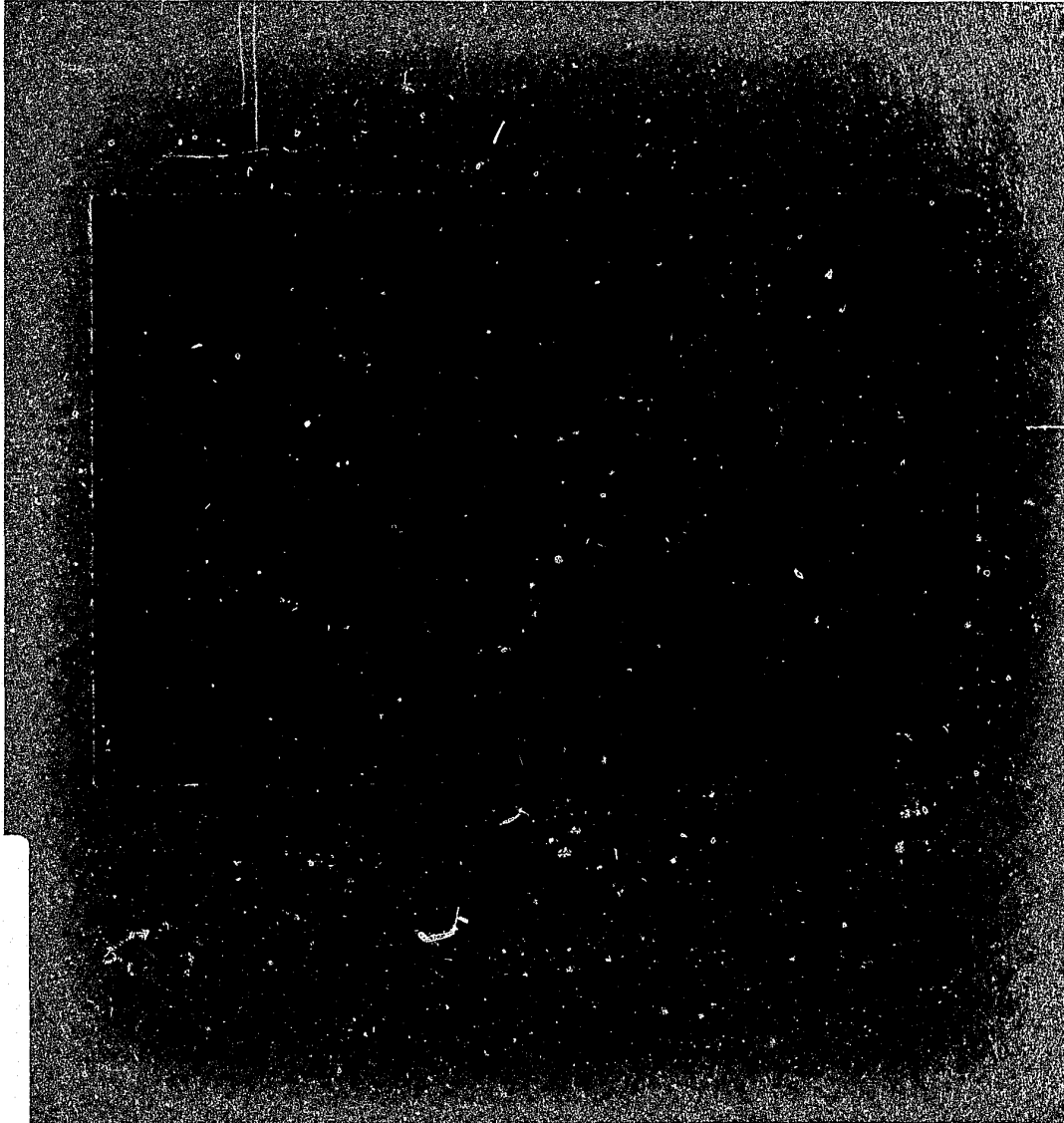


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THE IMPACT OF DOMESTIC RELATIONS
CASES ON THE NEW HAMPSHIRE SUPERIOR COURT:
ANALYSIS AND RECOMMENDATIONS

The preparation of this document was funded by the Law Enforcement Assistance Administration through the New Hampshire Governor's Commission on Crime and Delinquency.



