-204 with 22 M.R.S.A. §§ 4050-4058. Although the Protective Custody statutory scheme permits a Probate Court to issue a preliminary protection order, 22 M.R.S.A. § 4031(1)(B) (2012 & Supp. 2014), the child protective petition itself must be filed and adjudicated in the District Court. *Id.* § 4031(1)(A) (2012 & Supp. 2014).

191. 22 M.R.S.A. §§ 4041(1-A)(A)(1), (2)(A-2) (Supp. 2014); *In re Christmas C.*, 1998 ME 258, ¶¶ 4-5, 11-13, 721 A.2d 629.

192. *In re Adoption of L.E.*, 2012 ME 127, ¶ 13, 56 A.3d 1234.

193. *See e.g., In re Adoption of Hali D.*, 2009 ME 70, ¶ 1, 974 A.2d 916 (affirming termination of incarcerated father’s parental rights in context of petition for adoption brought by mother and her husband).

194. 22 M.R.S. § 4055 (2004 & Supp. 2014). That statute permits a court to terminate a parent’s rights without their consent if:

(1)(B)(2) The court finds, based on clear and convincing evidence, that:

(a) Termination is in the best interest of the child; and

(b) Either:

(i) The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child’s needs;

(ii) The parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child’s needs;

(iii) The child has been abandoned; or

(iv) The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041.

significant problems, outlined below, of adjudicating contested family matters in probate courts, there is a substantial risk that a parent-child relationship could be severed in a process that does not fully protect parents' rights, meet the best interests of the child, or serve the broader goals of preserving families set out in Maine law.<sup>195</sup>

The MPC includes a provision addressing the determination of paternity of a putative father in the context of an adoption proceeding,<sup>196</sup> which is also similar in many respects to a child protection proceeding in that it requires the court to make a case-specific determination of whether a biological parent may exercise his parental rights. The language of the statute suggests that, if a probate court finds that a putative father is the biological father of the child, it must then make specific findings about his ability to take responsibility for the child before it may "declare the putative father the child's parent with all the attendant rights and responsibilities."<sup>197</sup> If the father does not timely invoke the process to "establish" his parental rights, or he has not met the requirements of section 902(i) (i.e. the court does not make the aforementioned specific findings), the statute provides that the court must rule the he has "no parental rights," and his consent (or surrender and release) is not required for the adoption.<sup>198</sup>

The Law Court's opinion in *In re Tobias D.*, however, requires probate courts to interpret and apply the language of section 9-201 in a manner far different from the statute's plain language, apparently to ensure that the provision is not unconstitutional in its application.<sup>199</sup> Although the MPC provides that it is the father's burden to petition the court to have his parental rights granted by the court after demonstrating that he meets the requirements set forth in section 9-204(i),<sup>200</sup> the Law Court held that, in order to ensure that the father's liberty interests are adequately protected, the burdens must be reversed.<sup>201</sup> If a man is found to be the biological father but the petitioners nonetheless wish to proceed with the adoption, the matter must proceed as a TPR determination in which it is the petitioners' burden to prove that his rights should be terminated under the standard set forth in Title 22.<sup>202</sup> Thus, the Probate Court must follow the same requirements as those governing other contested TPR determinations in conjunction with adoptions under section 9-204.<sup>203</sup> Therefore, in this context as well, probate courts are making

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195. *See id.*, § 4003(3) (requiring "family rehabilitation and reunification" to be given "priority as a means for protecting the welfare of children" in child protection cases). Hon. Joseph Mazziotti, the Cumberland County Probate Judge, outlined a number of the challenges facing probate courts in these termination of parental rights cases in his September 27, 2010, letter to the Maine Legislature's Task Force on Kinship Families, *available at* <http://www.maine.gov/legis/opla/JudgeMazziottiRespon.pdf>. He stated that "more specific standards/guidelines to apply in a given situation would assist the probate court." *Id.*

196. 18-M.R.S.A. § 9-201 (2012).

197. *Id.* § 9-201(i) (2012).

198. *Id.* § 9-201(j) (2012).

199. *See In re Adoption of Tobias D.*, 2012 ME 45, ¶¶ 15–16, 40 A.3d 990.

200. 18-A §§ 9-201(d)(i) (2012).

201. *Tobias D.*, 2012 ME 45, ¶¶ 17, 20, 40 A.3d 990 ("[T]he procedures, burdens, and standards set out in [Title 22] section 4055 constitute the means by which the fundamental constitutional right to parent is safeguarded.")

202. *Id.* ¶¶ 16–21 (citing 22 M.R.S.A. § 4050 et seq. (2004 & Supp. 2014)).

203. *Id.* ¶¶ 17-18.



determinations that can permanently alter the legal relationship between a parent and child.

### 3. *Change of Name of Minor Child*

The core of Maine's name change law is quite simple: "If a person desires to have that person's name changed, the person may petition the judge of probate in the county where the person resides. If the person is a minor, the person's legal custodian may petition in the person's behalf."<sup>204</sup> The Law Court has interpreted the term "legal custodian" in that statute as meaning the person with "decision-making authority" over a child.<sup>205</sup> If two people share decision-making rights—as in the absence of an order affecting parents' status as the "joint natural guardians" of a child<sup>206</sup> or if there is a District Court order expressly awarding shared decision-making—<sup>207</sup> the Probate Court cannot grant a name change unless both "legal custodian[s]" join the petition.<sup>208</sup> Thus, while a probate court can issue an order changing a child's name (thereby affecting an important connection with a parent), it lacks the jurisdiction to allocate the authority to seek such change to a parent who does not possess it. Only a District Court can determine whether to vest one or both parents with such authority in a family matter.<sup>209</sup>

#### *B. The Impact of Probate Courts' Exclusive Jurisdiction of Certain Parental Rights Proceedings*

The District Court is the primary court in Maine where parental rights matters are adjudicated.<sup>210</sup> As explained above, there are several types of contested proceedings under the MPC which are unquestionably "family law" matters in terms of the parties, issues, and potential outcomes.<sup>211</sup> Probate courts report that their minor guardianship and adoption caseloads are increasing,<sup>212</sup> yet they lack the statutory tools and resources to effectively address the underlying issues facing the

204. 18-A M.R.S.A. § 1-701(a) (2012) (other provisions in section 1-701 set forth the fee and procedures and address situations of domestic violence or identity theft). Requests for name changes can also be included with an adoption petition. 18-A M.R.S.A. § 9-301 (2012)).

205. *In re Perry*, 2004 ME 46, ¶ 4, 845 A.2d 1153; *In re Kidder*, 541 A.2d 630, 631 (Me. 1988).

206. *See, e.g., Perry*, 2004 ME 46, ¶ 5, 845 A.2d 1153 (quoting 19-A M.R.S.A. § 1651 (1998)).

207. *See, e.g., Kidder*, 541 A.2d 630, 630-31 (Me. 1988) (holding that where a divorce judgment awarded parents "shared parental rights and responsibilities," one parent cannot be the "legal custodian" for purposes of changing the child's name).

208. *Perry*, 2004 ME 46, ¶ 4, 845 A.2d 1153.

209. As part of granting an initial adoption petition, the probate court can change a person's name. 18-A M.R.S.A. § 9-301. However, once such adoption is granted, one adopting parent would need to obtain a District Court order to allocate the name-change authority to her to the exclusion of the other adoption parent, just as any other parent would need to do.

210. *See* 19-A M.R.S.A. § 103 (2012) ("Except as otherwise expressly provided, the District Court has original jurisdiction of all actions under this Title."); 4 M.R.S.A. § 152(11) – (13) (Pamph. 2014).

211. *See* Nadeau, *supra* note 74, at 34 ("... Maine's probate courts have become family law courts. Any Maine judge of probate today will tell you, if asked, that his or her time on the bench is primarily consumed by custody and related family issues. Probate court provides the only forum where many issues concerning the welfare and property of individuals and family members may be addressed.")

212. *Id.* at 36; *In re Holmes*, 2011 ME 119, ¶ 4, 32 A.3d 1011 (noting the "substantial growth" of the probate court's "family law docket"); Mazziotti, *supra* note 130.

families involved in these cases, particularly in contested matters. The MPC provides little guidance or clear authority to the judges overseeing these difficult cases regarding how best to address children's needs on a case-specific basis, and, at the same time, vests exclusive jurisdiction of these matters in a system of part-time, independent probate courts that is inadequate to meet the needs of the litigants and the children involved. This section will outline some of the specific problems stemming from the current situation.

*1. The probate courts' limited statutory authority and lack of a centralized system hinder their ability to effectively address the needs of families in crisis*

As noted earlier, guardianships and adoptions often arise from problems affecting Maine families such as substance abuse, mental illness, domestic violence, poverty, homelessness, teen pregnancy, unemployment, and incarceration. As Maine's child protection system has become increasingly overburdened and under-resourced,<sup>213</sup> some DHHS caseworkers have come to regard guardianships as key tools in developing safety plans that avoid the need to file a child protection petition.<sup>214</sup> Unlike the contexts requiring testamentary guardianships (i.e. the death of parents), the situations warranting other guardianships, while acute, may nonetheless be temporary, and therefore there is

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213. DHHS's Child Protection Services Annual Reports document a dramatic increase in the agency's child welfare caseload in recent years. In 2003, there were 4,930 reports of child abuse and neglect that were of sufficient severity that DHHS assigned the matter to a caseworker for a safety assessment. Me. Dep't of Human Servs., Annual Report on Referrals 2003, 3 (May 3, 2004), available at [http://www.maine.gov/dhhs/ocfs/cw/reports/2003\\_CPS\\_Report.pdf](http://www.maine.gov/dhhs/ocfs/cw/reports/2003_CPS_Report.pdf). In 2008, the number of assigned reports had increased to 6,178, Me. Dep't of Human Servs., Annual Report on Referrals 2008, 3 (May 15, 2009), available at [http://www.maine.gov/dhhs/ocfs/cw/reports/2008\\_CPS\\_Report.pdf](http://www.maine.gov/dhhs/ocfs/cw/reports/2008_CPS_Report.pdf), and in 2014 the number was 8,945, Me. Dep't of Health & Human Servs., Child Protective Services Annual Report 2014, 5 (Mar. 2015), available at [http://www.maine.gov/dhhs/ocfs/cw/reports/documents/2014CPSAnnualReport\\_FINAL.pdf](http://www.maine.gov/dhhs/ocfs/cw/reports/documents/2014CPSAnnualReport_FINAL.pdf), representing an 81% increase in cases assigned to child welfare caseworkers over the course of eleven years.

There has been a corresponding substantial increase in child protection matters filed in District Court. Between fiscal years 2010 and 2014, the number of child protection petitions filed in Maine District Court increased by 36%, from 737 to 1008. Me. Admin. Office of the Courts, Maine State Court Caseload 5 Year Trend, 4 (Aug. 22, 2014), available at [http://www.courts.maine.gov/news\\_reference/stats/pdf/5yr%20Trend%20Stats/Statewide%20Stats%20FY'10\\_FY'14.pdf](http://www.courts.maine.gov/news_reference/stats/pdf/5yr%20Trend%20Stats/Statewide%20Stats%20FY'10_FY'14.pdf).

214. Faircloth, *supra* note 112; Mazziotti, *supra* note 130. The burdens on the child protection system have a spillover effect resulting in more guardianship petitions in Probate Court. As noted earlier, *supra* note 160 and accompanying text, one strategy frequently implemented by DHHS as part of a "safety plan" in child welfare investigations is to identify a non-parent family member to provide care for a child and then to encourage that relative to seek guardianship of the child. With the guardianship order in place, DHHS then closes its file on the child. See SANDRA S. BUTLER, UNIV. OF ME. CTR. ON AGING, SUPPORTING MAINE'S FAMILIES: RECOMMENDATIONS FROM MAINE'S RELATIVES AS PARENTS PROJECT 3, 7 (2005), available at [http://umcoa.siteturbine.com/uploaded\\_files/mainecenteronaging.umaine.edu/files/RAPPWhitePaper08.pdf](http://umcoa.siteturbine.com/uploaded_files/mainecenteronaging.umaine.edu/files/RAPPWhitePaper08.pdf) (describing factors leading to increasing number of children being raised by grandparents and other non-parent relatives and how guardianships save the State money).

Interestingly, in her 1966 essay, Taylor noted reduced agency caseload as one of the advantages of legal guardianships: "Social agencies which would develop and encourage the use of the relationship of guardian and ward would be able to 'close the case' after satisfactory placement had been achieved for appropriate children and letters of guardianship issued, as is done when an adoption decree is issued." Taylor, *supra* note 90, at 420.

reason to try to preserve the parent-child relationship. These scenarios require flexibility and customization of guardianship orders. However, the typical form orders for appointing guardians issued by most probate courts are not structured to set forth detailed, case-specific language.<sup>215</sup> Similarly, the short-term (maximum of six months) temporary guardianships permitted under the MPC limit probate courts' ability to provide extended interim relief.<sup>216</sup> Accordingly, many families involved with these cases find that the probate courts are not in a position to manage the proceedings in the most effective manner.

In contrast to the MPC's limited and rigid language in guardianship and TPR matters, discussed in the prior section, the statutes and rules governing family matters in District Court provide a far greater range of options to address the interests of the children in challenging situations, such as appointing a GAL, issuing and modifying interim relief, requiring participation in parent education programs and counseling, setting progressive visitation schedules, crafting reunification plans, and other targeted measures.<sup>217</sup> Family Law Magistrates oversee many of the cases involving children in the Judicial Branch's Family Division.<sup>218</sup> District Courts manage child protection matters pursuant to a specific statutory framework and timelines.<sup>219</sup> The underlying policy determination reflected in Maine's family law statutes is that a child is best served by maintaining a relationship with his or her parents unless compelling circumstances dictate otherwise and that such relationship should not be severed until all possible measures have been exhausted (or the parent fails to engage in such measures).<sup>220</sup> This approach is also required to protect parents' fundamental constitutional rights.<sup>221</sup>

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215. See *supra* note 153 and accompanying text; see also MITCHELL & HUNT, *supra* note 29, § 5.04 at 5-32.6 (discussing Form PP-104). A guardianship imposed pursuant to 18-A M.R.S.A. § 5-204(c) over the objections of one or both parents should set forth detail regarding the basis for finding the "intolerable living situation" and should include provisions for visitation rights and child support. MITCHELL & HUNT, *supra* note 29, § 5.06B at 5-32.9. Form PP-108 was developed for this purpose but it is not used by probate judges consistently. Faircloth, *supra* note 112 (noting that some probate judges do not use the standard forms). Judges may set forth such details and provisions in an order that is not set forth on the form.

216. 18-A M.R.S.A. § 207(c); see also *In re* Guardianship of Johnson, 2014 ME 104, ¶ 17 n.6, 98 A.3d 1023.

217. See 19-A M.R.S.A. § 1653(2) (2012); 22 M.R.S.A. §§ 4036, 4041 (Supp. 2014).

218. See M.R. Civ. P. 100, 110A.

219. See, e.g., 22 M.R.S.A. §§ 4031–4039 (2004 & Supp. 2014). The District Court can also order the parties to participate in mediation with a professional mediator hired, trained, and supervised by the Maine Judicial Branch's Court Alternative Dispute Resolution Services (CADRES). 19-A M.R.S.A. § 251; [http://www.courts.maine.gov/maine\\_courts/adr/index.shtml](http://www.courts.maine.gov/maine_courts/adr/index.shtml) (accessed on October 31, 2015). There is no equivalent service for litigants in the Probate Courts. The Cumberland Legal Aid Clinic has been fortunate to work with pro bono mediators in a few of our contested guardianship cases who provided mediation services in response to requests from either our office or the Probate Court. The Maine Legislature's Task Force on Kinship Families, in its November 2010 Report, suggested that increased availability of mediation services in guardianship matters would be beneficial to the Probate Court and families. See TFKF Report, *supra* note 160, at 8.

220. See 19-A M.R.S.A. § 1653(1)(C) (Supp. 2014); 22 M.R.S.A. § 4003(3) (Supp. 2014); *In re* Thomas D., 2004 ME 104, ¶ 41, 854 A.2d 195 ("The formulation of rehabilitation and reunification plans is a cornerstone of the Child and Family Services and Child Protection Act.").

221. See *Santosky v. Kramer*, 455 U.S. 745, 752–54 (1982).

Proper adjudication of difficult parental rights cases also requires a system whose structure can accommodate multiple court appearances and periodic reviews to address new conditions and circumstances as they arise. The Maine probate courts' decentralized, uncoordinated structure is ill-suited to address the challenges that can arise in parental rights matters. They are not included in the Family Division nor any other part of the Maine Judicial Branch. Accordingly, there is limited opportunity for development of uniform (or at least consistent) procedures among the various probate courts, and the practices of different probate courts in fact vary greatly.<sup>222</sup> Indeed, there is no "Probate Court system" to develop and implement policy and best practices and coordinate the work of all of the probate courts, as the Maine Judicial Branch does for the courts within its system.<sup>223</sup> This means that, other than the appellate jurisdiction of the Law Court<sup>224</sup> or the oversight of the Committee on Judicial Disability and Responsibility,<sup>225</sup> each of which can only review specific errors or complaints on a case-by-case basis, there is no oversight of the probate courts.<sup>226</sup>

The Maine Judicial Branch also has several features to increase efficiency and quality control and to improve the administration of justice within the Family Division. For example, Maine District Court judges and Family Law Magistrates participate in initial training and intensive continuing judicial education.<sup>227</sup> The

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222. While there is a set of procedural rules (i.e. Maine Rules of Probate Procedure) and standard forms for use in Probate Courts, many individual courts vary in their practice and may even require use of their own forms and unwritten procedures. Attorneys who practice in probate courts quickly learn not to assume that the procedure in one county will be followed in another. In addition, the election of a new judge in a county can bring about a range of changes in practice. Faircloth, *supra* note 112.

