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# Maine's Family Division—Lighting a Dark Stairway

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# *Maine's Family Division—Lighting a Dark Stairway*

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The establishment of the Family Division of the Maine District Court was the largest of the justice improvement initiatives undertaken by the Judicial Branch during the tenure of former Chief Justice Daniel E. Wathen. Conceived in 1996, the concept of the Family Division was introduced to the legislature by Chief Justice Wathen in his State of the Judiciary speech on February 11, 1997, when he explained the plight of unrepresented Maine citizens with family law problems as akin to being in "a darkened courthouse [where] there is a long, narrow and winding set of stairs. It is up to them to find the stairs and climb them on their own. I don't exaggerate when I say that the Family Division will be like showing that same person to a well-lit escalator."[1]

This article will summarize how the Family Division came to pass, describe its initial experiences, and suggest possible future improvements in its operations.

The establishment of the Family Division of the Maine District Court was the largest of the justice improvement initiatives undertaken by the Judicial Branch during the tenure of former Chief Justice Daniel E. Wathen.

In 1992, the Maine court system began to receive federal funding to assist with the handling of child support-related cases. Pursuant to Title IV-D of the Social Security Act, Congress had established a federal program designed to promote the establishment and collection of child support so that custodial parents and their children could enjoy financial independence rather than depend on public assistance programs in order to survive. Federal funding was made directly available to the state agency administering the federal IV-D program, which in Maine is the Department of Human Services, Division of Support Enforcement and Recovery. Federal regulations permitted the state IV-D agency to enter into a cooperative agreement with the courts, under which the courts could receive reimbursement at the applicable matching rate (currently 66%) for some of their child support work.[2] Maine's two agencies signed the requisite cooperative agreement, and the courts began to be reimbursed for a portion of the costs of administering family law cases. In addition, the court system hired a statewide child support coordinator.

Recognizing the need for additional resources within the courts, in the mid-1990s the child support coordinator began to research how other state court systems used federal IV-D funding. It turned out that several had developed quasi-judicial positions supported by federal child support funds. Connecticut and Vermont, for example, created "magistrates." Other states, such as New Hampshire and Delaware, utilized "masters." These quasi-judicial positions enabled other court systems to devote more time and resources to cases involving child support.

In October 1995 a crisis in funding for the state's largest legal services providers led to the convening of the

Fall Forum, a meeting in which many of the state's legal community leaders met to discuss possible systemic responses to the problem of under-funding of legal services for the indigent. This seminal event led to the establishment of the Justice Action Group (JAG), a committee chaired by Senior U.S. Circuit Judge Frank Coffin that also included Chief Justice Wathen, Associate Justice Howard Dana, and representatives from the Maine State Bar Association, the Maine Bar Foundation, and all of the state's major legal services providers. While JAG has sponsored or had a major role in a number of very important initiatives, including establishment of the Maine Equal Justice Project and Equal Justice Partners, and the recent "unbundling" changes to the Maine Bar Rules, it also has provided ongoing oversight and direction for coordination of the access to justice efforts in the state.

One year later a second similar event, Fall Forum II, was held, and the problem presented by unrepresented family law litigants' use of the courts was squarely identified as a major systemic issue. Forum participants noted that while there were significant resources available to help unrepresented, or "pro se," litigants complete the necessary forms to commence a divorce or other family law action, there was little help available for them in navigating a course to completion of the case.[3] Aware of the IV-D funding stream and the research on its use by other states, Chief Justice Wathen saw the possible link be-tween the identified need and the available IV-D funding, and proposed the creation of a system of "para-judges" to fill the need. These para-judges would have special experience and training in family law and family dynamics, and be tasked to, among other things, assist pro se litigants through the family law process. By adding new resources to the courts, litigants with counsel would also benefit. Family dockets around the state were backlogged, which often made it difficult to get into court promptly or to have motions for interim relief heard in a timely manner.

After further elaboration and development of the idea, in 1997 the Judicial Branch drafted—and former Speaker of the House Libby Mitchell sponsored—L.D. 1213, "An Act to Create a Family Division within the State's District Court." The bill identified the Family Division's mission as to "provide a system of justice that is responsive to the needs of families and the support of their children." It set forth a framework for the Family Division and outlined its jurisdiction, while leaving to the Supreme Judicial Court the task of adopting administrative orders and court rules governing Family Division practice and procedure. Governor King had endorsed the creation of the new Family Division, and included funds for the 33% state match in his proposed biennial budget.[4] The bill was referred to the Joint Standing Committee on Judiciary. As introduced, the bill created eight "family case management officer" positions, and authorized full interim hearing jurisdiction for these quasi-judicial officers. The governor's budget also authorized the addition of eight assistant clerks for the District Court and a social worker for the Family Division.