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January 15, 1974

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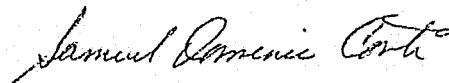
My Dear Chief Justice:

We are pleased to transmit to you, as Chief Justice of the Superior Court of the State of New Hampshire, the report of "The Impact of Domestic Relations Cases on the New Hampshire Superior Court: Analysis and Recommendations."

We have prepared a summary of recommendations which appears immediately following the Table of Contents. These recommendations must, however, be read in the light of the full supportive documentation which is included in the report.

It has been a distinct pleasure for us to participate with you in the conduct of this study. Pursuant to your request following our presentation of preliminary findings to you, we will be pleased to meet with you and other judges and officials of the New Hampshire Court System to discuss this report.

Very truly yours,


Samuel Domenic Conti

SDC:cs

Enclosures

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ACKNOWLEDGEMENTS

During this study we were impressed by the concern shown by participants in the New Hampshire judicial and legislative processes for the issues raised in our study and by their willingness to provide us substantial time, energy, and information. We wish to express our appreciation to all of those we interviewed, and our hope that we have reflected their concerns in this study, either by accepting and incorporating their particular recommendations, or, where this has not proven possible, by addressing the specific issues they raised and substantiating our reasons for choosing an alternative proposal. We wish to express our special thanks to the members of the New Hampshire Judicial Council who lent us time and assistance in completing this study.

The following consultants provided valuable help in the creation and production of this report:

Ted Rubin
Director for Juvenile Justice,
The Institute for Court
Management
Denver, Colorado

Anthony Zollo
Juvenile and Domestic
Relations Court
State of New Jersey

RECOMMENDATIONS

Part III. Proposals for Change in Court Procedures, Policies and Rules Relating to Domestic Relations Cases

A. Jurisdiction and Caseload

Superior Court judges should be assigned on a rotating basis, for a period of four months, to hear only domestic relations cases in Hillsborough County.

Use of a full-time domestic relations judge in Hillsborough County should be accompanied by development of a specialized supporting staff in domestic relations work.

The return day required for writs should be relaxed for parties bringing domestic relations cases forward on motion to modify orders.

B. Personnel

Clerks should be precluded from hearing cases as masters.

Domestic relations masters should be selected from among the experienced Bar, and especially among willing part-time judges of the Probate and District Courts. The qualifications, selection, assignments, and compensation of masters should be based on guidelines promulgated by the Court.

Clerks should prepare detailed caseload statistics for periodic reports to the office of the Chief Justice of the Superior Court and to the New Hampshire Judicial Council.

C. Finances

The Superior Court should immediately institute a study of all court finances. Procedures should be established for the Superior Court in each county to be fully accountable to the Chief Justice, and for rationalization of the present system of court financial support from the state, counties, and litigants themselves.

D. Dignity and Thoroughness of Proceedings

All domestic relations cases should be heard in dignified surroundings, either in chambers or in open court.

Commissioners (masters) should wear robes if they also hold office as judges of Probate or District Courts. All other commissioners should wear appropriate attire.

Recommendations - 2.

Parties to uncontested as well as contested marital cases should be required to file a financial affidavit with the Court. Except for good cause shown, both parties in uncontested cases should be available in Court for questioning by the judge or commissioner, especially with regard to financial issues.

To assure thoroughness and dignity of proceedings, as well as a record for possible appeal, all domestic relations cases before judge or commissioner, should be recorded in Court on magnetic tapes.

To minimize variations in judgments, while assuring judicial independence among judges and commissioners, a program of judicial education should be instituted and state-wide guidelines established for the setting of orders.

The present requirement for two character witnesses for a libellant in an uncontested divorce action should be abolished.

The Superior Court should schedule marital cases so as to minimize waiting time for litigants and their attorneys.

The Court should distribute a clearly-written informational booklet to familiarize litigants and potential litigants with domestic relations procedures in Superior Court. The Court might enlist the aid of the Judicial Council, New Hampshire Bar Association, or other responsible organization in preparation of this publication.

Part IV. Proposals for Legislation To Be Submitted in 1975

A. Jurisdiction and Personnel

The Superior Court should recommend legislation to empower commissioners, appointed by and under authority of the Court, to hear and dispose of domestic relations cases (with a narrow exception for contested custody cases) with full authority as though the commissioners were members of the Superior Court.