There is an informal nonprofit association, the Maine Probate Judges Assembly, which meets twice each year for educational presentations and discussion. Mazziotti, *supra* note 130. It has no responsibility for setting probate court policy or procedure. The Maine Supreme Judicial Court's Advisory Committee on Probate Rules oversees revisions to the Maine Rules of Probate Procedure. However, such rules are fairly general, and individual probate courts set much actual "procedure" through local practice, not the promulgation of rules.

223. Because the probate courts are not part of a "system" of courts—but instead a "separate and distinct" court exists in each county—a party cannot request a change in venue. *See In re Adoption of G.*, 502 A.2d 1044, 1046 n.5 (Me. 1986) (vacating adoption because probate court did not have jurisdiction over petition when no party resided in that county). Probate courts can transfer cases to another probate court. *See* 18-A M.R.S.A. §1-303(c) (2012).

224. *See* 4 M.R.S.A. § 7 (1989); 18-A M.R.S.A. §1-308 (2012).

225. ME. R. COMM. JUD. RESPONSIBILITY & DISABILITY, Order 6, available at <http://www.jrd.maine.gov/pdfs/JudRespDisabR%202-15.pdf>.

226. One consequence of this lack of supervision is that each probate judge has a nearly unfettered ability to control his or her court calendar or docket. A notable recent example of this is a probate judge who allegedly altered his docket to cause substantial delays in cases (including those involving children) as retaliation against the county in a dispute about his pay. Scott Dolan, *Judge Denied Big Pay Raise Retaliated by Causing Backlog, York County Officials Say*, PORTLAND PRESS HERALD, Nov. 9, 2015, <http://www.pressherald.com/2015/11/09/york-county-officials-find-probate-judge-intentionally-created-court-backlog-to-retaliate/>.

227. As Superior Court Justice Thomas Warren explained recently:

When appointed, Maine District [Court] Judges usually have a two month orientation program and shadow experienced judges before beginning independent case resolution. . . . After that, there is a requirement that all judges, justices, and magistrates obtain 24 hours of continuing judicial education within every two year period. In 2012 and 2014 the Judicial Branch held a three-day Maine Judicial College of judicial education

Judicial Branch maintains a roster of qualified GALs whom the District Court may appoint in child protection and family law matters<sup>228</sup> and oversees a program to recruit, train, and supervise volunteer GALs in child protection matters.<sup>229</sup> The Judicial Branch has policies and protocols to ensure language access for those with limited English proficiency or limited hearing.<sup>230</sup> It also provides low-cost or free mediation services by an approved roster of trained, professional mediators in family matters through the Court Alternative Dispute Resolution Service (CADRES).<sup>231</sup> Without a central authority, the probate courts cannot replicate these features; this limitation further undermines the probate courts' ability to meet the needs of the families who appear before them.

2. *The "split jurisdiction" of district and probate courts over parental rights matters leads to confusion, delay, inefficiencies, and inconsistent rulings*

One of the most serious consequences of the assignment of guardianship and adoption matters to the exclusive jurisdiction of the probate courts is that such cases can be complicated by the occurrence of separate, simultaneous proceedings in the District Court involving the same child.<sup>232</sup> My review of national surveys of court jurisdiction indicates that Maine may be unique or among only a very small number of states that have family law jurisdiction spread out between, not only different courts,<sup>233</sup> but separate court *systems*, each of which has exclusive

programs for judges and magistrates of the District Court . . . . It is anticipated that in the future the three-day Judicial College will offered every two years and in alternate years a one-day intensive educational program will be offered.

E-mail from Justice Thomas Warren, Chair of the Maine Judicial Branch's Judicial Education Committee, to author (July 28, 2015) (on file with author).

228. See generally 19-A M.R.S.A. § 1507 (2012); 22 M.R.S.A. § 4005 (Supp. 2014). For the roster, see *Guardians Ad Litem*, STATE OF MAINE JUDICIAL BRANCH, [http://www.courts.maine.gov/maine\\_courts/family/gal/index.html](http://www.courts.maine.gov/maine_courts/family/gal/index.html) (last visited Sep. 18, 2015).

229. The Maine Judicial Branch oversees the Court Appointed Special Advocate Program. See generally *Court Appointed Special Advocates*, STATE OF MAINE JUDICIAL BRANCH, [http://www.courts.maine.gov/maine\\_courts/family/casa/index.shtml](http://www.courts.maine.gov/maine_courts/family/casa/index.shtml) (last visited Sep. 18, 2015).

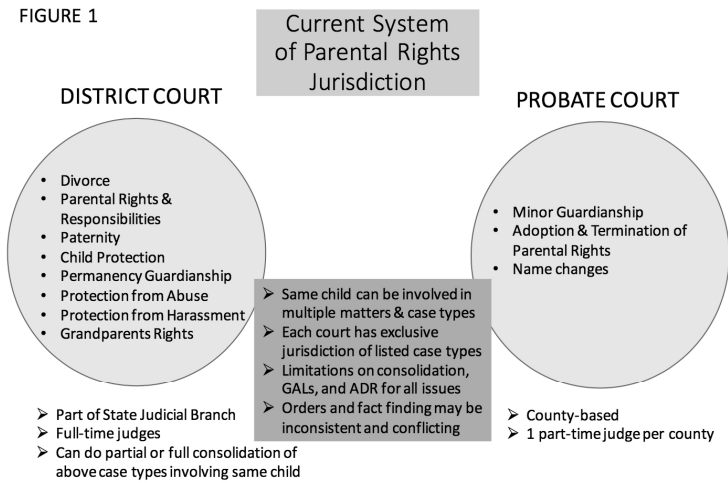
230. To view these policies, see *Accessibility and Interpreters*, STATE OF MAINE JUDICIAL BRANCH, [http://www.courts.maine.gov/citizen\\_help/access\\_interp.html](http://www.courts.maine.gov/citizen_help/access_interp.html) (last visited Sep. 18, 2015).

231. For information about CADRES, see *Alternative Dispute Resolution*, STATE OF MAINE JUDICIAL BRANCH, [http://www.courts.maine.gov/maine\\_courts/adr/index.shtml](http://www.courts.maine.gov/maine_courts/adr/index.shtml) (last visited Sep. 19, 2015).

232. See, e.g., *In re Guardianship of Johnson*, 2014 ME 104, ¶¶ 2-13, 98 A.3d 1023; *Jewel II*, 2010 ME 80, ¶¶ 36-37, 2 A.3d 301; *Jewel I*, 2010 ME 17, ¶ 6, 989 A.2d 726; see also *An Act To Ensure a Continuing Home Court for Cases Involving Children: Hearing on L.D. 890 Before the J. Standing Comm. on Judiciary*, 127th Leg. (Me. 2015) (statements of Lou Ann Clifford, Andrew Dawson, Sen. Roger Katz, Calien Lewis, Mary Ann Lynch, Rep. Kimberly Monaghan, Jacqueline Moss, Dana Prescott, Deirdre M. Smith, Heather Whiting, and Caroline Wilshusen) [http://www.mainelegislature.org/legis/bills/display\\_ps.asp?snum=127&paper=HP0609PID=0#](http://www.mainelegislature.org/legis/bills/display_ps.asp?snum=127&paper=HP0609PID=0#) (click to expand "Public Hearings" hyperlink; then follow hyperlinks for individual testimony documents) (describing significant problems presented, both system-wide and in specific cases, of current jurisdictional split of family matters between district and probate courts).

233. For example, in 2003 (the year of the most recent survey by the National Center for State Courts), Maine was one of thirteen states in which guardianships of minors were handled in a Probate Court, but it was one of only two states in which the Probate Court had the exclusive jurisdiction over such cases. NAT'L CTR. FOR STATE COURTS, NATIONAL SURVEY OF PROBATE JURISDICTION (2003),

jurisdiction over certain matters thereby precluding coordination or consolidation of proceedings.<sup>234</sup> The current system of “split jurisdiction” between district and probate courts is depicted in Figure 1.<sup>235</sup>



This split jurisdiction over parental rights matters is particularly problematic because Maine law is unclear regarding which proceedings take precedence or how conflicting orders are to be interpreted and enforced.<sup>236</sup> As a practical matter, by suspending parents’ rights, guardianship orders take precedence over underlying

available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/173>. The other state is Connecticut, whose probate courts have more extensive jurisdiction over a range of family matters, including child welfare and paternity cases, than Maine’s probate courts. See *Children’s Matters*, CONNECTICUT PROBATE COURTS, <http://www.ctprobate.gov/Pages/ChildrensMatters.aspx>, (last visited Sep. 20, 2015).

234. *Table of Probate Jurisdiction*, NATIONAL COLLEGE OF PROBATE JUDGES (2014) <http://ncpj.org/about-ncpj/state-courts-having-probate-jurisdiction/> (“In most states, probate subject matter jurisdiction is vested in the courts of general trial jurisdiction as a division within the courts.”). Some states continue to have designated probate courts, but such courts are usually part of the state judicial branch. For example, Vermont’s Probate Court is now part its Superior Court in the Vermont Judiciary. <https://www.vermontjudiciary.org/GTC/Probate/default.aspx> New Hampshire’s Probate Court is part of its Circuit Courts. <http://www.courts.state.nh.us/probate/>. Only Maine’s probate courts are described as “under county, not state, court system jurisdiction.” NATIONAL COLLEGE OF PROBATE JUDGES, *supra* at 13. Those few probate courts that are separate from the state court system also have far more limited jurisdiction than do Maine’s probate courts (i.e. estate or adult guardianship/conservatorship matters), making conflicts unlikely. *Id.*

235. Figure 1 does not include the theoretical, but apparently unused, jurisdiction of Probate Courts to make parental rights determinations and the concurrent jurisdiction of the district and probate courts to issue preliminary protection orders in child protection matters. See *supra* notes 111–114 and accompanying text.

236. *Marin v. Marin*, 2002 ME 88, ¶ 10 n.1, 797 A.2d 1265.

District Court divorce and parental rights orders,<sup>237</sup> but they cannot supersede child protection and protection from abuse orders.<sup>238</sup> Yet, no statute or Law Court opinion sets forth explicit guidance on how the determination of priority for proceedings and orders must apply in various situations. Moreover, probate and district courts are inconsistent regarding communication about pending matters.<sup>239</sup> Even if courts do share information, Maine law provides no guidance to courts about how to proceed in a way that protects the parties' rights and the child's interests and ensures that they handle the matter in an efficient and effective way.<sup>240</sup>

District courts and probate courts may, in their respective parental rights cases involving the same child, engage in fact finding or may appoint GALs to conduct an investigation and provide recommendations.<sup>241</sup> However, separate proceedings render it difficult, if not impossible, for the other court to avoid re-litigation of certain issues or to build on (and issue orders consistent with) prior knowledge acquired by the court and GAL about the family and the course of proceedings.<sup>242</sup>

Similarly, name change petitions involving minor children, which are in the exclusive jurisdiction of probate courts, can be rendered more complex by the fact that a parent's authority to seek such name change is controlled by the rights granted under a District Court order; yet the District Court has no jurisdiction to order a child's name to be changed as part of a parental rights proceeding.<sup>243</sup> Thus, where there is no parental rights order in effect but a child's parent wishes to change a child's name without the consent of the other parent, the Law Court explained the two-step, two-court process for doing so as follows: "If a single parent with shared decision-making authority wishes to change a child's name, the appropriate procedure is to petition the District Court for an allocation of parental rights giving her or him the exclusive authority to do so. Once a parent has been allocated the authority, he or she may then petition the Probate Court

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237. *Id.* ¶ 10 (noting that the District Court has jurisdiction to determine parental rights and responsibilities as between parents "subject to the outstanding guardianship" another has over their child). MITCHELL & HUNT, *supra* note 29, § 5.01.3.C at 5-16-5-17.

238. Nadeau, *supra* note 74, at 36; 22 M.R.S.A. § 4031(3) (Supp. 2014) (stating that a child protective order "takes precedence over any prior order regarding the child's care and custody").

239. *In re* Guardianship of Johnson, 2014 ME 104, ¶¶ 15-17, 98 A.3d 1023; *Jewel II*, 2010 ME 80, ¶ 50, 2 A.3d 301.

240. *Jewel II*, 2010 ME 80, ¶¶ 24, 36, 50, 2 A.3d 301. Indeed, the courts may conclude that they simply need to allow the proceedings before their respective courts to continue as there is no way to consolidate the matters due to the courts' respective exclusive jurisdiction.

241. *See, e.g., Johnson*, 2014 ME 104, ¶ 15, 98 A.3d 1023 (noting conflicting District and Probate Court orders in effect); *In re* Guardianship of Kean R. IV, 2010 ME 84, ¶ 5, 2 A.3d 340 (noting that the District Court had scheduled a hearing on a parental rights and responsibilities matter for the month following a hearing on the paternal grandmother's guardianship petition, which both parents opposed).

242. *See, e.g., In re* Adoption of Michaela C., 2004 ME 153, ¶ 8 n.1, 863 A.2d 270 (noting that, for unknown reasons, the Probate Court had appointed a GAL for a child in an adoption proceeding where a different person had served as GAL in the child protection proceeding).

243. 18-A M.R.S.A. § 1-701(a) (2012); *In re* Perry, 2004 ME 46, ¶ 5, 845 A.2d 1153; *In re* Kidder, 541 A.2d 630, 631. By contrast, the District Court does have jurisdiction to order a name change for one or both divorcing spouses as part of a divorce judgment pursuant to 19-A M.R.S.A. § 1051 (2012), presumably for reasons of efficiency.

unilaterally.”<sup>244</sup>

While a District Court judge, as well as a GAL, may have become very familiar with (and a familiar face to) a child involved in a child protection proceeding, the adoption of that child must proceed in a new case before a judge who has no prior knowledge of the child, the petitioners (who may be foster parents or other long-term caregivers), or the context for the adoption.<sup>245</sup> The need for an entirely new and separate proceeding for the child’s adoption not only may result in significant delays in completing the adoption, it may derail the adoption entirely. The Probate Court may decide that, notwithstanding the District Court’s permanency, the adoption petition should be denied, thereby sending the child back into the State child protection system.<sup>246</sup>

A related complication that can arise in these dual-jurisdiction child protection matters stems from the probate courts’ authority under the MPC adoption provision to find that DHHS’s position to withhold consent to a pending adoption is “unreasonable.”<sup>247</sup> In *In re Adoption of Matthew R.*,<sup>248</sup> the child’s mother had consented to the entry of a District Court child protection permanency order and specifically to the child’s adoption by his foster parent.<sup>249</sup> Other family members unsuccessfully sought to intervene in the child protection matter, and then petitioned for adoption of the child in probate court.<sup>250</sup> The foster parent then filed a competing adoption petition in the same probate court, which consolidated the matters. The Probate Court held a hearing on the issue of DHHS’s position opposing the family members’ petition and concluded that DHHS had unreasonably withheld its consent.<sup>251</sup>

One of the few types of family law matters on which probate and district courts do have some concurrent jurisdiction is with respect to child support, as such orders can be entered by the Probate Court in guardianship matters, as well as by the District Court<sup>252</sup> or by DHHS (through its Division of Support Enforcement and

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244. *Perry*, 2004 ME 46, ¶ 5 n.1, 845 A.2d 1153. One could argue, however, that changing a child’s name implicates the other parent’s rights, thus requiring that the court provide the parent notice and an opportunity to be heard. The Law Court has never considered the constitutionality of unilateral name changes.

245. See Testimony of Lou Ann Clifford and Caroline Wilshusen (Guardians ad litem) in Support of LD 890, 127th Legis, [http://www.mainelegislature.org/legis/bills/display\\_ps.asp?paper=HP0609&snum=127#](http://www.mainelegislature.org/legis/bills/display_ps.asp?paper=HP0609&snum=127#).

246. *Id.*; 18-A M.R.S.A. § 9-205.

247. 18-A M.R.S.A. § 9-302(a)(3) (2012).

248. *In re Adoption of Matthew R.*, 2000 ME 86, 750 A.2d 1262.

249. *Id.* ¶ 3.

250. *Id.* To add even more complexity, those same family members obtained guardianship over the child’s sibling, who was also the subject of a child protective proceeding. *Id.* at ¶ 3, n.2.

251. *Id.* ¶ 5. The Law Court denied DHHS’s appeal from that decision as interlocutory and remanded the case for a final determination on the adoption petitions. *Id.* ¶¶ 5–8. The Law Court was critical of the Probate Court for bifurcating the issue of consent from the adoption itself as having contributed to the further delay in the resolution of the child’s adoption. *Id.* ¶ 8, n. 5.