The proposed legislation was not universally supported. While there was little debate about the central goal of assisting unrepresented litigants, there were a number of concerns about specific provisions. Some thought that the court should have advocated for, and the legislature should have endorsed, a full family court, with eight new judges.[5] Others worried about the constitutional implications of having cases adjudicated by persons who were not judges and who had not been vetted and authorized to act by the traditional process of appointment by the governor and confirmation by the legislature.[6] Others thought the money would be better spent in providing funds for guardians ad litem in contested family matters. Some attorneys, having just seen the state effectively remove attorneys from one significant practice area (workers compensation), thought that the proposal represented the beginning salvo in a similar effort to limit or remove attorneys' roles in this more central part of many of their practices. Still others worried, in light of the multiple elements of the case management officer's defined role, that the Family Division represented the thin end of the wedge in a systemic shift from the traditional "hands-off" role of courts in a system based on English common law to a more interventionist model akin to the systems based on continental Europe's civil code.[7]

These concerns were aired in the legislative process, but a majority of the Judiciary Committee supported the bill with a number of proposed changes. Perhaps the most important of these was the insertion of a provision allowing parties to elect to have interim parental rights and responsibilities issues heard by a judge. The bill, as amended, was enacted and then signed by Governor King on May 27, 1997 as Public Law 1997, Chapter 269.

With an effective date of January 1998, the court had a lot of preparatory work to complete before the Family Division could commence operations. The District Court chief judge and deputy chief judge each took on major imple-

mentation tasks. Chief Judge Michael Westcott chaired the committee given the responsibility of drafting a set of court rules to govern Family Division operations. Deputy Chief Judge Thomas Humphrey chaired the court's Implementation Team, which was asked to develop more detailed procedures and necessary forms. The two court leaders also developed a process for hiring the eight case management officers (CMOs) authorized by the legislation. A comprehensive training plan was developed, not only for the new CMOs but also for the clerks and judges already a part of the court system. Provision of ancillary supports such as offices, security, scheduling, statistical reporting and administration were planned. The new division would impact virtually all elements of the court system.

On December 3, 1997, the Supreme Judicial Court promulgated the Family Division Rules developed by Chief Judge Westcott's committee and provided in the promulgation order that they would take effect on April 6, 1998. The rules identified the following goals for the Family Division: to promote a timely resolution of family cases; to address promptly the establishment, modification and enforcement of child support orders; to provide effective case management; to facilitate parenting arrangements in the best interest of children at an early stage in the proceedings; to promote education for the parties about parenting issues and to inform litigants about available community services; to provide a better understanding of court processes; to identify domestic relations cases in which there is domestic abuse or a power imbalance in order to protect children and adults, and to ensure a fair resolution of the case; to promote civility in family law proceedings; to minimize the harm to children caused by family law cases; and to make appropriate referrals to alternative dispute resolution services.[8] These goals guided the Implementation Team as it developed a detailed procedural manual for the Family Division.

Using four regional screening committees, and a final central hiring committee, eight CMOs were selected. Judges, private attorneys and mediators participated in the hiring process at both levels. The CMOs began work in April 1998, and initially participated in two weeks of intensive training. At the close of the training period, additional training on the Family Division's Rules, procedures and forms also was provided to judges and court clerks. Finally, the Implementation Team was converted into an Oversight Team, chaired by District Court Judge RaeAnn French, which provided ongoing guidance and, as issues arose, recommended appropriate changes in the rules or procedures to address those issues.

The heart of the Family Division process is the initial case management conference. These conferences are automatically scheduled by the court system whenever a new family law action (divorce, paternity case, unmarried parental rights and responsibilities action) that involves one or more children is filed, or when a post-judgment motion in one of these actions is commenced. The case management conference usually occurs within thirty-five to forty-five days of case initiation, and serves several important purposes.

The first intended purpose is for the conference to function as a triage event, to identify the issues that are likely to be resolved by agreement and those that are not likely to be so resolved, and to assess the severity of the conflict between the parties. The second planned purpose is to stabilize the family unit in a time of crisis, and to ensure that the needs of the children are met, and their interests protected. This is usually accomplished by the entry of an agreed-to temporary order governing the parties' parental rights and responsibilities, including decision-making authority, the children's primary residence and contact with the other parent. A second temporary order is usually entered, which establishes both the initial level of child support, and a collection mechanism. In addition, the case management conference provides an opportunity to establish a time frame and process for moving the case to resolution. This often involves referral to mediation and may include the use of other resources, such as parent education programs or the appointment of a guardian ad litem.