B. Finances

The Superior Court should recommend legislation in-creasing domestic relations filing fees to offset in-creased costs resulting from appointment of commis-sioners to hear domestic relations cases.

Recommendations - 3.

Following the study (recommended in Section III-C above), the Superior Court should recommend legislation necessary to promote a more rationalized structure for general Court finances.

Part V. The Domestic Relations Case and the Probation Department, the State of New Hampshire (by consultant Ted Rubin, The Institute of Court Management)

Strengthen judicial influence over Probation Department management.

Increase efficiency in the management of court-ordered payments.

Specialist Domestic Relations Officer.

The Department should employ paraprofessional personnel as domestic relations specialists; paraprofessional aides could also improve Probation supervision of offenders.

The calendaring of domestic relations cases should consider judge as well as Probation Department time priorities within the social objective of bringing these matters more quickly to court consideration.

Assignment of all domestic relations cases in Hillsborough County to a single Superior Court judge.

Parties to a divorce should not be routinely referred for social agency review prior to hearing.

Officials should review present Probation Department bonding practices.

The Municipal/District Court Probation Offices should be merged into the State Department of Probation.

Larger studies of court organization and structure are indicated.

NEW HAMPSHIRE DOMESTIC RELATIONS STUDY

I. INTRODUCTION

At first sight, the Superior Court appears to have domestic relations cases well under control. The Justices of the Superior Court dispose of marital matters¹ at a minimum inconvenience to themselves. A large proportion of cases are turned over to masters or judicial referees for hearing; most of the remainder are processed in batches on Monday mornings or other designated domestic relations days. Many times, the Clerk of Court serves as master in domestic relations cases. This service provides litigants a court hearing even when judges might not be available. It relieves overcrowded domestic relations calendars. In many cases it provides the Clerk a modest extra income from master's fees.

Domestic relations litigants generally face little delay from the Court in having their cases heard; with the notable exception of Legal Aid cases, domestic relations matters are most often delayed by the actions and

¹The domestic relations jurisdiction of the Superior Court is specified by statute. New Hampshire Revised Statutes Annotated (hereafter RSA) 491:7 empowers the Superior Court to take cognizance of "petitions for divorce, nullity of marriage, alimony, custody of children and allowance to wife from husband's property for support of herself and children." Included in domestic relations cases are contempt for non-support and reciprocal enforcement of support actions. In this report we use the terms "marital cases" and "domestic relations cases" interchangeably.

indecision of the parties themselves. Finally, Superior Courts in several counties have excellent facilities intended to provide "an atmosphere of dignity and respect" for the courts.² The pathbreaking New Hampshire Court Accreditation Commission is actively policing the few court-houses with less than satisfactory facilities to bring them up to standards of "judicial atmosphere and proper decorum."³ The present satisfaction of the New Hampshire Superior Court with the atmosphere and processing of domestic relations cases was aptly summed up by one Court official. "We don't have problems in our court," we were told. "It's only the litigants who have problems."

In one sense that may well be so; but in another sense, the problems of litigants are rapidly becoming problems for the Superior Court as well. New Hampshire is a state concerned with the stature of its courts. The New Hampshire Court Accreditation Commission found an unsatisfactory court facility "debases the entire judicial system."⁴ No less of a threat is posed by the present perfunctory hearing of marital cases involving thousands of New Hampshire residents each year and constituting the bulk of today's Superior Court civil caseload.

²Report of the New Hampshire Court Accreditation Commission on the Accreditation of Court Facilities (Hon. John W. King, Chairman), Sept., 1973, p. 7.

³Ibid., p. 2.

⁴Ibid., p. 1.

In Court Year 1973, domestic relations cases finally became a full 50 per cent of all civil cases filed in the New Hampshire Superior Court. According to Judicial Council statistics, three-quarters of all civil cases heard in Superior Court today are domestic relations matters. Table I shows, for example, that domestic relations cases heard or resulting in the entry of orders amounted to 76 percent of the 7,458 civil cases tried or heard in Superior Court during Court Year 1973. Moreover, these figures do not include hearings on temporary domestic relations orders (in particular, temporary support orders), thereby substantially understating the number of Superior Court domestic relations hearings.⁵ In short, a large proportion of all litigants in the New Hampshire Superior Court form their impressions of that Court from the dignity and justice they experience in domestic relations cases.