252. 18-A M.R.S.A. § 5-204 (2012); 19-A M.R.S.A. §§ 1652, 2001–2012 (2012 & Supp. 2014). Kennebec County Probate Judge James Mitchell and his co-author Philip Hunt suggests that the “simplest solution” is to “redirect[]” a child support order between parents to the guardian. MITCHELL & HUNT, *supra* note 29, § 5.01.3.C at 5-15. However, such redirecting would not, strictly speaking, be in accordance with the child support guidelines, which base awards on the “gross income of both



Recovery, which is separate from its Office of Child and Family Services) in an administrative proceeding.<sup>253</sup> However, the efficiencies that can be gained by allowing a probate court to enter a child support order as part of a guardianship proceeding are quite limited where a support order is already in effect. The law is unclear regarding the priority of orders in the event that multiple orders are in effect.<sup>254</sup> With respect to child support orders, a probate court cannot issue an order regarding arrears that have accrued under a District Court order, even in the context of issuing an order directly implicating the parental rights of the parent with a support obligation.<sup>255</sup> It can be quite confusing to sort out whether and to what extent a child support order is enforceable when there is a guardianship order in effect, particularly when it concerns a child who is one of multiple children included on another support order.<sup>256</sup>

The Law Court commented in an appeal in a probate court termination of a parental rights matter, where the father sought to have his child support arrearage eliminated on the termination of such rights, that the Probate Court was correct in declining to address the issue of support; “These orders originate in the District Court, and the District Court retains jurisdiction to amend or terminate such orders.”<sup>257</sup> The Law Court appeared to be not only referring to the order with respect to the father in that case, but also observing, as a general matter, that child support matters (“These orders...”) are addressed in the District Court.<sup>258</sup>

A related problem of split jurisdiction arises when the parties in a contested guardianship or adoption case reach an agreement that involves modification to an existing parental rights order in a District Court family matter. The parties must first request that the Probate Court stay the proceedings, and then they must file a new post-judgment matter in the District Court (meeting all of the filing and service requirements) to move the District Court to make the modification to the

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parties” and presumes that the “primary care provider” supports the child directly and the other parent must make weekly payments. *See* 19-A M.R.S.A. § 2006 (2012 & Supp. 2014).

253. 19-A M.R.S.A. §§ 2002, 2101–2109 (2012 & Supp. 2014). *See also* Testimony of Attorney General Janet Mills in Support of LD 890, 127th Legis., <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=29269> (describing four cases in which child support enforcement was complicated by the occurrence of simultaneous proceedings in probate and district courts).

254. MITCHELL & HUNT, *supra* note 29, § 5.01.3.C at 5-15. If there is an administrative order issued by DHHS, such order is suspended once a court order (whether from District or Probate Court) is entered. *Id.* at 5-16.

255. *In re Jacob B.*, 2008 ME 168, ¶ 19, 959 A.2d 734.

256. MITCHELL & HUNT, *supra* note 29, § 5.01.3.C at 5-16–5-17 (2014). Moreover, a guardianship terminates automatically when the ward reaches the age of 18 and presumably the accompanying child support obligation ends with it. This leads to a different result from some child support orders issued under title 19-A, which may terminate between the ages of 18, and 19 if the child is attending secondary school. 19-A M.R.S.A. § 2001(11) (2012).

257. *Jacob B.*, 2008 ME 168, ¶ 21, 959 A.2d 734.

258. An additional distinction is that probate judges have the discretion to enter child support orders in guardianship matters, *see* 18-A M.R.S.A. § 5-104 (2012) (“the court *may* order parent to pay child support”) (emphasis added), whereas a District Court parental rights and responsibilities order must include “a provision for child support . . . or a statement of the reason for not ordering child support,” 19-A M.R.S.A. § 1653(2)(D)(3) (2012). Some probate judges, as a matter of regular practice, refuse to order child support as part of guardianship proceedings.

District Court order.<sup>259</sup> This is in sharp contrast with, for example, litigants' options for resolving Protection from Abuse (PFA) Proceedings; if they reach an agreement to amend a family matter order in lieu of (or in addition to) a PFA Order, it is quite simple to have the District Court amend the family matter order on the same day that the parties are in court for the PFA.<sup>260</sup>

The circumstances described in the 2004 Law Court opinion *In re Adoption of Michaela C.* demonstrate how this split jurisdiction can allow a dispute to develop into a morass, with a young child at the center.<sup>261</sup> The District Court had terminated the child's mother's parental rights in a child protection proceeding, but her father still had his parental rights. DHHS's permanency plan, approved by the District Court, was for the child to be adopted by her paternal grandmother, Rachel, an arrangement to which her father indicated that he would consent. Rachel filed an adoption petition in the Sagadahoc County Probate Court. The child's maternal grandmother, Linda, filed a competing adoption petition in the York County Probate Court, which both the father and DHHS opposed.<sup>262</sup> The York County Probate Court refused to dismiss Linda's petition, and the entire situation came to a standstill for years.<sup>263</sup> The Law Court held that the York County Probate Court had to dismiss Linda's petition because the biological father would not consent to the adoption by Linda and the Probate Court could not terminate his parental rights in that matter since there was a pending child protection petition.<sup>264</sup> The Law Court stated plainly: "Children should not be in limbo, caught between courts."<sup>265</sup>

The Maine Judicial Branch's Family Division Task Force issued a Report on June 6, 2014, which addressed, among other concerns, the split jurisdiction system

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259. Faircloth, *supra* note 112. We have done several of these cases in the Clinic, such as when the parties to a contested adoption agree to the entry of a District Court order granting a petitioner de facto parent status, thereby establishing a legal parent-child relationship without requiring the termination of the biological parents' rights.

260. See 19-A M.R.S.A. § 4010(2) (providing that PFA proceedings may be independent of or joined with other family matters). In the Cumberland Legal Aid Clinic's experience with PFA matters, we have frequently seen cases resolved on the dates set for a final hearing through the parties' agreement to enter or modify an order in a parental rights proceeding. Similarly, a District Court judge presiding over a protective custody proceeding may enter an order regarding parental rights pursuant to 19-A M.R.S.A. § 1653, which can enable the parties to resolve the protective custody case through an amendment to a family matters order. 22 M.R.S.A. § 4036(1-A) (Supp. 2014). The District Court can also consolidate child protection and grandparents' visitation rights proceedings. 19-A M.R.S.A. § 1805 (2012).

261. *In re Adoption of Michaela C.*, 2004 ME 153, 863 A.2d 270.

262. The local probate court for Rachel, who lived with the child in Kennebec County, was the Kennebec County Probate Court. However, counsel for Linda, the maternal grandmother, was the Probate Judge in that county so her petition was transferred to the Sagadahoc County Probate Court. *Id.* ¶ 19 n.5, 863 A.2d 270.

263. *Id.* ¶ 8, 863 A.2d 272-73.

264. *Id.* ¶¶ 14, 19, 863 A.2d 270 (citing 18-A M.R.S.A. § 9-204(a) (2012); 22 M.R.S.A. § 4051 (Supp. 2014)).

265. *Id.* ¶ 15, 863 A.2d 270. Linda's adoption petition had been pending in the York County Probate Court for three years by the time of the Law Court's opinion; the Law Court issued its opinion nine days after the completion of briefing.

for family matters.<sup>266</sup> The Task Force noted, based on information gathered at a series of public hearings and from solicitation of public comments: “Litigants and attorneys expressed dissatisfaction with the disconnect between the various district courts and the county probate courts. Overall, the perception is that when families are required to appear before two completely separate and disconnected legal venues, the result is confusion and waste of precious resources.”<sup>267</sup>

Social science findings bear out these concerns and note even more worrisome conclusions. Extensive research during recent decades has documented the adverse effects on children’s emotional health and development of protracted and contentious litigation regarding custody issues.<sup>268</sup> Some scholars have analyzed the potential negative impact of intergenerational disputes, such as grandparent visitation litigation, which can often occur in the context of parental conflict and instability.<sup>269</sup> Commentators have also noted how “fragmented” jurisdiction over children’s issues can cause a range of harms for children, litigants, and the courts.<sup>270</sup> Maine’s split jurisdiction between district and probate courts – and the associated delay, confusion, and conflict – implicate all of these concerns.

### 3. *The probate courts’ “informality” and limited resources can result in inadequate due process and access to justice for litigants*

Maine’s probate courts have long touted their reputation as an informal “peoples’ court” where unrepresented litigants can have their matters addressed in a setting away from the often-emotional and fast-paced, hectic state courts.<sup>271</sup> As the vast majority of what probate courts do is non-adversarial, whether it be the

266. Maine Judicial Branch, Family Division Task Force, Final Report to the Justices of the Maine Supreme Judicial Court 6 (2014) (“FDTF Report”) available at [http://www.courts.maine.gov/maine\\_courts/supreme/comment/fdtf/ftdf\\_notice.shtml](http://www.courts.maine.gov/maine_courts/supreme/comment/fdtf/ftdf_notice.shtml).

267. *Id.*

268. John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 99–100 (2005); Joan B. Kelly, *Psychological And Legal Interventions For Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL’Y & L. 129, 131 (2002); Linda D. Elrod, *Reforming The System To Protect Children In High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 496–501 (2001); Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 405 (2000); Catherine C. Ayoub et al., *Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCILIATION COURTS REV. 297, 298–301 (1999); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 85, 123–27, 133–34 (1997); Richard Wolman & Keith Taylor, *Psychological Effects of Custody Disputes on Children*, 9 BEHAV. SCI. & L. 399 (1991).

269. Stephen A. Newman, *Grandparent Visitation Claims: Assessing the Multiple Harms of Litigation to Families and Children*, 13 B.U. PUB. INT. L.J. 21, 27–40 (2003).

270. Carolyn D. Schwartz, *Unified Family Courts: A Saving Grace for Victims of Domestic Violence Living in Nations With Fragmented Court Systems*, 42 FAM. CT. REV. 304, 309–10 (2004); *Developments in the Law—The Law of Marriage and Family: Unified Family Courts And The Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2105–06 (2003); Elrod, *supra* note 268, at 519–20; Catherine Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3, 6–9 (1998); Weinstein, *supra* note 268, at 173–74.

271. Public Testimony of Hon. Michael Dubois, Androscoggin County Probate Judge, before Joint Standing Committee on the Judiciary, 127th Legislature (February 3, 2015). Judge Dubois estimated that between 80-90% of litigants in his court were not represented by counsel.

administration of estates (which can often be managed entirely by the register and her staff, without any involvement of the probate judge) or uncontested guardianships and name changes,<sup>272</sup> the un-court-like “feel” for the register’s office may provide a less stressful setting for petitioners and others seeking help. Indeed, reports regarding the operation of probate courts, discussed further in Part IV.A below,<sup>273</sup> note the probate court offices seem to function and serve the public well.

However, in the context of contested parental rights matters before a probate court or the District Court, or where a probate court’s actions may supersede those of the District Court, this informality and overall structure can be counter-productive and even injurious to the rights of litigants and the interests of children.<sup>274</sup> Although Probate Judges describe their approach as having positive benefits, their description of what such approach entails suggests that they equate informality with a casual approach to process.<sup>275</sup>

The probate courts, with very limited resources, are ill-equipped to handle the protracted nature of contested parental rights disputes, which often require multiple testimonial hearings, including those for modification or enforcement of prior court orders. Circumstances may necessitate expeditious resolutions of specific disputes to protect a child’s best interests or a litigant’s rights. Probate Judges are part-time, and each probate court has only one judge to serve the entire county. Thus,

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272. In 2013, only 25% of minor guardianship petitions and 1% of name change petitions filed in Maine probate courts were contested matters. Attorneys were involved in 4% of name changes. Data is not publicly available regarding attorney involvement in adoption proceedings. Research results on file with author.

273. See *infra* notes 305–340 and accompanying text.

274. In addition to the problems associated with informality set forth below, many probate judges do not routinely follow the Maine Rules of Evidence in contested testimonial matters involving parental rights, although such proceedings are not exempted from the rules’ applicability. ME. R. EVID. 101.

275. For example, Androscoggin County Probate Judge Michael Dubois noted in his statement to the Judiciary Committee on behalf of the Probate Judges Assembly in opposition to LD 890 that, among the benefits of litigating family law matters in probate court rather than District Court:

Any interested person may petition the probate court to ensure the protection and promotion of a minor’s best interests. No predetermination of standing is required, no extensive pleadings and no pre-hearing conferences are needed. In fact, *notice may be waived* as the circumstances warrant. Many probate guardianships are resolved quite successfully *without employing the myriad legal and social services supports*.

Letter of Hon. Michael Dubois to Joint Standing Committee on Judiciary, L.D. 890 (127th Legis. 2015) (emphasis added) (on file with author); see *infra* notes 352–370 and accompanying text (discussing L.D. 890 and the model set forth therein).

Similarly, in 1986, Franklin County Probate Judge Richard Morton (who is still in office) offered the following caution to the Maine Legislature’s Joint Standing Committee on Judiciary as a basis to reject legislation that would merge all family law matters into the District Court and create several new full-time probate judge positions within that court:

The informality and extra time that we are now able to provide to the public will be a thing of the past. People who now can obtain guardians or conservators without attorneys will be forced to hire counsel because the cases will have to be properly organized and documented when the Judge arrives. Perhaps it is essential to progress that the Probate Courts become as impersonal as the District Courts are now, but society pays dearly for that progress and the architects of progress must recognize the cost they are exacting.

Testimony of Franklin County Probate Judge Richard Morton, L.D. 2119 (112th Legis. 1986). Some attorneys have told me that they prefer to be in a probate court when the “informality” is advantageous to a client’s position.

scheduling hearings (particularly contested testimonial proceedings requiring several hours of court time) is very challenging, often leading to substantial delays or interruptions in proceedings.<sup>276</sup>

A probate judge's failure to timely process minor guardianship cases led to the reprimand of the Probate Judge for violation of the Judicial Canon requirement that a judge "dispose of all judicial matters promptly."<sup>277</sup> The Maine Supreme Judicial Court found that the Probate Judge was well-intentioned and that his "failure to effectively manage his caseload was undoubtedly aggravated by the substantial growth of the [] Probate Court's family law docket in recent years."<sup>278</sup> The Court noted that a "heavier docket requires judicial practices tailored to the time-sensitive needs of children and families."<sup>279</sup> However, there have been no systemic or structural changes in the Maine probate courts to allow judges to tailor their practices to these acute needs.

The limited resources and informal practices of the probate courts can also lead to inadequate due process for litigants in contested parental rights matters. Probate courts do not customarily record proceedings in minor guardianship matters, even in testimonial hearings where there is a request by one of the parties.<sup>280</sup> Creating a record of proceedings is not only a core due process value,<sup>281</sup> it is also a best practice.<sup>282</sup> Having an accurate record is essential for reviewing a

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276. See MAINE BAR DIRECTORY 98-99 (2014) (noting days each month when each county probate court holds court dates, such as Knox County, "first & third Wednesday of each month," or Somerset County, "every three weeks"). A probate court may spread the trial days in a single contested matter across several weeks because it cannot schedule a matter for consecutive days due to the limited availability of the Probate Judge. Even non-testimonial court dates in guardianship matters are sometimes scheduled more than six months into the future. The delays in scheduling guardianship matters can be contrasted with child protection proceedings, which must follow 22 M.R.S.A. § 4035(4-A) (2004 & Supp. 2014), which requires the District Court to issue a jeopardy order within 120 days of the filing of a child protection petition. Indeed, I have heard reports that, in at least one Maine county, the delays in scheduling guardianship hearings have gotten so lengthy that a significant number of individuals concerned about the welfare of a child now resort to pursuing the more unusual and complicated route of filing a "three-party petition" to initiate a child protection proceeding in District Court. See *supra* note 159 (explaining three-party petition process).

277. *In re Holmes*, 2011 ME 119, ¶ 1, 32 A.3d 1011 (citing Maine Judicial Canon 3(B)(8)).

278. See *id.* ¶ 4, 32 A.3d 1011 (quoting Justice Jon Levy's factual findings).

279. *Id.*

280. See, e.g., *In re Guardianship of Johnson*, 2014 ME 104, ¶ 10, 98 A.3d 1023. However, the Law Court has held that TPRs in adoption cases are "child protection" proceedings, and therefore must be recorded pursuant to 22 M.R.S.A. § 4007(1) (2004 & Supp. 2014). *In re Dylan B.*, 2001 ME 31, ¶ 1, 766 A.2d 577 (vacating TPR order against mother and remanding where Probate Court failed to record contested TPR hearing).

281. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-23 (1996); *Gorman v. University of Rhode Island*, 646 F. Supp. 799, 808 (D. R.I. 1986), *rev'd in part on other grounds*, 837 F.2d 7 (1st Cir. 1988); *In re Guardianship of McIntosh*, 2015 ME 95, ¶ 14, 120 A.3d 654 ("In proceedings in which fundamental liberty interests are implicated, due process requires that there be an adequate record of the trial court decision, including any transcript of the proceedings, to permit fair consideration of the issues on appeal.")

282. See Task Force on Revision of the National Probate Court Standards, National Probate Court Standards, § 1.3.E (2012) ("Records of all relevant probate court decisions and proceedings should be accurately maintained and securely preserved.")

court's actions on appeal,<sup>283</sup> and it can also be important for promptly documenting an agreement reached by parties at the courthouse by entering it “on the record” or for accurately capturing the specific terms of a bench ruling.<sup>284</sup> The burden of arrangements for making one's own recording is particularly severe on unrepresented or low-income parties.<sup>285</sup>

The Maine Supreme Judicial Court has identified testimonial hearings involving the guardianship of children as a type of proceeding that a court must routinely record, regardless of any request of the parties.<sup>286</sup> However, many probate courts did not follow the recording requirement set forth in that administrative order.<sup>287</sup> Accordingly, “to . . . ensure that probate proceedings involving fundamental rights or liberty are . . . recorded,” the Law Court recently adopted amendments to the Maine Rules of Civil Procedure and the Maine Rules of Probate Procedure<sup>288</sup> requiring probate courts to record “any proceeding that . . . any statute, court rule, or administrative order requires be recorded.”<sup>289</sup> This would encompass minor guardianship proceedings, as well as any proceeding that “any party requests, at least 24 hours before the start of the proceeding, be recorded.”<sup>290</sup> With these amendments, probate courts should now record all parental rights matters that come before them, but given that most do not own recording equipment, it may be some time before such recording becomes routine.