These conferences are sometimes complicated by the limitations on a CMO's authority. If either party objects to a temporary order, the CMO cannot enter an order over that objection without holding a hearing. The Family Division Rules do allow a CMO to conduct an immediate hearing, but this is often hard to accomplish due to the press of other cases on the conference docket, or because of concerns about adequate time for the parties or counsel to prepare. Moreover, if either party indicates that there is a dispute about parental rights and responsibility issues, they have the right to elect that a judge resolve the dispute,[9] and if such an election is made, the CMO cannot proceed further. However, in most cases the parties agree to the entry of appropriate orders, and the case progresses to the next step in the process, which is usually mediation.

The final and perhaps unplanned purpose of the conference is that of its

psychological significance. It is well established in the literature on divorce that the initiating partner is usually twelve to eighteen months ahead of the responding partner in processing the reality of divorce. All too often, the case management conference is the first time when the reality of the fact that the process of family dissolution is moving forward comes home to the responding partner. Similarly, one partner or the other will often have unrealistic expectations about how the process will work, or the range of likely consequences. The initial discussion with the case management officer is often a reality check for one or both parties, many of whom do not initially understand that, whatever its other costs or benefits may be, divorce is almost always a financial catastrophe for both parties.

The case management conference is designed to be used whether attorneys represent the parties or not. Percentages of represented clients as opposed to pro se litigants vary throughout the state, but one or both parties appear without a lawyer in 60% to 80% of cases. The rules of evidence do not apply, and the CMOs engage in a dialogue with pro se parties that is designed to help them understand and utilize the process without needing to know the complexities of the laws and court rules.

The CMO completes a Case Management Order at the close of each conference. This four-page form captures all temporary agreements and orders, lists the other issues to be resolved, establishes deadlines for the exchange of information, and schedules other pre-trial events in the case. Most importantly, it either orders the parties to participate in two critical events, mediation and co-parenting education classes, or waives the necessity of those next steps.

Mediation is required by statute in all family law cases involving children[10] and, at the parties option, this requirement can either be satisfied through the Court Alternative Dispute Resolution Service (CADRES) or by engaging the services of a private mediator. Mediation is either scheduled through CADRES at the case management conference, or the parties are ordered to engage in private mediation prior to the next status conference. Many cases settle in mediation, in which case the next court date is used for an uncontested final hearing, which ends the case.

Another important tool for consensual resolution utilized at this stage in the process is referral to one of the co-parenting education programs that have been established throughout the state, in part utilizing funding from the federal access and visitation grant program, administered through the Department of Human Services and the Family Division. Case management officers often order parties to participate in an initial four-hour co-parenting education class, in which the parties are taught to utilize positive practices for successfully conducting a post-divorce relationship (and how to minimize negative interactions), and to engage in the collaborative decisionmaking required by an allocation of shared parental rights and responsibilities.

When these softer dispute resolution approaches are not successful in resolving a case, either interim or final evidentiary hearings become necessary. If there are issues that cannot wait for a final hearing for resolution, an interim hearing is held. Case management officers have jurisdiction to hold interim contested hearings on all issues. However, if there are parental rights and responsibilities issues in dispute, the parties may opt to have a judge conduct the interim hearing. Interim hearings can be as short as an hour or as long as two days, depending on the complexity and contentiousness of the issues to be resolved.

Finally, regardless of whether an interim hearing is necessary, the CMO will conduct a pretrial conference to prepare the parties for a final, contested hearing. A Pretrial Order is entered specifying the issues in dispute, the estimated time necessary for trial, deadlines for discovery, designation of expert witnesses, and disclosure of witness lists and trial exhibits. If the final hearing involves only child support and related issues, it will be held by the CMO.[11] If other issues are in dispute, the final hearing must be conduced by a judge. The law does not allow CMOs to conduct final contested hearings on other issues, even if the parties agree to CMO jurisdiction.[12] The Family Division will celebrate its fourth anniversary as this article is published. Over that four-year period, CMOs will have conducted nearly 40,000 conferences, 2,000 interim hearings, and 8,000 final hearings. Parties exercise their right to elect a judge for interim hearings in only a small fraction of the Family Division's cases. The Family Division has become an integral part of Maine's

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District Court, and given the increased responsibilities and caseload pressures, which are fully engaging the court's judicial resources, it is now virtually impossible to see how the courts could continue to operate without it.

In the fall of 2000 an evaluation of the new system was conducted. For more than a month, every litigant, attorney and support enforcement agent attending a Family Division event was given an evaluation form and asked to return it to the Office of the Chief Judge of the District Court. Approximately 780 parents and 360 attorneys and support enforcement agents returned completed questionnaires.