The procedures in Superior Court do not always leave the best of impressions with the parties to domestic relations cases. On November 2, 1973, in Strafford County, a single Superior Court justice heard approximately 140 divorce cases. "Divorce, cafeteria style," a local news-

⁵For example, in a random sample of one-quarter of the marital cases disposed of in Strafford County Superior Court in Court Year 1972, 40% had temporary support orders entered or support stipulations approved. Ninety percent of the cases had temporary orders (such as temporary restraining orders and temporary custody orders) issued perfunctorily upon filing of the libel. Dispositions of these matters were not included in the statistics reported to the New Hampshire Judicial Council.

TABLE I

DOMESTIC RELATIONS CASES AS A PROPORTION
OF TOTAL SUPERIOR COURT
CIVIL CASELOAD

Court Year*	Civil Cases Entered**			Civil Cases Heard, Etc.***		
	Marital Cases	Total Civil Cases	%	Marital Cases	Total Civil Cases	%
1973	7,603	15,604	50	5,636	7,458	76
1972	6,593	13,736	48	4,912	6,569	75
1971	5,836	12,868	45	4,356	5,869	74
1970	5,498	12,741	43	4,013	5,216	77
1969	5,184	12,133	43	3,794	4,967	76

* The court year runs from August 1 to the following July 31. Court Year 1973 is the year ending July 31, 1973.

** These statistics are taken from the Biennial Reports of the Judicial Council of the State of New Hampshire. For court years 1972 and 1971, see The 14th Biennial Report of the Judicial Council, Dec. 31, 1972, Table V (Court Year 1972), Table IV (1971); for 1970 and 1969, see The 13th Report of the Judicial Council, Dec. 31, 1970, Table V (1970), and Table IV (1969). The as yet unpublished figures for 1973 were obtained from the Office of Secretary of the Judicial Council.

*** These figures are taken from the same sources cited in ** above. To determine marital cases heard we combined categories listed under "Civil Actions Disposed of During Year," as follows: "Contested Marital Cases Heard During Year," plus "Uncontested Marital Cases Heard During Year," plus "Marital Cases Brought Forward In Which Orders Made During Year." In order to determine total civil cases heard, etc., we subtracted from total "Civil Actions Disposed of During Year" the following items: "Marital Cases Dismissed Without Prejudice," "Defaulted and Continued for Judgment," and "All Other Actions Disposed of Without Hearing." In fact, the domestic relations cases were probably a higher proportion of civil cases heard, etc., than is indicated by this table. For example, court officials in Hillsborough and Strafford Counties indicate that temporary orders, including temporary restraining orders, temporary support orders, and the like, were not recorded in Superior Court statistics for those counties even though they might have involved ex parte hearings.

paper called the event.⁶

That was an experiment. The scene is not much more impressive in the modern Hillsborough County courthouse on Monday mornings, traditionally known there as a domestic relations day. Nine hundred eighty-seven (987) domestic relations cases were heard in Hillsborough County in 1973, of which 933 were uncontested. These uncontested cases were heard in an average of 3.5 minutes each, also roughly the average time for four other counties sampled.⁷ A number of attorneys interviewed spoke of the surprise of their clients after such a proceeding. "Is that all?" the bewildered litigant would ask after passing through the quick ritual. Such a casual procedure cannot but detract from the institutions of marriage and the Court itself.⁸ Moreover, there is a major question whether justice can be done in such rapidly processed cases.

The hasty disposition of domestic relations cases

⁶Foster's Daily Democrat (Dover, N.H.), p. 1, Nov. 3, 1973.

⁷Slightly over 100 domestic relations cases were clocked in the counties of Cheshire, Grafton, Hillsborough, Strafford, and Sullivan, during November and early December, 1973. Hearings of contested matters, contempts, and motions to modify orders, averaged 34 minutes each.