Another indication of the limited resources of these courts is that some attorneys who represent low-income litigants have noted that it is far more difficult

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283. *McIntosh*, 2015 ME 95, ¶¶ 14–15, 120 A.3d 654; *In re Guardianship of Helen F.*, 2013 ME 18, ¶¶ 5–7 (vacating adult guardianship order where Probate Court did not make recording of the proceedings and the judge's inability to recall the evidence presented prevented the appellant from submitting an adequate statement of the evidence pursuant to M.R. App. P. 5(d)). *See also In re Guardianship of Johnson*, 2014 ME 104, ¶ 17 n. 6, 98 A.3d 1023 (noting the difficulty of determining on appeal what proceedings took place when there is no recording).

284. *See Toffling v. Toffling*, 2008 ME 90, ¶ 8, 953 A.2d 375 (upholding District Court's entry of judgment based on agreement orally put on the record by the parties).

285. As noted in the *Johnson* opinion (a case in which the Clinic represented the appellant at both the trial and appellate levels), a probate court did not permit a party to make her own recording of a contested guardianship hearing after the court refused to record the proceedings. The Law Court declined to reverse the judgment due to such action, but it did note in its opinion: “Nevertheless, it is preferable in every instance for a trial court to allow a party to record a hearing if the court is unwilling or unable to do so.” *Johnson*, 2014 ME 104, ¶ 18, 98 A.3d at 1023.

286. Recording of Trial Court Proceedings, Me. Admin. Order JB-12-1 (as amended by A. 11-14) (effective Nov. 24, 2014). The Maine Judicial Branch maintains a central Office of Transcript Operations and Projects, which provides transcriptions services for state court proceedings. *See The Office of Transcript Operations and Projects*, STATE OF MAINE JUDICIAL BRANCH, [http://www.courts.maine.gov/maine\\_courts/transcription/index.shtml](http://www.courts.maine.gov/maine_courts/transcription/index.shtml) (stating that the office “provides the official transcripts of electronically recorded hearings from the Maine State Courts” and making no reference to probate courts) (last visited Sep. 21, 2015).

287. In the recent opinion in *Johnson*, the Law Court noted that Administrative Order JB-12-1 appears to require such recordings but declined to apply the AO in that case or to clarify its requirements. *Johnson*, 2014 ME 104, ¶ 18 n.7, 98 A.3d 1023.

288. ME. R. CIV. P. 76H ADVISORY COMMITTEE'S NOTE TO 2015 AMEND., ME. JUDICIAL BRANCH WEBSITE/RULES (visited Sept. 14, 2015).

289. ME. R. CIV. P. 76H(b)(2)(A); *see* ME. R. PROB. P. 76H (providing that, other than with respect to costs and fees, “Rule 76H of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.”).

290. ME. R. CIV. P. 76H(b)(2)(B).

for such clients to receive a waiver of filing and related fees in probate courts than in state courts, although both are ostensibly governed by the same rule for such waivers,<sup>291</sup> and the U.S. Constitution's requirement of due process, regardless of the ability to pay court fees, applies to both.<sup>292</sup> This practice creates another barrier to the courts for a large number of litigants.

*4. The practice of law by Maine Probate Judges undermines the delivery of justice in parental rights matters*

The fact that sitting Probate Judges (and candidates for such office) are permitted under the Maine Code of Judicial Conduct to practice law<sup>293</sup> can further complicate parental rights proceedings in probate court. The only limitation on the judges' practice is before their own court.<sup>294</sup> This means that Probate Judges can appear as counsel in matters before their fellow Probate Judges in other counties, as well as in state courts anywhere, including the same county in which they sit.

The practice of law by Maine's elected part-time Probate Judges has long been the specific focus of extensive criticism.<sup>295</sup> It causes practical problems and can lead to actual or apparent conflicts of interest;<sup>296</sup> at the very least, it can be unsettling for the litigants and the other counsel.<sup>297</sup> Such problems can be

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291. See ME. R. CIV. P. 91; ME. R. PROB. PROC. 91 (stating that "Rule 91 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts"). For example, although Rule 91(a)(3) sets forth a presumption of inability to pay court fees or costs if the affidavit states that the person's income is "derived from poverty-based public assistance programs," one of our clients, who was disabled and received needs-based benefits for herself and her two children, was ordered to appear for a testimonial hearing before a probate court when she sought a waiver of the filing and service fees (more than \$100) for her petition to terminate the guardianship regarding her third child. After the hearing, the probate court denied the fee waiver (but allowed the client to pay in monthly installments) because the client testified, in response to questioning from the judge, that she paid \$8 per month for the Netflix streaming service (the only television programming her children watched) and \$25 per month for a cell phone (her only telephone). We have also noted that some probate courts refuse to grant fee waivers to incarcerated individuals as a matter of policy, and other attorneys have reported similar difficulties obtaining fee waivers for low-income clients.

292. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 124–25 (1996) (holding that denying indigent parent's access to record on appeal of termination of her parental rights violated due process).

293. See ME. CODE JUD. CONDUCT, COVERAGE & EFFECTIVE DATE I(B) (exempting probate judges from several provisions of the code, including those prohibiting the practice of law).

294. ME. CODE JUD. CONDUCT, COVERAGE & EFFECTIVE DATE I(B)(1).

295. *In re Estate of McCormick*, 2001 ME 24, ¶ 16 n.4, 765 A.2d 552; ME. CODE JUD. CONDUCT, ADVISORY COMMITTEE'S INTRODUCTORY NOTE TO 2015 AMEND., ME. JUDICIAL BRANCH WEBSITE/RULES (visited Sept. 15, 2015).

296. The ethical issues created by Maine's current probate court system were the focus of oral arguments before the Maine Supreme Judicial Court in a judicial misconduct appeal involving a Probate Judge. Justice Joseph Jabar posed the following questions to counsel for both the Probate Judge and the Committee on Judicial Responsibility and Discipline: "Aren't all these problems inherent in having elected probate judges and allowing them to practice?... Isn't this just the nature of the system in Maine?" Both attorneys responded: "Yes." Judy Harrison, *High Court Considers Ethical Problems of Probate Court Judges*, BANGOR DAILY NEWS (Nov. 4, 2015), <http://bangordailynews.com/2015/11/04/news/state/high-court-considers-ethical-problems-of-probate-court-judges/>; see also Scott Dolan, *Justices on Maine's Highest Court Ask If Multiple Roles Cloud Ethical Rules For Accused Judge*, PORTLAND PRESS HERALD (Nov. 4, 2015), <http://www.pressherald.com/2015/11/04/maines-highest-court-weighs-whether-to-discipline-part-time-judge/>.

297. See *McCormick*, 2001 ME 24, ¶ 16, 765 A.2d 552.

compounded because there is only one Probate Judge in each county, which requires a transfer of the case itself when there is a conflict of interest presented by the judge's practice of law.<sup>298</sup> Maine is an outlier, particularly in its utter lack of any restriction on the practice, permitting Probate Judges to appear before courts in their own county<sup>299</sup> or before Probate Judges of other counties.<sup>300</sup>

The implications of the lack of limitations on probate judges' law practice is exemplified by a recent contested minor guardianship case in which the law school clinic I supervise represented a biological parent. Counsel for the petitioners unseated the Probate Judge during the course of the proceedings. Because there is only one judge in each county, the Probate Court had to transfer our case to another county, requiring additional travel for all of the parties, including our low-income client, witnesses, and counsel. While the delay in our proceedings from the transfer was fairly minimal, there is certainly the potential for longer delays to result from any case transfer. The transfer also meant that all of the prior judge's knowledge of the case was no longer a part of the proceedings. Opposing counsel, now a sitting Probate Judge, represented the petitioners until the case went to a contested hearing. He then represented the other biological parent in a parallel District Court parental rights proceeding involving the same child. These events demonstrate the inconvenience, disruption, cost, and appearance of impropriety that can result from the exemption created for Probate Judges from the Judicial Code's prohibition on practice by judges when combined with the current Probate Court structure.

By providing the above description of the range of problems presented by the current jurisdictional alignment of parental rights matters, my intention is not to suggest that Maine's Probate Judges are not qualified, dedicated, ethical jurists. To the contrary, many Probate Judges, despite their part-time status, low pay, inadequate resources, and poor guidance from the applicable statutes, do an exceptional job handling very difficult cases. These judges devise creative solutions to family problems and are clearly committed both to administering their courts in a fair and just manner and to serving the best interests of all litigants who come before them, especially the children at the center of parental rights disputes. However, even the most conscientious and hard-working Probate Judge must nonetheless operate within the limitations created by the MPC, the Probate Court structure and its resources, and the split-jurisdiction approach to family matters. My criticisms here address those limitations, not the judges who must contend with

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298. 4 M.R.S.A. § 307 (2014).

299. New York imposes the following restrictions on all part-time judges:

[Part-time judges] shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

N.Y. COMP. CODES R. & REGS. tit. 22, § 100.6(B)(2) (2015).

300. By contrast, in New Jersey, "Surrogates" (who are the equivalent of probate judges):

Shall not practice law in any estate or trust matter, including the preparation of wills, trust documents, or any other probate documents, in or out of court. Furthermore, a surrogate or deputy surrogate shall not practice law in any criminal, quasi-criminal or penal matter, whether judicial or administrative in nature, in that county, nor in the Superior Court, Chancery Division, Probate Part in any county.

N.J. R. COURT 1:15-1(C), available at <http://www.judiciary.state.nj.us/rules/r1-15.htm>.



them.

#### IV. PROPOSALS FOR REFORM

As discussed in the prior section, Maine probate courts' adjudication of parental rights disputes results in a wide range of problems. The exclusive jurisdiction of these matters in under-resourced and part-time courts creates numerous limitations on these courts' abilities to effectively and promptly address these matters. Having a child at the center of one of these disputes also involved in a pending or prior District Court matter presents an even more significant problem. Accordingly, a range of reforms to the structure and jurisdiction of the probate courts is necessary to reverse these problems. As an initial matter, the Legislature must expand the jurisdiction of the District Court to include these MPC parental rights matters so the same court can hear all matters involving the parental rights of a child. A more comprehensive solution, as recommended in numerous studies and reports, is to absorb the county-based probate courts into the Maine Judicial Branch.<sup>301</sup> Such restructuring, however, is not likely to occur anytime soon. As long as Maine probate courts remain apart from the state court system as sixteen individual courts, other reforms are needed to minimize the negative impacts on litigants, such as mandating recording of probate court proceedings and limiting the practice of law by Probate Judges.

In addition to these jurisdictional and structural changes, the text of the MPC provisions governing these matters is in need of substantial reform. A series of Maine Supreme Judicial Court opinions adopting interpretations of the laws to preserve their constitutionality and to enable courts to use them to effectively address the needs of children and litigants has resulted in a body of case law that must be read in conjunction with the statutory language, in some cases to *reverse* the text's plain language. However, there are a number of provisions that no amount of generous interpretation could enable a court to apply in a way that addresses the full range of a child's needs and embodies the broader policy goal of preserving families. The Legislature also needs to revise the law to work effectively in a court with jurisdiction to hear all matters involving parental rights of a child. Accordingly, I offer a series of suggested reforms for the MPC itself, which the Legislature could enact regardless of which court hears the matter.

##### *A. Attempts to Reform the Probate Court System*

Maine has a remarkable history of studying the problems of the probate court system generally and their handling of parental rights matters specifically and then not acting on the resulting recommendations. Indeed, even though Maine voters amended the Maine Constitution in 1967 to abolish the probate court system, leaving only the implementation for the Legislature, no action has been taken to effectuate the voters' mandate.<sup>302</sup> I briefly outline this unfortunate history here.

The period from the 1950s to 1980s saw multiple attempts to reform Maine's probate court system. Each of the proposals advanced during this period suggested

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301. See *infra* Part IV.A.

302. Resolves 1967, ch. 77 (amending ME. CONST. art. VI, § 6 (repealed 1967)).

eliminating the courts in their present form and merging them into the state court system, which was itself undergoing rapid development and unification during this time.<sup>303</sup> These efforts were launched in 1952, when Edward F. Dow, Chair of the University of Maine's Department of History and Government<sup>304</sup> published his study *County Government in Maine* on behalf of the Maine Legislative Research Committee.<sup>305</sup> 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.<sup>306</sup> The reports that followed struck similar themes and made similar proposals.

The Maine Legislature authorized two extensive studies of Maine's probate courts in the 1960s.<sup>307</sup> The reports resulting from these studies describe a situation that closely resembles the current system.<sup>308</sup> The second, more comprehensive study, conducted by the Institute of Judicial Administration ("IJA"), was commissioned on the heels of a statewide referendum in 1967, 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.<sup>309</sup> However, the language of the amendment provides that the repeal "shall become effective at such time as the Legislature by proper enactment shall

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303. WHITTIER, *supra* note 17, at 29-30. The statewide District Court was established in 1961, replacing numerous county courts and creating a unified system. *See* P.L. 1961, ch. 386. The Legislature established the present Superior Court system, which had been county-based, in 1930. *See* P.L. 1929, ch. 141.

304. *The History of Political Science at UMaine*, THE UNIVERSITY OF MAINE, <http://umaine.edu/polisci/the-history-of-political-science-at-umaine> (last visited September 16, 2015).

305. *See generally* DOW, *supra* note 17.

306. *Id.* at 17. He recommended that the number of probate judges, courts, and registers be reduced statewide and that registers should be appointed by the probate judges. *Id.* at 18. His report included a strong critique of the county government structure, which had changed little since the constitutional amendment of 1855. *Id.* at 6-10.

A commission convened by Governor John H. Reed in the early 1960s to review the entire Maine Constitution and make recommendations for reform included among its proposal the appointment of probate judges. However, the Maine Legislature rejected this proposal in 1963. TINKLE, *supra* note 20, at 16. As discussed in this section, the Maine Legislature has consistently rejected proposals to reform the probate courts or the position of probate judge.

307. *See generally* THE INSTITUTE OF JUDICIAL ADMINISTRATION, THE DESIRABILITY OF INTEGRATING ACTIVITIES OF THE PROBATE COURTS OF MAINE INTO THE SUPERIOR COURT 1-2 (1969) [hereinafter IJA REPORT] (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) [hereinafter BPA REPORT].

308. *See, e.g.*, BPA REPORT, *supra* note 307, 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.

309. *See* 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." IJA REPORT, *supra* note 307, at 1-2. The Legislative Research Committee retained the Institute of Judicial Administration, based in New York, to undertake the study. *Id.* at 2.

establish a different Probate Court system with full-time judges.”<sup>310</sup> 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.*”<sup>311</sup>

The Legislature has never fulfilled the condition of the amendment, although it has considered numerous court restructuring proposals in the years since its passage.<sup>312</sup> The 1969 Report issued by the IJA 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.”<sup>313</sup> This approach was favored because it reflected the Superior Court’s familiarity with probate court matters as it 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.”<sup>314</sup>

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 the Maine Probate Court to the Superior Court.<sup>315</sup> The MPLRC based this recommendation on reasoning similar to that in the IJA’s 1969 recommendations, as well as several changes that were necessary as a result of the adoption of the UPC in Maine.<sup>316</sup> The MPLRC noted that the probate courts shared jurisdiction with other courts in actions for separation, support of wives and children, and protective custody of children. The enactment of the MPC had eliminated the probate court’s jurisdiction over separation actions, as noted above.<sup>317</sup>

310. Resolves 1967, ch. 77 (amending ME. CONST. art. VI, § 6 (repealed 1967)).

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

312. For a period of time, it appears that some assumed that such condition could not be fulfilled absent a further constitutional amendment permitting the Governor to appoint probate judges. See MAINE PROBATE LAW REVISIONS COMMISSION, *supra* note 116, at 12–13. However, as the Supreme Judicial Court clarified in its 1980 opinion, no further amendment is needed if the Legislature simply eliminated the position of “probate judge.” Opinion of the Justices, 412 A.2d at 981.

313. IJA Report, *supra* note 307, at 16–18.

314. *Id.* at 25.

315. MAINE PROBATE LAW REVISION COMMISSION, REPORT TO THE LEGISLATURE: RECOMMENDATIONS CONCERNING THE PROBATE CODE AND CONSTITUTIONAL AMENDMENT (Jan. 1980). This proposal would have retained the county-based registers of probate, but would make them a part of the state judicial system. *Id.* at 17–18.

316. *Id.* at 1–20. Those changes would apparently create greater inefficiencies in the probate court system (as more of the work could be performed by registers), and the Commission determined that the simpler approach was simply to transfer all jurisdiction to the Superior Court. Among the other reasons it recommended 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.

317. *Id.* at 5. The MPLRC noted that there had been some proposals for a family court system as part of probate court reform, but the report was not clear what those proposals were. The MPLRC concluded that combining family and probate matters into one court was not appropriate given the “considerable question as to the actual and meaningful relationship between matters of probate law” and those that are usually considered to be part of family law, as they “do not involve the same kind of judicial discretion.” *Id.* at 6–7. It did note that a family court system could be established as a division

The MPLRC was concerned, however, that a further constitutional amendment would be necessary to implement all of the recommended changes—it recommended that the Legislature submit certain specific questions regarding the constitutionality to the Supreme Judicial Court.<sup>318</sup> Accordingly, the Senate sought an opinion from the Maine Supreme Judicial Court as to the constitutionality of the bill, “An Act to Transfer Probate Jurisdiction to the Superior Court,” then pending before it.<sup>319</sup> 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.<sup>320</sup> Nonetheless, the Legislature never enacted the bill.

Efforts to study and reform the 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.<sup>321</sup> The committee is commonly referred to as the “Cotter Committee” after its chair William R. Cotter, then President of Colby College.<sup>322</sup> The Judicial Council created the Cotter Committee to again study the probate court structure and system of part-time elected judges, particularly in light of the enactment of the MPC, and to “[e]xamine the need for changes in the judicial structure for handling family matters, including the possibility of creating a special ‘family court structure.’”<sup>323</sup>

The Cotter Committee noted that, as a result of the enactment of the MPC 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.<sup>324</sup> 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.<sup>325</sup> The vast majority

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within the Superior Court to “avoid any undesirable further fragmentation in the judicial system.” *Id.* at 7. At that time, unlike the present, the Superior Court had jurisdiction over divorce and other family law matters.