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The results were overwhelmingly positive. Parents were asked to rate the CMOs on such things as courtesy, efficiency, patience and fairness. They were also asked whether they understood what happened in court, whether they had an opportunity to explain things, and whether they felt the process was helpful in resolving children's issues. More than 95% of those responding rated the work of the case management officers as excellent or good. The survey completed by attorneys and support enforcement agents covered a variety of subjects, including questions about the CMO's legal ability, impartiality, integrity, temperament, diligence, case management skills and overall competence working with families. Consistent with the results of the parents' survey, more than 95% of those responding rated the CMOs as excellent or good.

However, no new system is ever perfect. The Family Division's major issue is a success problem. The statistics, the evaluations, and reports from clerk's offices, the bar and case management officers make clear that eight CMOs are inadequate to meet demand for the Family Division's services. Anecdotal evidence indicates it can still be difficult to get a very quick hearing in truly urgent cases, due to the interplay of due process requirements, Family Division Rules, CMO resources and scheduling constraints. The large number of cases in which the parties do not elect to have interim issues decided by a judge has resulted in numerous CMO interim hearings, and the time dedicated to those hearings has made it more difficult to hold initial case management conferences in the thirty-five to forty-five day time period contemplated by Family Division procedures.[13] As one attorney has noted, "If you build it, they will come." While it may be that the demand for services in the family law area is infinitely elastic (and no matter how many judges or CMOs are assigned, work will always exceed resources), it is clear that existing resources are over their capacity to handle the current caseload in some parts of the state.

The system is unquestionably beneficial in the large majority of cases in which neither party is represented. Many attorneys have commented that when one party is represented and the other is not, the case management conference system makes it much easier for them to deal with the anxieties of the unrepresented party, because a neutral, rather than the adverse party's attorney, is explaining the necessary steps and moving the case along. However, when two attorneys are involved, the system has undoubtedly increased the cost of some types of moderately contested proceedings and may occasionally introduce delay in the process.

The District Court recently reconfigured certain of its administrative operations, and the Domestic Relations Advisory Committee, chaired by Deputy Chief Judge Robert Mullen, has now taken over the Family Division Oversight Team's functions within a broader set of responsibilities. That committee will continue to develop recommended improvements in the Family Division Rules and procedures, and will be examining whether other changes ought to be recommended to the legislature, including the addition of new CMOs and clerks, changes to the CMO's jurisdiction or authority, or other changes requiring statutory revisions.

While those improvements are under consideration, the experience of the past four years has shown that the initial vision was sound and that the Family Division has provided a system of justice that is responsive to the needs of families and the support of their children. Unrepresented litigants need no longer feel as though they stand at the bottom of an intimidating and poorly lit set of stairs, which they must climb in order to move to the next stage in their lives.

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## ENDNOTES

1. "The State of The Judiciary Address of Chief Justice Daniel E. Wathen," in *Laws of Maine*, 2 (1997): 1360.
2. Not all of the work undertaken by courts is reimbursable under the program. For example, federal regulations specify that work undertaken by judges and those on their immediate support staffs, such as secretaries, law clerks and bailiffs, is not reimbursable. In Maine, the federal dollars received were tied to work undertaken in the various District Court clerks' offices.
3. As examples, the courts provide family law form packages with completion instructions; the Kennebec-Somerset Legal Secretaries Association has long provided form completion help in local courthouses; and Pine Tree Legal Assistance has developed a very comprehensive Web site (www.helpmelaw.com).
4. *See* Public Law 1997, Chapter 24, Part JJ, Sec. 1.
5. However, given the limitations of the IV-D program, additional judges would not be eligible for federal reimbursement.
6. The Family Division Rules provide that CMO interim orders are reviewable de novo at trial, and give the parties fifteen days in which to file an objection to a CMO's final order and have a judge review the matter. Fam. Div. R. III(G)(2). This approach has since been held to be constitutional in Arsenault v. Bordeau, Oxford County Superior Court, Docket No. AP-99-06, decided February 8, 2000.
7. In fact, a more assertive role for judicial officers in managing the court's docket and in protecting the interests of children was an intended consequence. The success of this approach in divorce cases led the court to develop a similar case management approach for child abuse and neglect cases about a year later.
8. Fam. Div. R. II(B).
9. *See*, 4 MRSA 183(D)(2); Fam. Div. R. III(B)1.
10. 19-A MRSA 251(2).
11. 4 MRSA 183(D)(4); Fam. Div. R. III(C)(2)(b).
12. Fam. Div. R. III(C)(2)(b).
13. Conversely, in a small number of cases, due to the constraints on judicial schedules, parties are able to tactically utilize the election of a judicial interim hearing option to delay urgent relief necessary to stabilize a crisis situation or to provide for the immediate needs of minor children.