318. *Id.* at 20–23.

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

320. *Id.*

321. 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 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).

322. Lauren McArthur, *Debate Renewed Over Probate Reform*, LEWISTON DAILY SUN 1, 1 (Mar. 5, 1985), <https://news.google.com/newspapers?id=PAAqAAAAIIBAJ&sjid=52cFAAAAIBAJ&pg=5557%2C554585>.

323. Cotter Report, *supra* note 321, at 1. This study took place during a time of development of “family court” systems across the country. See H. TED RUBIN & VICTOR EUGENE FLANCO, COURT COORDINATION OF FAMILY CASES, NATIONAL CENTER FOR STATE COURTS, STATE JUSTICE INSTITUTE 7–9, 51–61 (1992).

324. Cotter Report, *supra* note 321, at 2.

325. *Id.*

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 two courts was the result of “historical development” rather than planning, and that it was not a “rational allocation of resources.”<sup>326</sup>

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 that have a significant impact on families.*”<sup>327</sup> The Committee recommended concurrent jurisdiction in the District and Superior Courts over guardianship, conservatorship, and other protective proceedings.<sup>328</sup> This shift would “help further consolidate family matter jurisdictions (adoptions and name changes) within the court where all other family matters are primarily handled.”<sup>329</sup> 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.<sup>330</sup> 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.<sup>331</sup>

The following year, 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.”<sup>332</sup> 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.<sup>333</sup> “*This scattered jurisdiction,*” the report continued, “prevents the most efficient use of Maine’s judicial resources in serving troubled parents and children.”<sup>334</sup> The then-current framework resulted in simultaneous and inconsistent proceedings and prevented

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326. *Id.* at 5. It noted in particular that a recent report regarding the child welfare system outlined the critical need for more judicial time for child welfare cases in District and Superior Courts. *Id.* at 5 (citing GOVERNOR’S WORKING GROUP ON CHILD ABUSE AND NEGLECT LEGAL PROCEEDINGS, *supra* note 100, at 14–20). The Cotter Committee also noted that there was a lack of uniformity of procedure, particularly in the area of adoptions.

327. *Id.* at 5, 9 (emphasis added).

328. *Id.* at 7.

329. *Id.* at 7.

330. *Id.*

331. 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. *Id.* at 7–8.

332. COMMISSION TO STUDY FAMILY MATTERS IN COURT, FINAL REPORT TO THE 112TH LEGISLATURE (March 1986).

333. *Id.* at 3. 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 as well as parental rights and child protective matters. *Id.*

334. *Id.* (emphasis added).

consolidation of matters involving the same child or children.<sup>335</sup> “Each judge,” the CSFMC noted, “has only a few pieces of the family’s puzzle. No uniform solution to the family’s problems can be fashioned by a judge lacking the whole picture.”<sup>336</sup> The delay caused by unavailable courtrooms or “overburdened” judges can cause uncertainty, anxiety, and “do greater damage to a troubled family.”<sup>337</sup> The CSFMC concluded: “Consolidation of jurisdiction over family matters within one Maine court can address those problems.”<sup>338</sup> “However,” it also noted, “before this consolidation can occur, Maine’s current probate court system must be revamped,” and specifically that the probate courts must be absorbed into the state judicial department,<sup>339</sup> as the current structure of the system prevented them from being integrated into a “unified approach to family matters in the Maine courts.”<sup>340</sup>

Despite the consistent findings and recommendations of these three reports issued within a six-year period, and the urging of both the Judicial Council<sup>341</sup> and the Chief Justice of the Maine Supreme Judicial Court,<sup>342</sup> the Maine Legislature enacted none of the reports’ recommendations. As noted earlier, the Maine Legislature eventually created the Family Division of the Maine Judicial Branch in 1997.<sup>343</sup> The Maine Judicial Branch describes the scope of the matters encompassed within the Division as nearly every kind of matter addressing the

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335. *Id.* at 4.

336. *Id.*

337. *Id.* at 6.

338. *Id.* at 9.

339. *Id.* at 9, 11. 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, but the CSFMC also noted that consolidation of jurisdiction within the state court system “may be appropriate at a later date.” *Id.* at 12.

340. *Id.* at 10.

341. 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. 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](http://lldc.mainelegislature.org/Open/LegRec/113/Senate/LegRec_1987-02-02_SP_p0110-0113.pdf)). In the letter, the Council noted that the Council and others had studied the probate court system since 1966, with several 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. *Id.* (citing LD 1250 (112th Legis. 1987) (resulting in “Leave to Withdraw” status on April 3, 1986)). 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,” *id.* at 113 (citing LD 2402 113th Legis. (1987)), which was also ended with “leave to withdraw” status on May 26, 1987.

342. 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](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.”); *see also* McArthur, *supra* note 322 (describing reaction to the proposed probate court reform).

343. P.L. 1997, ch. 69, § 1 (enacting 4 M.R.S.A. § 183 (Supp. 2014)).

lives of children:

This includes divorce, annulment, judicial separation, parental rights and responsibilities, paternity, child support (including cases brought under the Uniform Interstate Family Support Act), visitation rights of grandparents, emancipation, and any post-judgment motions arising from these actions. Also under the umbrella of the Family Division are protective custody proceedings, protection from abuse actions and cases brought under the Maine Juvenile Code.<sup>344</sup>

There is nothing in the legislative record from the enactment of the Family Division regarding the family matters that would *not* fall within its scope: namely, those within the exclusive jurisdiction of the Probate Court.

The 2014 Report of the Family Division Task Force (“Task Force”) noted earlier<sup>345</sup> is the latest study to recommend changes to the current alignment of jurisdiction over parental rights matters.<sup>346</sup> The Task Force undertook an “intensive and concentrated review of the current family matters process.”<sup>347</sup> Its findings about the significant problems caused by the split jurisdiction 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.”<sup>348</sup>

However, “given the mammoth undertaking that would create” (likely in recognition of the string of unsuccessful attempts at making such reform), the Task Force offered a far more modest recommendation: that the District Court’s jurisdiction be expanded to include guardianships and name changes in paternity matters to allow consolidation of such proceedings with other family matters in the District Court involving the child.<sup>349</sup> The Task Force explained that “[c]reating an avenue for the parties and/or District Court to request all family matters be consolidated before the District Court would, in great part, minimize the confusion created by dueling legal forums, decrease intentional delay by one or more of the parties, and conserve family financial resources.”<sup>350</sup> The Task Force’s recommendation included statutory and rule changes to effectuate such consolidated proceedings, as well as to encourage cooperation between the District and Probate Courts regarding family matters and to require parties in District Court matters to disclose any Probate Court matters involving the child.<sup>351</sup>

Thus, in light of the consistent findings of more than a half-century of studies

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344. Maine Judicial Branch, Family Division, [http://courts.maine.gov/maine\\_courts/family/index.shtml](http://courts.maine.gov/maine_courts/family/index.shtml) (last visited Sep. 29, 2015).

345. FDTF Report, *supra* note 266; *see supra* notes 266–267 and accompanying text.

346. In the year between the flurry of reports in the 1980s and the FDTF Report, the only recommendation made about the Probate Courts was a brief mention in the 1992 report of the Commission to Study Maine’s Courts. Commission to Study the Future of Maine’s Courts, Preliminary Recommendations (Sept. 1992) (Revised Following Meeting of September 25, 1992). That commission recommended that the position of Probate Judges be converted to four full-time probate judges, who would be appointed and become part of the overall Maine Judicial Branch (which would organize the four probate courts using groupings of counties). *Id.* at 12.

347. FDTF Report, *supra* note 266, at iv.

348. *Id.* at 6 n.7.

349. *Id.* at 6 n.7.

350. *Id.* at 7.

351. *Id.* at 7–8, app. B1–B2, C5.

of the probate court system, there can be little question that substantial reform is not only needed, but is urgently overdue. In the section that follows, I discuss a range of reforms that would address the most acute problems seen today.

### *B. Jurisdictional and Structural Reforms*

#### *1. Eliminate the “Scattered Jurisdiction” and Enable the District Court to Serve as a Child’s “Home Court”*

In light of all of the difficulties of simultaneous and conflicting orders and proceedings involving the same child described earlier, the Maine Legislature should end the current system of divided exclusive jurisdiction between district and probate courts so that the same court can adjudicate all matters implicating parental rights regarding a child. This would fulfill the mission of the Family Division and enable all litigants to benefit from the efficiencies and benefits of a comprehensive family justice system.

Building on the recommendations of the Family Division Task Force, Maine law should be amended to provide concurrent jurisdiction in District Court for guardianship of a minor, change of a minor’s name, and adoption (including paternity determinations and terminations of parental rights in the context of adoption petitions).<sup>352</sup> A provision should be enacted to require that, if the child is already the subject of an interim or final order in effect that resulted from a Parental Rights and Responsibilities, Divorce, Grandparents Rights, Child Protection, Paternity, Protection from Abuse, or Protection from Harassment matter, or if there is a pending proceeding in Maine District Court to seek such order, any guardianship, name change, or adoption matter must be both filed in and addressed in the District Court (or transferred to that court if the initial filings were in the Probate Court), and preferably in the court location where such order, judgment, or proceeding occurred.<sup>353</sup>

This reform would establish the District Court as a child’s “home court,” having exclusive, continuing jurisdiction over the child, including modification and enforcement of all orders regarding that child, if that court has already issued, or is presently overseeing litigation seeking, an order concerning parent rights of that child.<sup>354</sup> A guardianship or adoption petition would essentially be treated as a

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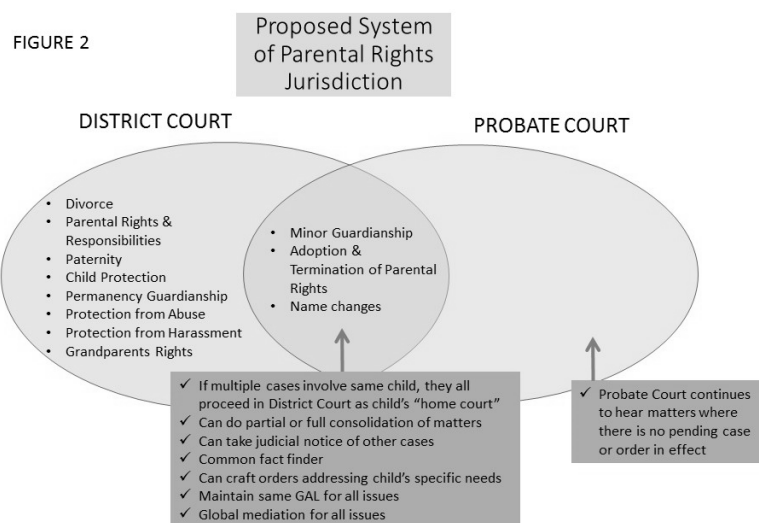
352. 4 M.R.S.A. § 152 (1989 & Supp. 2014) (regarding District Court jurisdiction); 18-A M.R.S.A. §§ 1-701, 5-102, 5-204, 9-103, 9-201, 9-204 (2012 & Supp. 2014) (regarding Probate Court jurisdiction).

353. This model is reflected in LD 890, “An Act to Ensure a Continuing Home Court for Cases Involving Children,” which is pending in the Maine Legislature. L.D. 890 (127th Legis. 2015) *available at* [http://www.mainelegislature.org/legis/bills/display\\_ps.asp?paper=HP0609&snum=127](http://www.mainelegislature.org/legis/bills/display_ps.asp?paper=HP0609&snum=127) (last visited Sep. 29, 2015). The bill has been carried over to the Second Session pursuant to a request from the Joint Standing Committee on Judiciary.

354. This proposal is based on the basic objectives and concepts set forth in the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), codified in Maine law at 19-A M.R.S.A. §§ 1731–1783 (2012 & Supp. 2014). That Act provides that, if a court in one state has issued a “child custody determination,” such court thereafter has “exclusive, continuing jurisdiction” over that determination (including any modification of such order) unless the parties no longer reside in or have significant connections with such state. 19-A M.R.S.A. §§ 1746, 1747 (2012). The law also precludes



petition to the court seeking modification (or termination) of an existing order or a cross-petition for a different order (in the case of pending proceedings). Where there is a question regarding whether a case must proceed in District Court, the statute should require communication between the courts to resolve the dispute, and, where appropriate, determine the process for transferring the matter to another court.<sup>355</sup> To end the current practice of forum-shopping between district and probate courts (and then among probate courts of different counties), Maine law should require that cases brought in Probate Court initially be transferred to the District Court when a case is started there, and it should permit parties to remove any other case to the District Court from the Probate Court.<sup>356</sup> This model is depicted in Figure 2.



There are several significant benefits to a system requiring consolidation of all proceedings involving a child in one court. It eliminates the confusion, added

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simultaneous child custody proceedings in different states and sets forth procedures and standards for determining which state may exercise jurisdiction over the matter. 19-A M.R.S.A. § 1750 (2012).

355. The UCCJEA includes provisions requiring or authorizing communications between courts of different states to resolve jurisdiction questions. *See, e.g.*, 19-A M.R.S.A. § 1748(4), 1750(2) (2012). In *Guardianship of Johnson*, which involved simultaneous and conflicting proceedings in the Probate and District Courts, the Law Court explained the importance of communication between courts with pending proceedings involving the same child. *In re Guardianship of Johnson*, 2014 ME 104, ¶¶ 16–17, 98 A.3d 1023.

356. The MPC includes a provision regarding removal of matters to Superior Court for jury trials, but that does not provide a mechanism for removal of family matters (which cannot be decided by a jury) nor does it expand the jurisdiction of the District Court to hear any Probate Court matters. *See* 18-A M.R.S.A. § 1-306 (2012). A party may wish to remove a case to the District Court because, even where there is no risk of conflicting orders or simultaneous proceedings, there is still the question of whether a probate court has sufficient staff, court time, and resources to adjudicate contested family law matters. In many instances the “formality” of a District Court proceeding, with its associated procedures and standards, would best serve the family involved.

costs, re-litigation, and re-education of a new judge or GAL, and the conflicts described above. It enhances the efficient and timely disposition of family matters. It provides more flexibility and opportunities for creative solutions to address children's needs while preserving their relationships with parents who still have parental rights. It ensures that the parties and court are aware of what orders are in effect and the procedural status of the case. It ends the practice by some litigants of "court-shopping" or otherwise using the present two-court system (and multi-county system of separate probate courts) to increase delay, cost, or inconvenience to another party. It facilitates the participation of attorneys and GALs in the matter and permits global mediation of all issues among all involved family members (everyone's at the table and everyone buys in).<sup>357</sup> All of these results would benefit the courts as well as the parties and children involved.<sup>358</sup>

This recommendation would not only address the significant problems created by concurrent orders and proceedings in the district and probate courts, it would also serve the broader policy goal of minimizing the adverse impact of litigation on children and families, discussed above.<sup>359</sup> Based on research findings, many states have established specialized family courts with comprehensive jurisdiction, including Unified Family Courts, to ensure that proceedings can be as effective and efficient as possible and to minimize the amount of time a family must appear in court to resolve a dispute.<sup>360</sup> Some scholars have argued that "unit[ing] in one

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357. See, e.g., 19-A M.R.S.A. § 1653(1)(A) (2012) ("The Legislature finds and declares as public policy that encouraging mediated resolutions of disputes between parents is in the best interest of minor children.").

358. Testimony of Mary Ann Lynch, Maine Judicial Branch, in Support of LD 890, 127th Legislature (April 2015), <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=29276>. The Family Law Advisory Commission (FLAC) concluded its Report to the Judiciary Committee on LD 890 with the following:

FLAC is not taking a position either for or against LD 890, but in general supports the notion that it is important to have clear, consistent and timely proceedings in family matters to minimize or avoid confusion, delay, undue expense and the likelihood of inconsistent results. Certainly, if one were setting out today to design the model system from the ground up for adjudicating issues affecting children and families, it is doubtful that our current approach would be used.

MAINE FAMILY LAW ADVISORY COMMISSION, REPORT TO 127TH MAINE LEGISLATURE JOINT STANDING COMMITTEE ON JUDICIARY ON LD 890 "AN ACT TO ENSURE A CONTINUING HOME COURT FOR CASES INVOLVING CHILDREN" (April 2015), <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=29262>.

359. See *supra* notes 268–270 and accompanying text.

360. Scholars and others working on court reform efforts have documented the problems of "fragmentation" in family law jurisdiction and developed the "Unified Family Court" model as a means to reduce such problems. See, e.g., Barbara A. Babb, *Unified Family Courts: An Interdisciplinary Framework and Problem-Solving Approach* in PROBLEM-SOLVING COURTS: SOCIAL SCIENCE AND LEGAL PERSPECTIVES 65, 76 (Richard L. Weiner & Eva M. Brank eds., 2013); *Developments in the Law – Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2106 (2003) (noting UFC advocates' view, consistent with "family systems theory," that "traditional courts' 'illogical compartmentalization' of a family's legal problems is more than a breach of best practices: fragmented resolutions result in substantive injustice to the family and may even amplify the damage that family conflicts cause."); Catherine Ross, *The Failure of Fragmentation: The Promise of Unified Family Courts*, 32 FAM. L. Q. 3 (1998). In addition, several state courts adopted aspects of the UFC model to provide comprehensive subject matter jurisdiction over family law matters in a single court.

court all matters relating to parents and children,” would be “a major step towards advancing the interests of all children” as the legal issues in all of these proceedings essentially focus on the “best interests of the child.”<sup>361</sup> As Professor Andrew Schepard has explained, a “unified” family court would address “all disputes involving parents and children, regardless of the legal label that their dispute receives . . . . [Such labels are] often arbitrary, and the problems that families present to the court are interrelated.”<sup>362</sup>

The few provisions in Maine law that presently permit consolidation of certain kinds of parental rights proceedings reflect these same objectives. The Child Protection Act and Protection from Abuse Act both permit consolidation of other parental rights matters pending in District Court.<sup>363</sup> The Legislature’s 2011 amendment to permit District Court judges to oversee the adoption petitions of permanency guardians in child protection matters was also a step towards simplifying the process by permitting it to approve an adoption in the context of an existing case involving the child.<sup>364</sup> Ensuring clarity and consistency is a significant policy reason behind the Uniform Child Custody Jurisdiction and Enforcement Act, adopted by Maine and every other state in the U.S. to eliminate multiple proceedings and conflicting orders by precluding more than one state from issuing orders concerning custody of a child.<sup>365</sup>

The primary argument in opposition to this proposal stems from the probate courts’ contention that they are better able to oversee adoptions and guardianship matters involving the protection of children than the District Court, and specifically, that they can order emergency relief more quickly.<sup>366</sup> With respect to the latter assertion, they may be referring to their jurisdiction to grant preliminary protection orders in child protective proceedings, which, as noted above, is concurrent with the District Court. Some Probate Judges state that they are more responsive to the needs of children and families than District Court judges and

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Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230, 233 (2008).

361. MASON, *supra* note 24, at 190.

362. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 178 (2004).

363. See 22 M.R.S.A. § 4031(3) (Supp. 2014) (permitting consolidation of protective custody proceedings with another pending proceeding in which child custody is an issue); 19-A M.R.S.A. § 4010(2) (2012).

364. See 22 M.R.S.A. § 4038-E (Supp. 2014).

365. See 19-A M.R.S.A. § 1731 cmt. (2012) (setting out “statement of purposes” of UCCJEA, including avoiding “jurisdictional conflict and competition,” discouraging use of multiple states for “continuing controversies over child custody,” avoiding re-litigation of issues decided in other courts, and facilitating enforcement of existing orders).

366. Letter from Hon. Michael Dubois, President, Me. Probate Judges Assembly, to Joint Comm. on Judiciary (April 16, 2015) (“The Probate Courts have served as the best forum for a just, speedy and inexpensive resolution for family crises involving the placement and protection of minors.”). The Probate Registers Association took a position neither for nor against LD 890. Ayers, *supra* note 146. In addition, Judge Mazziotti notes that having a single judge and a relatively small caseload enables Probate Judges to personally oversee the scheduling of emergency matters and to recommend a specific plan for the management of each case. Mazziotti, *supra* note 130.

schedule matters more quickly than a District Court judges could.<sup>367</sup> This is a curious assertion, as the District Court, which has full-time judges, regularly acts on an emergency basis—including after hours, in a range of matters.<sup>368</sup> Further, there has never been a study or analysis of the respective scheduling practices of the probate and district courts.<sup>369</sup> If there is any deficiency in the responsiveness of the District Court, that problem should be addressed specifically rather than maintaining an entire dual-court exclusive jurisdiction situation, which causes extensive delays in other matters and particularly in adoptions taking place after child protection matters.<sup>370</sup>

This proposal would not require any change for adoption proceedings where the parents have died or provided consent through a private arrangement. Similarly, such requirement likely will not have an impact on parent-initiated or testamentary guardianships since there would not be any parental rights and responsibilities order *in effect* at the time of petition. This reform would primarily expand the District Court's adoption jurisdiction to include all those cases involving children who were the subject of a child protection or other parental rights proceeding in that court (beyond the permanency guardianship context),

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367. Dubois, *supra* note 366; Nadeau, *supra* note 74, at 33 n.29 (“God knows how many times during the past six years I have received telephone calls at my home during the late afternoons, evenings, and early morning hours from DHS caseworkers requesting an emergency protection order in a child protective case because they allegedly could not find one of our local state judges for the same purpose.”); Testimony of Probate Judge William Blaisdell IV before Joint Committee on the Judiciary, 127th Legis. (Feb. 3, 2015). In other contexts, however, probate judges assert that they lack the resources to timely manage cases involving children. See Dennis Hoey, *Woman Sues York County Probate Judge Over Delay*, PORTLAND PRESS HERALD (Dec. 3, 2015), <http://www.pressherald.com/2015/12/03/woman-sues-judge-nadeau-over-case-delay/> (quoting Probate Judge Nadeau, who was subject of civil rights lawsuit for allegedly creating delays in his docket over pay dispute, as saying that certain kinds of probate matters “especially guardianship disputes involving parents, have become far more complex and time-consuming to preside over,” resulting in scheduling delays).

368. See, e.g., 15 M.R.S.A. § 55 (2003) (search warrants); 15 M.R.S.A. § 706 (2003) (arrest warrants); 17 M.R.S.A. § 1021(4) (2006) (*ex parte* orders to seize abused or neglected animals); 19-A M.R.S.A. § 4006(2) (Supp. 2014) (temporary protection from abuse orders); 22 M.R.S.A. § 810 (2004) (orders granting DHHS custody of person who is a threat to the public health). This is not a new contention by probate judges. The 1985 Cotter Committee report concluded that availability to take emergency action is not unique to probate courts, and that, in fact, District and Superior Courts (which have far more judges) have more availability than probate courts to take emergency action. COTTER REPORT, *supra* note 321, at 4.

369. Attorneys consulted in my own informal survey about the relative scheduling delays in these courts universally stated that they have observed far more and longer delays in their Probate Court matters than in state court matters, and this has been my observation as well.

370. Two attorneys with an adoption-focused practice were the only individuals to testify against LD 890. They raised concerns regarding the capability of District Court judges to oversee the complex adoption process. In his written testimony, attorney Christopher Berry wrote: “[A]doptions require speedy resolutions due to Federal regulations; which the already burdened District Courts would likely not be able to meet.” *An Act to Ensure a Continuing Home Court for Cases Involving Children: Hearing on L.D. 890 Before the J. Standing Comm. On Judiciary*, 127th Leg. (Me. 2015) (statement of Christopher Berry), available at <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=29267>. He also argued that adoptions are a “specialized area of the law” with which Probate Courts are already familiar, and that “adoptive parents and children [who] come into the Probate Courts understand that this is a fresh start, a new beginning and trust that every procedure has been reviewed, checked and heard.” *Id.* Of course, there is no reason why District Court judges could not achieve the level of expertise possessed by probate judges in adoption matters.

where the familiarity of the judge, DHHS, and GAL would be beneficial to the adoption context.

I should emphasize that I have sketched out here only some very broad ideas for addressing the problems described earlier in this Article. Implementation would require revisions to several laws and related rules, as well as a study of the costs and impact on both court systems of such change to determine the best process for effectuating the reforms.<sup>371</sup> For that reason as well, the Legislature must develop and implement a plan for reform at the earliest opportunity.

## 2. Recording of Proceedings

As noted earlier, the Probate Courts do not routinely record testimonial or other proceedings other than for TPR hearings, and the Maine Supreme Judicial Court recently amended Maine Rules of Civil Procedure and Probate Procedure to make clear that parties are entitled to have any proceeding recorded, on twenty-four hours' notice of such request, and that courts must record certain proceedings as a matter of course, where set forth in a rule, statute, or order.<sup>372</sup> However, it should not be the responsibility of a probate court litigant, most of whom are unrepresented, to invoke the right to a recording in advance. A requirement that courts record all proceedings involving parental rights should also be clearly set forth in the applicable statutes. Specifically, the MPC should be amended to require that all hearings and other proceedings in guardianship and other parental matters are recorded by the Court (whether Probate or District Court), as well as other proceedings on request of one or more parties, all at no cost to the parties.<sup>373</sup>

## 3. Law Practice by Probate Court Judges

Every study of the probate courts, starting with the University of Maine

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371. One consideration, for example, is the appointment of counsel for indigent litigants where required by statute. In Probate Courts, such appointments are made by individual courts and paid out of the court's budget. If such appointments were to occur in District Court, it would likely need to be through the Maine Commission on Indigent Legal Services, which oversees appointment of counsel in child protection proceedings, as well as in criminal and civil commitment matters. See 4 M.R.S.A. § 1801 (Pamph. 2014).

372. See *supra* text accompanying notes 288–290; ME. R. CIV. P. 76H(b)(2)(B); ME. R. PROB. P. 76H. See also *In re Guardianship of McIntosh*, 2015 ME 95, ¶¶ 14–15, 120 A.3d 654 (clarifying that probate courts must record all adult guardianship proceedings because they implicate fundamental liberty interests and because “without an adequate record, including a transcript, the appellate court and the parties to the appeal cannot adequately address the trial court's fact-findings and exercises of its discretion.”).

373. For example, the child protection statute specifies that all child protection proceedings must be recorded. 22 M.R.S.A. § 4007(1) (Supp. 2014) (requiring recording of all children protection proceedings); *In re Dylan B.*, 2001 ME 31, ¶ 3, 766 A.2d 577 (holding that Probate Court TPR must be recorded pursuant to 22 M.R.S.A. § 4007(1)). Maine Supreme Judicial Court Administrative Order JB-12-1 (A. 11-14) includes “Testimonial Proceedings involving the appointment of a Guardian for a Minor” among the types of proceedings that must be recorded. However, some Probate Courts apparently consider the order to have no application to proceedings in their court, despite the fact that they have near exclusive jurisdiction over such matters. See *In re Guardianship of Johnson*, 2014 ME 104, ¶ 10 n.6, 98 A.3d 1023 (noting that probate court did not record minor guardianship proceeding or permit a party to make its own recording).

Bureau of Public Administration (BPA) 1967 study, outlined the many serious implications of permitting Probate Judges to practice law part-time due to potential for actual conflicts as well as an overall appearance of impropriety it causes.<sup>374</sup> On the question of converting the probate judge position to full-time, 12 of the 16 judges interviewed for the BPA study—which was undertaken when the probate courts' caseloads were considerably lighter than they are today—believed that the system would operate more efficiently if they were full-time positions and the judges did not need to attend to a law practice at the same time.<sup>375</sup> They also felt that converting the positions would increase the respect for the position and decrease the chances for abuse of judicial discretion.<sup>376</sup> Such a system would also increase uniformity among the probate courts with respect to procedure.<sup>377</sup>

The Cotter Committee was perhaps most blunt in its assessment, issued thirty years ago. It observed that the practice of law by probate judges was a “point of serious complaint” and raises “the serious appearance of impropriety.”<sup>378</sup> It concluded that the practice “should no longer be permitted to continue,” and it recommended amending the applicable Code of Judicial Conduct to “prohibit the practice of law by all judges, including Probate Judges.”<sup>379</sup> No modifications to the probate court system or ethical rules have been enacted in response to—or consistent with—those recommendations,<sup>380</sup> and the same problems documented in 1985 persist today. Indeed, it is likely they have worsened as, with the enactment of the MPC and expansion of minor guardianship law over the past 35 years, the role of Probate Judges today is primarily one of overseeing litigation, while registers take care of most of the estate administration responsibilities.

The Maine Supreme Judicial Court can amend the applicable provisions of the Maine Code of Judicial Conduct<sup>381</sup> to, at the very least, impose limitations on the practice of law by Probate Judges before other probate courts or other courts in the

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374. See COTTER REPORT, *supra* note 321, at 4; MAINE PROBATE LAW REVISION COMMISSION, *supra* note 116, at 8–10; COMMISSION TO STUDY FAMILY MATTERS IN COURT, *supra* note 332, at 11; IJA REPORT, *supra* note 307, at 13; BPA REPORT, *supra* note 307, at 21–25.

375. BPA REPORT, *supra* note 307, at 21–22.

376. BPA REPORT, *supra* note 307, at 21–23. The BPA noted in its report: “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.” *Id.* at 23.

377. *Id.* at 24. The BPA Report considered and dismissed any potential downsides to prohibiting such practice. Two of the “disadvantages” raised by some probate judges interviewed—less “access to judges” and decreased connection with community—were in fact seen by the report authors as improvements, since they would minimize the “problem of preserving the confidence of the community in the impartiality of the judge.” *Id.* at 24–25 (internal quotations omitted).

378. COTTER REPORT, *supra* note 321, at 4.

379. *Id.* at 4–6.

380. The Maine Probate Judges Assembly adopted a “nonbinding resolution” in the 1990s “recommending” that probate judges not appear before other probate judges in contested matters (but permitting the judges' law partners to do so). MITCHELL & HUNT, *supra* note 29, § 14.42 at 14-126.

381. See ME. CODE JUD. CONDUCT, INTRODUCTORY NOTE, COVERAGE & EFFECTIVE DATE I(B)(2); see also 4 M.R.S.A. § 307 (Pamph. 2014) (governing probate judges' conflict of interest); 18-A M.R.S.A. § 1-303(c) (2012) (authorizing probate courts to transfer a case to another county “in the interest of justice”). This change could be phased in over time to allow Probate Judges to make necessary changes to their practices or, if they prefer, to choose not to seek re-election.

same county.<sup>382</sup> The Court has acknowledged that the practice of law by Probate Judges is controversial and unpopular, but it has taken the position that any restrictions on the practice of law by Probate Judges must begin with the Maine Legislature.<sup>383</sup>

#### 4. *Comprehensive Reform*

As an alternative to all of the above suggestions, the Maine Legislature could finally adopt a “different Probate Court system with full-time judges,” as directed by Maine voters nearly 50 years ago, by shifting the probate courts’ jurisdiction to the Maine Judicial Branch as has been recommended, proposed, and attempted several times since the Maine Constitution was amended. The probate courts have remarkable staying power, most likely because the prospect of undertaking such reorganization is seen as “mammoth,”<sup>384</sup> expensive, and political, since it may be regarded as shifting power from counties to the State. However, such calculus fails to account for the substantial costs of maintaining the status quo, in terms of inefficiencies as well as the injuries to children and families from a family justice system that falls far short of addressing their needs.

Each year that passes sharpens the contrast between the two court systems and renders the need for comprehensive reform more urgent. The Maine Legislature has now imposed on the probate courts substantial responsibility for adjudicating a wide range of matters that implicate not only property but also individuals’ constitutional rights, with potentially drastic and permanent impact on the lives of children and families. At the same time, Maine’s Judicial Branch has, as a unitary system of courts, taken measures to improve the adjudication of matters under its jurisdiction—measures not found in the probate courts. There is every reason to suspect that a reorganization to merge the probate courts into the state Judicial Branch will become both more challenging and more urgent as time goes on. Maine’s legislators should fulfill the mandate issued to them by Maine’s electorate and start the process of bringing the probate courts into our modern court system as

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382. See also Peter L. Murray, *Maine’s Overdue Judicial Reforms*, 62 ME. L. REV. 631, 640–41 (2010) (noting potential for “serious scandal” and other problems from current system in which probate judges are permitted to practice law).

383. ME. CODE JUD. CONDUCT, ADVISORY COMMITTEE’S INTRODUCTORY NOTE TO 2015 AMEND., ME. JUDICIAL BRANCH WEBSITE/RULES (visited Sept. 25, 2015). The Court stated:

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. *Id.*; *In re Estate of McCormick*, 2001 ME 24, ¶16, 765 A.2d 552 (“The practice of allowing part-time probate judges to litigate cases as part-time lawyers has received widespread criticism . . . . The Maine Legislature has addressed this issue and has continued to allow probate judges to maintain active probate practices.”). However, the statutory provision cited by the Court in *McCormick* as the source of probate judges’ authority to practice law, 4 M.R.S.A. § 307, contains only an implicit reference to such authority, rather than actually conferring it. 4 M.R.S.A. § 307 (Supp. 2014). Rather, it is the Code of Judicial Conduct, as noted above, which expressly exempts probate judges from the prohibition on practice. However, as a practical matter, amending the Code of Judicial Conduct to restrict probate judges’ practice of law should occur in the context of broader reform to the probate courts’ structure, which only the Legislature can implement.

384. FDTF Report, *supra* note 266, at 6 n.7.

soon as possible.

For one potential model, Maine could once again look to the courts of Massachusetts. The courts of that commonwealth are unified in one court system. One “department” of that system is the “Probate and Family Court,” which has comprehensive jurisdiction (some of it concurrent with other departments) of nearly every kind of case involving children.<sup>385</sup> The probate courts were, until the enactment of a sweeping court reform measure by the Massachusetts legislature in 1978, county-based and funded.<sup>386</sup> Indeed, there is no shortage of models for such reform, as the clear trend among states is to consolidate their courts, including their probate courts, into a single court system.<sup>387</sup> Maine remains an outlier, with no clear benefits to its citizens from maintaining such position.

### *C. Reforming the Maine Probate Code – Moving Beyond the Orphan Model*

Addressing the substantial jurisdictional and structural problems associated with adjudicating parental rights in probate courts is a necessary, but not sufficient, step to reverse the ways Maine law falls short in meeting the needs of the children and families involved in these cases. Any court that hears a guardianship or adoption matter must operate within the statutory framework set by the Legislature. The current language of the MPC provides little by way of the standards, authority, and flexibility that a court needs when attempting to meet the needs of children in volatile, complex, and contentious situations. Although the very same rights are at stake in probate court and District Court parental rights proceedings, and the policy of family preservation should apply with equal force in all such cases, the MPC provides probate courts with few tools to enable the matters to operate effectively as forms of private child protection. The enactment in 2011 of a provision authorizing probate courts to enter an order for “transitional arrangements for minors” as part of a guardianship was an excellent addition to the MPC,<sup>388</sup> but it does not go far enough. Substantial changes to the guardianship and adoption statutes are needed to address the realities faced by the families involved in these complex cases.

Further, as discussed in Part III.A., the Law Court has, when exercising its appellate jurisdiction over MPC matters, noted several ways that the MPC fails to

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385. See MASS. GEN. LAWS ANN. ch. 215, §§ 1-6 (West 2005). The PFC does not have jurisdiction over juvenile matters, but the Juvenile Court department has jurisdiction over many kinds of family law matters, and, in any event, matters may be transferred between departments, and courts in one division can enter orders in another. Telephone Interview with Linda Medonis, Deputy Court Adm’r for Mass. Probate and Family Court (June 4, 2015).

386. 1978 Mass. Acts, 647-50, ch. 478, §§ 128-38; Telephone Interview with Paul Burke, Deputy Court Adm’r for Mass. Housing Court (June 8, 2015). These reforms stemmed from a strongly-worded study of the Commonwealth’s various courts, including county-based probate courts. The committee, chaired by Archibald Cox, noted that “unification” was the “primary standard for modern judicial administration,” GOVERNOR’S SELECT COMMITTEE ON JUDICIAL NEEDS, REPORT ON THE STATE OF MASSACHUSETTS COURTS 13–15 (Dec. 1976), and it recommended, among other reforms, absorbing the county probate courts into a unified state court system to eliminate the “delay and waste” caused by “the extraordinary fragmentation of jurisdiction and responsibility.” *Id.* at 3, 7, 10–11, 15.

387. For example, Vermont absorbed their county-based probate courts into the state judiciary in 2010. 2009 Vt. Acts & Resolves 185. See also sources cited *supra* notes 233–234.

388. P.L. 2011, ch. 43, § 2 (codified as 18-A M.R.S.A. § 5-213 (2012)).



ensure adequate protections for parents or to be consistent with other aspects of Maine parental rights law, and it has effectively re-drafted several key provisions of the MPC. Accordingly, the guardianship and adoption provisions within the MPC are in need of substantial revision to reflect the case law developments regarding the constitutional rights of parents and to provide coherent and useful guidance to courts, attorneys, and litigants. This section will briefly outline some reforms to the MPC itself to make courts better equipped to address these matters and to serve the overarching policy goals of Maine's family laws.<sup>389</sup>

### *1. Minor Guardianships*

The appointment of a guardian for a minor is a substantial event for the child, her parents, and the guardian. Unless the guardianship is limited, a parent's rights are suspended indefinitely, which implicates the parent's fundamental constitutional liberty interest in parenting her child.<sup>390</sup> The appointment is also a potentially life-changing experience for a child. It may enable him to find safety and stability in a new home, but it may also limit or sever his connection with one or both biological parents. Such appointment also imposes a significant responsibility on the guardian: to provide shelter and care for another person's child. Accordingly, Maine law must provide clear standards to the courts making such appointments to ensure that initial appointment of a guardian and the ongoing supervision of the guardianship appropriately consider and reflect the rights, responsibilities, and interests of all parties.

Three sources can serve as useful primary models for reforming the guardianship statute. First, as noted above, minor guardianships involve aspects of both parental rights and child protection matters; accordingly, the Legislature can look to, and where appropriate, adopt language similar to provisions in Title 19-A (parental rights and responsibilities) and Title 22 (child protection) of the Maine Revised Statutes. Consistency with the approaches taken in these matters is particularly important if the Legislature expands the District Court's jurisdiction so that it may adjudicate MPC parental rights matters, as proposed above. Second, the MPC should reflect Maine Supreme Judicial Court case law on guardianship and adoption, particularly with respect to the requirements for appointment and termination of guardianships.

A third model for revisions to the MPC is the newly enacted Vermont Act 170,

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389. The Legislature's Probate and Trust Law Advisory Commission (PATLAC) recently reviewed the MPC in light of revisions to the UPC and issued a comprehensive report and recommendations to amend the MPC (except for the adoption provisions, which are not included in the UPC). PROBATE AND TRUST LAW ADVISORY COMMISSION, PATLAC RECOMMENDATIONS: UNIFORM PROBATE CODE WITH PROPOSED AMENDMENTS AND COMMENTS (attachment to REPORT TO MAINE LEGISLATURE JOINT STANDING COMMITTEE ON JUDICIARY RE: RESOLVE 2013, CH. 5) ("PATLAC Report") (Dec. 6, 2014). The Report and Recommendations were incorporated by reference in L.D. 1322 (127th Legis. 2015), which was carried over to the next session of the Legislature. PATLAC made several recommended revisions to the minor guardianship provisions of the UPC, most of which do not represent substantive changes. However, in a follow-up report issued in November 2015, PATLAC modified its earlier proposal to include two revisions to ensure that the MPC is consistent with case law with respect to the burdens of proof in minor guardianships issued over the objections of parents and contested terminations of guardianships. It is expected that these revisions will be reflected in amendments to LD 1322.

390. *In re* Guardianship of Jeremiah T., 2009 ME 74, ¶ 22, 976 A.2d 955.

“An Act Relating to the Guardianship of Minors,” which became effective on September 1, 2014.<sup>391</sup> This law, which overhauled Vermont’s minor guardianship statute, was enacted in response to a 2012 Report to the Vermont Legislature, “Minor Guardianship Proceedings in Vermont,”<sup>392</sup> issued by a committee established by statute. That report raised many concerns about minor guardianship identical to those noted in this Article. The Vermont Legislature also enacted a jurisdictional requirement similar to the “home court” jurisdiction proposal above.<sup>393</sup> Accordingly, this new law serves as an ideal model for statutory language aimed at addressing those concerns.

Revisions to the MPC’s guardianship provisions should address several objectives. One is to encourage family members to reach agreements about the care of children, whether through a guardianship or other arrangements. By eliminating the all-or-nothing approach to guardianship orders in terms of both their scope and length suggested by the current statute, and by granting parties the ability to reach an agreement for a guardianship order that will specifically address the parents’ current situation and the child’s needs, there will be more guardianships by consent and fewer protracted, contested matters. For example, I suspect that many parties would be willing to agree to the entry of an interim order, which would address a child’s immediate needs while preserving the parties’ positions in the litigation. These temporary arrangements can operate as trial periods, with the opportunity for extending or modifying the orders so that the parties—or, if necessary, the court—can find a plan that will work for all.

At the same time, the statute should ensure that there is a supervisory role for the court in the establishment of all guardianships, even those by consent or nomination by a parent, as well as the ongoing monitoring of the guardianship. The allocation of parental rights to non-parents is a matter that implicates both a child’s well-being and a parent’s fundamental constitutional rights. Accordingly, while families should be encouraged to reach agreements that will work best for them, the court should ensure that all litigants’ rights are protected and a child’s best interests are served throughout the course of the guardianship.

*a. Appointment of a Guardian of a Minor.*

*Standard for Appointment.* The Maine Legislature’s multiple amendments to the standard for appointment under section 5-204 has left the provision long and unwieldy, particularly with respect to appointment of guardians over the objections of parents. Therefore, such language should be both simplified and clarified for use in the non-testamentary context.

The language regarding when a parent’s consent is not required is outdated and ambiguous.<sup>394</sup> The phrase “parental rights of custody” is unclear and inconsistent with other current provisions of Maine family law. For example, the Title 19-A

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391. 2014 Vt. Act 170 (codified as VT. STAT. ANN. tit. 14, §§ 2621-2634 (Supp. 2014)).

392. ACT 56 MINOR GUARDIANSHIP COMMITTEE, MINOR GUARDIANSHIP PROCEEDINGS IN VERMONT 2012: REPORT TO THE VERMONT LEGISLATURE (Dec. 15, 2012), <http://www.leg.state.vt.us/reports/2012ExternalReports/284664.pdf>.

393. VT. STAT. ANN. tit. 14, § 2624 (Supp. 2014).

394. See 18-A M.R.S.A. § 5-204(a) (2012).

provisions regarding parental rights and responsibilities specifically eliminated the word “custody,” which is often the source of confusion.<sup>395</sup> Accordingly, the first condition for appointment could simply read: “There are no living parents with parental rights and responsibilities.”

Appointment by consent should remain an alternative condition for appointment, and the language presently in section 5-204(b) appears to provide sufficient clarity. However, I recommend additional requirements for consented-to guardianships to ensure that such consent is voluntary and based on a complete understanding of the implications. The new Vermont law provides a good model for such language, and the Vermont Judiciary—of which their county-based probate courts are a division—has created a new form for providing such consent.<sup>396</sup>

For appointment of guardians over the objection of a parent, it is critical that the statute reflect the constitutional principles set forth in cases such as *Jeremiah T.*<sup>397</sup> and *Jewell II*<sup>398</sup> by setting a high standard. Prior to the adoption of the language in section 5-504(c) the standard for appointment of a guardian was essentially the same as that for termination of parental rights in a child protection action.<sup>399</sup> However, given that appointment of a guardian is not a *permanent* removal of parental rights and as long as other statutory language is in place to enable the parent to realistically seek modification and termination of the guardianship, as described below, the standard for such appointment need not be the same as a termination of parental rights. However, it must nonetheless require findings of unfitness by clear and convincing evidence.<sup>400</sup>

The specific standard for “unfitness” should be clearer than either the awkwardly phrased “at least temporarily intolerable living situation” language of section 5-204(c), or the Maine Supreme Judicial Court’s explanation of that language.<sup>401</sup> For example, the Legislature could adopt some of the language from the definition of “jeopardy” in the child protection context.<sup>402</sup> In many respects, the

395. See 19-A M.R.S.A. § 1653 (2012); see also JON D. LEVY, MAINE FAMILY LAW 6-3 (2014).

396. VT. STAT. ANN. tit. 14, § 2626 (Supp. 2014). The form is available at <https://www.vermontjudiciary.org/eforms/PMG70p.pdf>.

397. *In re Guardianship of Jeremiah T.*, 2009 ME 74, ¶ 27, 976 A.2d 955.

398. *Jewell II*, 2010 ME 80, ¶12, 2 A.3d 726.

399. See *supra* notes 66–67 and accompanying text.

400. *In re Guardianship of Chamberlain*, 2015 ME 76, ¶ 33, 118 A.3d 229.

401. *Jewel I*, 2010 ME 17, ¶ 13, 989 A.2d 726 (holding that an unfit parent is one who is “currently unable to meet the child’s needs and that inability will have an effect on the child’s well-being that may be dramatic, and even traumatic, if the child lives with the parent”).

402. See 22 M.R.S.A. §§ 4002(6), 4035(2) (Supp. 2014). “Jeopardy” is defined as: [S]erious abuse or neglect, as evidenced by:

- A. Serious harm or threat of serious harm;
- B. Deprivation of adequate food, clothing, shelter, supervision or care or education when the child is at least 7 years of age and has not completed grade 6;
- B-1. Deprivation of necessary health care when the deprivation places the child in danger of serious harm;
- C. Abandonment of the child or absence of any person responsible for the child, which creates a threat of serious harm; or
- D. The end of voluntary placement, when the imminent return of the child to his custodian causes a threat of serious harm.

functional difference from the perspective of the parent and child is insignificant in a public versus private child protection action. The child is, in most cases, removed from the home<sup>403</sup> and placed into the custody of a non-parent over the objection of a parent. The Vermont guardianship statute takes a somewhat different approach to the appointment standard, by framing the standard in terms of the needs of the child rather than the unfitness of a parent. In order to appoint a guardian, regardless of whether a parent objects,<sup>404</sup> the court must find that the child meets the definition of “a child in need of guardianship,” and the statute defines that term to encompass a wide range of situations in which a parent is unable to provide adequate care.<sup>405</sup> The Maine Legislature could adopt some aspects of this approach in the MPC as well.

Because a guardianship determination also results in the acquisition of parental rights by a non-parent, including those of physical residence, a court must make a specific finding, in addition to parental unfitness, that appointment of the petitioner as guardian would be in a child’s best interest.<sup>406</sup> The Legislature should amend the statute to clarify this best interest standard and to incorporate by reference the definition of “best interest” found in Title 19-A.<sup>407</sup> The “best interest” determination is particularly important when a court is faced with competing petitions for guardianship of the same child.

Finally, the Legislature should amend the MPC to require courts appointing guardians over the objections of one or both parents to include in its order detailed

*Id.* § 4002(6). The statute also sets forth specific definitions for “abuse or neglect” and “abandonment” at sections 4002(1) and (1-A), respectively.

403. In some instances, DHHS will file a so-called “straight” child protection petition, without an accompanying preliminary protection order, and seek supervision of the child and family while he or she remains in the home of one or both parents. *Id.* §§ 4032, 4033, 4036(1)(B) (2004 & Supp. 2014).

404. VT. STAT. ANN. tit. 14, §§ 2626, 2627 (Supp. 2014).

405. *Id.* § 2622(2):(2) “Child in need of guardianship” means:

(A) A child who the parties consent is in need of adult care because of any one of the following:

- (i) The child's custodial parent has a serious or terminal illness.
- (ii) A custodial parent's physical or mental health prevents the parent from providing proper care and supervision for the child.
- (iii) The child's home is no longer habitable as the result of a natural disaster.
- (iv) A custodial parent of the child is incarcerated.
- (v) A custodial parent of the child is on active military duty.
- (vi) The parties have articulated and agreed to another reason that guardianship is in the best interests of the child.

(B) A child who is:

- (i) abandoned or abused by the child's parent;
- (ii) without proper parental care, subsistence, education, medical, or other care necessary for the child's well-being; or
- (iii) without or beyond the control of the child's parent.

406. 18-A M.R.S.A. § 5-204(c) (2012) (“[T]he proposed guardian would provide a living situation that is in the best interest of the child.”); *id.* § 5-207(b) (“[T]he welfare and best interests of the minor will be served by the requested appointment.”).

407. 19-A M.R.S.A. § 1653(3) (2012). Presently, the MPC has its own definition of “best interest of the child” at 18-A M.R.S.A. § 5-101(1-A) (2012), which, at one time, aligned with that used in other parental rights matters under Maine law, but has not been amended to reflect changes to section 1653(3) in title 18-A. See PATLAC Report, *supra* note 389, at 543 (proposing to define “best interest of minor” in minor guardianship statute to incorporate the 19-A M.R.S.A. § 1653(3) definition).

findings setting forth the basis for such appointments, as is required in jeopardy determinations.<sup>408</sup> The Law Court has encouraged probate courts to issue specific findings in orders in contested guardianship matters.<sup>409</sup> However, not all probate courts follow this practice, which can present difficulty both on appeal and in subsequent proceedings to modify or terminate guardianship orders.

*Temporary Guardianships.* The MPC sets a fixed limit for temporary guardianships at six months.<sup>410</sup> In some instances, the family would be better served by a longer temporary guardianship (such as to implement a transition plan under section 5-213 or some other progressive arrangement). However, the language of the MPC does not grant clear authority to courts to extend temporary guardianships or to order successive appointments.<sup>411</sup> In the recent opinion in *In re Guardianship of Johnson*, the Law Court noted the restricted authority granted to probate courts under the MPC with respect to temporary guardianships.<sup>412</sup> The Law Court interpreted the present statute to preclude a court from using “serial temporary guardianships as stop-gap measures while the petition for permanent guardianship is proceeding.”<sup>413</sup> However, some probate courts interpret the provision to provide courts flexibility to make successive appointments of temporary guardians, on agreement of the parties, where the parents object to the entry of a permanent guardianship yet the parties agree that the child and parents are not yet ready for reunification.<sup>414</sup>

To eliminate uncertainty and inconsistency, the MPC should be amended to eliminate the confusing and counterproductive temporary-versus-permanent guardianship distinction. Instead, the statute should permit a court to set a specific term for a guardianship—which may be short or long—and to extend such term as needed, with the goal of addressing the specific circumstances presented including the implementation of transitional arrangements under section 5-213. A court should also have authority to enter an interim order if needed to address a child’s immediate needs, much like the orders that District Court judges may enter in the

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408. 22 M.R.S.A. § 4035(2)(B) (Supp. 2014) (“The court shall make findings of fact on the record upon which the jeopardy determination is made.”).

409. See *In re Guardianship of Johnson*, 2014 ME 104, ¶ 21, 98 A.3d 1023 (noting that probate court’s findings explained the basis of its findings under the statutory requirements); *Jewel I*, 2010 ME 17, ¶¶ 12-13, 989 A.2d 726 (indicating the required findings by probate court for entry of guardianship over parent’s objection).

410. 18-A M.R.S.A. § 5-207(c) (2012).

411. A probate court has authority to extend a temporary guardianship where one of the parents of the minor is “a member of the National Guard or the Reserves of the United States Armed Forces under an order to active duty for a period of more than 30 days.” 18-A M.R.S.A. § 5-207(c-1) (2012). Under certain circumstances, as described in the statute, the temporary guardianship may be extended until 30 days after the parent is no longer under active duty orders. *Id.*

412. 2014 ME 104, ¶ 17 n.6, 98 A.3d 1023.

413. *Id.*

414. Mazziotti, *supra* note 130. For example, in the *Johnson* case the Probate Court entered a Limited Guardianship Order to implement a transitional arrangement under section 5-213 pursuant to the parties’ agreement. *Johnson*, 2014 ME 104, ¶ 6, 98 A.3d 1023. The Law Court nonetheless interpreted such order as another “temporary guardianship” entered after the expiration of the original temporary guardianship order. Courts and litigants attempting to fashion such orders would greatly benefit from more clarity and flexibility with respect to both temporary guardianships and transitional arrangements.

full range of parental rights proceedings.<sup>415</sup>

Additionally, the present language in the MPC does not provide a sufficiently stringent notice requirement for temporary guardianships. The current law not only shortens the notice requirement in the UPC to only five days prior to the hearing, and does not require notice to anyone whose address or whereabouts are unknown, but also allows the court to waive notice on any person—other than the minor child if at least fourteen years of age—*entirely* for “good cause.”<sup>416</sup> Given the substantial rights at stake in these cases and importance of providing notice to a parent before their rights are suspended, the MPC should at least follow the language in the UPC<sup>417</sup> regarding notice and dispense with granting the court such broad discretion.

*b. Scope of Guardianship Order and Process for Review and Modification.*

The MPC sets forth few provisions regarding the scope and effect of guardianship orders, and the existing language could be far clearer. In one provision, which applies to guardianships for both minors and adults, “[a] judge may appoint a limited guardian with fewer than all of the legal powers and duties of a guardian.”<sup>418</sup> Another provision applicable only to minor guardianships states: “If the court appoints a limited guardian, the court shall specify the duties and powers of the guardian . . . and the parental rights and responsibilities retained by the parent of the minor.”<sup>419</sup> Thus, the MPC is drafted in such a way that a guardianship that reserves no rights for the parents is the default, rather than the exception. This approach runs counter to policy objectives of family preservation and the engagement—to the maximum extent possible and appropriate—of both parents in a child’s life.<sup>420</sup> As the Law Court has noted, a guardianship order that does not expressly reserve rights in the biological parents “effectively strip[s] the parents of their parental rights.”<sup>421</sup>

The MPC should provide courts with both clear authority and flexibility to

415. See ME. R. CIV. P. 107(a)(1) (allowing courts to enter orders regarding parental rights and responsibilities prior to the entry of a final judgment).

416. 18-A M.R.S.A. § 5-207(c). PATLAC’s 2014 report explained the rationale for departing from the UPC’s language on the procedure for temporary guardianships is that the MPC’s approach “accommodates prompt disposition and appropriate protections for participants in the context of Maine’s part-time Probate Courts.” PATLAC Report, *supra* note 389, at 584. The limitations of the present court structure should not drive the policy decisions regarding the due process requirements for these important matters. Indeed, the “service and notice” provisions for the initiation of a preliminary protection order in a child protection proceeding are far more stringent than those for temporary guardianships. 22 M.R.S.A. § 4033(2) (Supp. 2014) (requiring notice to parents “by any reasonable means” unless there is a finding that “[t]he child would suffer serious harm during the time needed to notify the parents” or such prior notice would place the child at risk of serious harm).

417. UNIF. PROBATE CODE § 5-204(d) (amended 2010).

418. 18-A M.R.S.A. § 5-105 (2012).

419. 18-A M.R.S.A. § 5-204(d) (2012).

420. *Cf.* 19-A M.R.S.A. § 1653(2)(D)(4) (Supp. 2014) (requiring all parental rights and responsibilities orders to include language granting both parents access to records and information regarding the minor child *unless* the court specifically finds that such access is not in the child’s best interests or would cause detriment to the other parent and states the reasons for such finding in the order).

421. *In re* Guardianship of Johnson, 2014 ME 104, ¶ 15, 98 A.3d 1023.

craft guardianship orders that best serve a child's needs and interests in a particular situation by setting forth what specific rights are retained by parents whose rights are intact at the time of the guardian's appointment, including rights of contact, involvement in decision-making, and access to records and information about the child.<sup>422</sup> Courts issuing guardianship orders must also have clear statutory authority to set forth specific terms regarding the circumstances of parent-child contact, parental education, participation of the child and one or more of the parties in counseling (together or separately), as well as other measures designed to preserve, support, and enhance the parent-child relationship, to ensure the safety and well-being of the children during the pendency of the guardianship, and to enable the family to move towards reunification.<sup>423</sup> The statute should require guardianship orders to spell out a guardian's powers—and the parents' corresponding retained rights—and reverse the “default” to require courts to make specific findings if it does *not* retain parental rights for a parent, and it should also be required to explicitly address the impact of such order on any current rights of contact.<sup>424</sup> Guardianship orders that include these terms would provide far more clarity to the parties regarding their respective rights and responsibilities and would provide a foundation for continued parental engagement and potential reunification.<sup>425</sup>

I would also propose adding a requirement for the guardian to provide regular reports regarding the child to the court and the child's parents—the Vermont statute has such provisions—<sup>426</sup>which would keep the court and parents reasonably informed and allow early identification of any problems that may require further action of the court.<sup>427</sup> This would ensure that a guardian is fulfilling all of her

422. See VT. STAT. ANN. tit. 14, § 2628(b) (Supp. 2014): A guardianship order issued under this section shall include provisions addressing the following matters:

- (1) the powers and duties of the guardian consistent with section 2629 of this title;
- (2) the expected duration of the guardianship, if known;
- (3) a family plan on a form approved by the Court Administrator that:
  - (A) in a consensual case is consistent with the parties' agreement; or
  - (B) in a nonconsensual case includes, at a minimum, provisions that address parent-child contact consistent with section 2630 of this title[.]

The “family plan” form is available at <https://www.vermontjudiciary.org/eforms/PMG61.pdf>.

423. Compare 19-A M.R.S.A. § 1653 (Supp. 2014) with 22 M.R.S.A. § 4041(1-A) (Supp. 2014). With the establishment of “permanency guardians” and a specific provision permitting adoption by the same, title 22 now has particularly useful guidance for provisions about parent-child contact. 22 M.R.S.A. § 4038-C (Supp. 2014).

424. See VT. STAT. ANN. tit. 14, § 2630(a) (Supp. 2014) (“The Court shall order parent-child contact unless it finds that denial of parent-child contact is necessary to protect the physical safety or emotional well-being of the child. Except for good cause shown, the order shall be consistent with any existing parent-child contact order. The order should permit the child to have contact of reasonable duration and frequency with the child's siblings, if appropriate.”).

425. Judge Mazziotti notes that his practice is to encourage parties to reach agreement on guardianship orders—particularly temporary orders—that preserve some rights for the parent (such as contact and access to information) so that the parents have incentives “to turn things around” and the guardians understand that they will need to demonstrate an ability to comply with an order for him to consider appointing them as permanent guardians. Mazziotti, *supra* note 130.

426. VT. STAT. ANN. tit. 14, § 2631 (Supp. 2014).

427. The MPC requires conservators to file certain reports and an annual accounting with the court, 18-A M.R.S.A. §§ 5-418, 5-419 (2012), but has no corresponding requirement for guardians.

obligations to the child and that the parents have been able to exercise their rights and to be informed of their children's welfare, and it would enable the court to make adjustments to the order as necessary. The MPC should include clear language permitting courts to modify guardianship orders to reflect any changed circumstances that arise while the order is in effect, much like parental rights orders.<sup>428</sup> And, as is the case in District Court parental rights matters, the MPC should authorize the court to order the parties to mediate in good faith before holding a hearing.<sup>429</sup>

The November 2010 Report issued by the Maine Legislature's Task Force on Kinship Families includes similar recommendations for amendments to the MPC's guardianship provisions and to the procedures for such appointments.<sup>430</sup> The 2011 amendment to grant probate courts the authority to order transitional arrangements for minors was one of the recommendations, and the only one adopted by the Legislature.<sup>431</sup> The Task Force also concluded that kinship families would be "well-served" by: "guardianship orders that include terms of visitation . . . with the child's parents or other persons[;] . . . guardianship orders that include findings or reasons for granting or modifying the guardianship[; and]. . . the increased use of mediation prior to contested guardianship hearings."<sup>432</sup>

The minor guardianship law should allow for continued engagement, as appropriate, of the child's parents to preserve the family relationship and to allow the guardianship to serve as a foundation for reunification where appropriate. Guardianship orders should reflect these policy goals by not only spelling out the parties' rights and responsibilities—thereby ensuring that the rights granted under the order can be enforced if necessary—but also by providing guidance for the court in any post-appointment proceedings including modification and termination of the order. Maine's existing family law and child protection laws, which include preservation of parent-child relationships among their goals, can provide substantial guidance for these revisions.

As a final note, the Legislature should amend the MPC to reflect the role of DHHS in guardianships. As discussed earlier, while many guardianship petitions are filed at the behest of DHHS as part of a "safety plan" to avoid removal of the child pursuant to a child protection petition,<sup>433</sup> DHHS has no formal role or

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428. See 19-A M.R.S.A. § 1653(10) Supp. 2014); 19-A M.R.S.A. § 1657 (2012); VT. STAT. ANN. tit. 14, § 2630(c) (Supp. 2014). Such a change was also recommended by Assistant Attorney General Janice Stuver in her comments to the Task Force on Kinship Families. See TASK FORCE ON KINSHIP FAMILIES: INTEGRATED ANSWERS TO INFORMATION REQUESTS, at 4 (2010), <http://www.maine.gov/legis/opla/kinshipfamResponsesToInfoReq.pdf>. In the Clinic's experience with these matters, we have noted that some probate courts in Maine simply do not recognize a "motion to modify" process for a guardianship order.

429. See 19-A M.R.S.A. § 251 (2012) (family matters); 19-A M.R.S.A. § 851(4) (2012) (judicial separation); 19-A M.R.S.A. § 1653(11) (Supp. 2014) (parental rights and responsibilities matters); 19-A M.R.S.A. § 1804 (2012) (grandparents visitation matters).

430. 124TH MAINE LEGISLATURE, FINAL REPORT OF TASK FORCE ON KINSHIP FAMILIES 7-10 (November 2010), <http://www.maine.gov/legis/opla/kinshiprpt.pdf> (hereinafter "TASK FORCE ON KINSHIP FAMILIES").

431. 18-A M.R.S.A. § 5-213 (2012).

432. TASK FORCE ON KINSHIP FAMILIES, *supra* note 430, at iii.

433. See *supra* note 214 and accompanying text.



responsibilities in the proceeding itself. While these “private child protection” matters can minimize the State’s involvement with a family, it also cuts off potential routes to services and support that may be essential for family reunification, particularly where poverty limits a parent’s access to treatment, transportation, visitation supervisors, and other resources.

The Vermont guardianship task force noted a similar dynamic in that state,<sup>434</sup> and the new guardianship law requires the state’s Department for Children and Families to adopt a specific policy limiting use of guardianships as a resolution for investigations of child abuse or neglect.<sup>435</sup> Rather, the child welfare caseworker may refer a family member to a resource for more information about seeking a guardianship, and, where a guardianship has been entered, the caseworker must “inform the guardian and the parents about services and supports available to them in the community and shall close the case within a reasonable time unless a specific safety risk is identified.”<sup>436</sup> The Maine Legislature should consider adopting similar or other language clarifying the appropriate role of DHHS in guardianship matters.

*c. Termination of Guardianships.*

The current MPC could be far clearer regarding termination of guardianships. Section 5-210 is titled “Termination of appointment of guardian; general” but refers only to automatic terminations or resignations of the guardian, whereas section 5-212 is titled “Resignation or removal proceedings” and refers to petitions to terminate the guardianship.<sup>437</sup> Interestingly, the MPC makes no reference to a minor ward’s parents in the guardianship termination provisions, which suggests that this provision as well is based on a testamentary appointment (i.e. “orphan”) model where the parents have no role in the proceedings after appointment.<sup>438</sup>

The simplest approach for reform would be to consolidate these two provisions and make further amendments to expressly address the rights of petitioning parents who are seeking to recover their rights. In addition, the statute should reflect the requirements and clarifications set forth in Maine Law Court case law requiring parents’ petitions to terminate, such as the presumption of parental fitness,<sup>439</sup> and the requirement in certain circumstances of transitional arrangements.<sup>440</sup> The Vermont guardianship law provides a detailed description of the procedure and analysis for termination cases, which would be consistent with Maine’s current approach and provide far better guidance to courts and litigants than the current

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434. ACT 56 MINOR GUARDIANSHIP COMMITTEE, *supra* note 392, at 7–8, 14.

435. VT. STAT. ANN. tit. 14, § 2634 (Supp. 2014).

436. *Id.* § 2634(4).

437. 18-A M.R.S.A. §§ 5-210, 5-212 (2012).

438. PATLAC has recommended that MPC consolidate all termination provisions in one section. PATLAC Report, *supra* note 389, at 561-64. However, it has proposed to move the termination provision outside of the minor guardianship law entirely to the “General Provision” that applies to all guardianships. This would cause confusion because certain language that is applicable only to minor guardianships.

439. *In re* Guardianship of David C., 2010 ME 136, ¶ 7, 10 A.3d 684.

440. *In re* Guardianship of Stevens, 2014 ME 25, ¶¶ 16–20, 86 A.3d 1197.

statute.<sup>441</sup>

## 2. Adoptions, Paternity, and Termination of Parental Rights

The language of Article IX of the MPC, particularly with respect to terminations of parental rights and determinations of paternity, is in need of substantial revision. Foremost, the Legislature must bring the statutory language in line with the case law and ensure that it reflects the significant implications for the families involved with these cases. In *In re Tobias D.*, the Law Court noted that the paternity aspects of adoption law are quite outdated, such as its lack of provision for paternity testing. The Law Court suggested the probate courts use provisions in Title 19-A as helpful guidelines.<sup>442</sup> The adoption statute must also reflect the development of the jurisprudence of parental rights generally. As the Law Court noted in that opinion: “Through many years of interpretation, we have concluded that the procedures, burdens, and standards set out in [Title 22] section 4055 constitute the means by which the fundamental constitutional right to parent is safeguarded.”<sup>443</sup>

The MPC should include specific language requiring reunification efforts (or waiver of the same) as a prerequisite for a TPR hearing, as is the case in child protection cases under Title 22, as well as additional provisions incorporating other aspects of Maine’s child protection law. This language would impose an affirmative duty on courts overseeing such TPR proceedings to ensure that they provide parents a fair opportunity to address their fitness and relationship with their children before a court may permanently dissolve those legal bonds.<sup>444</sup> Such provision would reverse the holding in *In re Adoption of L.E.*, which was based on a reading of the current language in the MPC.<sup>445</sup> The Law Court noted: “[T]he Adoption Act does not incorporate [the Title 22] termination [of parental rights] subchapter’s purpose, which is to ‘[a]llow for the termination of parental rights at the earliest possible time *after rehabilitation and reunification efforts have been discontinued* and termination is in the best interest of the child.”<sup>446</sup>

As an additional note, now that the Maine Legislature has adopted the Maine Parentage Act,<sup>447</sup> there may be several provisions in the MPC that it would need to amend, including those pertaining to the establishment of paternity.<sup>448</sup> In addition, the MPA’s clarification of when a court can find a person to be a child’s *de facto*

441. VT. STAT. ANN. tit. 14, § 2632 (Supp. 2014).

442. *In re Adoption of Tobias D.*, 2012 ME 45, ¶ 11 nn.7-8, 40 A.3d 990.

443. *Id.* ¶ 17.

444. *See, e.g.*, 22 M.R.S.A. § 4041 (2004 & Supp. 2014) (setting forth DHHS’s obligations to attempt family reunification through as a specific “rehabilitation and reunification plan” and to receive court permission to cease such reunification efforts as a prerequisite to petitioning to terminate a parent’s rights).

445. *In re Adoption of L.E.*, 2012 ME 127, ¶ 13, 56 A.3d 1234.

446. *Id.* In that case, neither parent specifically sought reunification efforts, so the holding of the case addresses only the court and petitioners’ lack of an affirmative duty, not a parent’s potential entitlement to such efforts if requested.

447. Maine Parentage Act, P.L. 2015, ch. 296 (codified as 19-A M.R.S.A. §§ 1831–1936 and miscellaneous other amendments).

448. *See, e.g.*, 19-A M.R.S.A. § 1861 (2012) (regarding voluntary acknowledgment of paternity).

parent<sup>449</sup> may decrease the need for many adoptions, such as by step-parents, so that there are fewer adoption/TPR cases outside of the child protection context.

### 3. *Change of Name*

The language of Maine's name change statute has not changed significantly since it was enacted in the 19th century. As noted above, it employs language regarding a parent's authority to change a minor's name that does not reflect the laws that set such authority—specifically section 1653 in Title 19-A.<sup>450</sup> The language should be revised to reflect the current notions of “parental rights and responsibilities,” and it should also authorize a court to make a name change as part of an existing parental rights proceeding, rather than requiring two separate proceedings in every case.

### 4. *Appointment of GALs*

GALs can play an essential role in the parental rights cases discussed in this Article. The MPC also contains a statute regarding GALs but, like the best interest of the child language, other provisions in Maine law have developed since its enactment so that the MPC's approach is quite different from that set out in other family law statutes.<sup>451</sup> Because GALs in cases involving minors—as opposed to adult guardianships—perform a similar function and analyze similar, if not identical, questions as those appointed in Title 19-A or Title 22 parental rights matters, the Legislature should amend the MPC to ensure that the standards and requirements for all GALs are consistent. This will also make it easier to appoint a single GAL across multiple proceedings involving the same child.

## V. CONCLUSION

There is an urgent need for reforms to our current system of adjudicating parental rights matters in Maine's probate courts, for the benefit of Maine children and families, as well as for the proper administration of justice in Maine. We must acknowledge that these courts are taking an increasingly important role in addressing the most acute needs and challenges of families in crisis; this sharply differs from their traditional role of ensuring long-term stability for orphans and their property, strains their limited resources, and is ultimately unworkable due to their adherence to outdated models of court administration. Maine is falling far short of having an effective family justice system and, as a result, it is failing Maine families. The Maine Legislature cannot continue to sit this one out. It must set in motion a plan to overhaul the current court structure and substantive law to fulfill its obligation to those families. Although the reforms are already long overdue, there is no time to lose.

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449. *Id.*

450. *See supra* notes 204–208 and accompanying text. 19-A M.R.S.A. §§1501(a), 1653 (2012).

451. *Compare* 18-A M.R.S.A. § 1-112 (2012) *with* 19-A M.R.S.A. § 1507 (2012).