⁸On the other hand, a judge even under the best of circumstances cannot be expected to issue an order which satisfies the needs of both parties in many domestic relations cases. Protracted court action may well indicate emotional needs of one or both litigants which it is simple impossible to meet in a legal forum. For example, one of the contested cases in our sample included 15 motions, petitions or exceptions filed by the parties, and three hearings held by the Court between the filing of the libel and granting of the divorce decree. After the divorce decree, there were 15 motions, etc., and four hearings as well as one unsuccessful appeal to the New Hampshire Supreme Court.

reflects an underlying fact: many Superior Court judges find this work distasteful compared to other types of litigation. This results in delegation of a large fraction of domestic relations work, especially cases of an uncontested nature, to a master, often the court clerk.⁹

Cases heard by masters (rather than a judge) are generally heard in conference rooms or even the clerk's own office, further diminishing the dignity of the hasty proceedings. As the New Hampshire Judicial Council reported, "There is an increasing danger that litigants will find the procedure too mechanical and come to believe they are being ignored," adding, "under the present system it is easy for the public to conclude that they have been shortchanged by the judicial system."¹⁰

The issue of marital litigation in the Superior Court has been studied by a number of New Hampshire groups. The Governor's Commission on Court System Improvement perceived the impact of domestic relations caseloads on non-jury cases in terms similar to those we have used above:

This commission believes that the non-jury matters other than marital cases are not considered by the Superior Court with sufficient deliberations to warrant a belief that this type of case is adequately reviewed by the Court prior to decision. The reason is not that the judges are unwilling to devote the necessary amount of time, but that the necessary

⁹Neither statute nor court rule appear to define qualifications for a master. See, for example, Superior Court Rule 76 and New Hampshire Statute RSA 498:12. The relevant portions of that statute read as follows: "The appointment of commissioners and receivers, the reference of questions to masters, . . . may be had and done by the Superior Court in any county. . . ."

¹⁰13th Report of the Judicial Council, Dec. 31, 1970, p. 21.

amount of time is not available to the judges because of the time required to endlessly process the large number of marital matters that are required to be considered by them. The situation in the busier counties may be demonstrated by the Issues to Court List which are issued from time to time by the Clerk, listing this type of case for trial. It is not at all unusual to have more than 30 non-jury cases scheduled for hearing before a single judge in a single day. Since the time of the judge in a day for actually hearing evidence rarely exceeds five hours, it is apparent that if all of these cases require hearing, there is inadequate time to hear and dispose of the cases required to be heard. As a result of this problem the courts and the clerks have devised numerous expedients to reduce the amount of time that the judge must give to this type of case, including transferring cases that will take any amount of time to Masters or Auditors to hear and report to the Court, which has the effect of shunting out of Court the more important non-jury cases. . . .¹¹

Principally to free the Superior Court's time so that the courts can more adequately handle non-marital, non-jury matters, "but also to improve the handling of domestic relations cases themselves," the Commission recommended that the Probate Court be granted concurrent jurisdiction over domestic relations cases. The New Hampshire Judicial Council endorsed this recommendation, listing the following reasons:

- (1) It would permit one Judge to oversee the same case from its inception to its completion, avoiding the multiplicity of judges who now often sequentially review the same case.
- (2) It would provide for the integration of jurisdiction over matters involving intrafamilial relations as recommended in modern court systems, avoiding the fragmentation of jurisdiction over matters with sociological implications.
- (3) It would permit litigants to receive a more prompt hearing and avoid interfering with the congestion of court and jury trials in the Supreme Court.

¹¹New Hampshire Bar Journal, Summer 1969, pp. 243-44.

(4) It would permit litigants to appear before a judge of a constitutional court rather than a clerk of courts as is now often required because of congestion in the Superior Court docket.

(5) It would permit New Hampshire to remove from its judicial system the last vestige of the archaic fee system.

(6) It would permit the State to take another step toward the objective of a full-time judicial system, eliminating the problems inherent with a part-time judiciary.¹²

After examining the proposed change in domestic relations jurisdiction and studying the processing of domestic relations matters in Superior Court, we recognize the problems highlighted by the Governor's Commission and Judicial Council. However, for a number of reasons we favor retaining the present exclusive original jurisdiction of the Superior Court over marital matters and recommend solution of the various problems within this framework.

To split domestic relations jurisdiction between the Superior and Probate Courts would have many disadvantages. From the point of view of the Superior Court, split jurisdiction would mean a substantial reduction in present caseload. Combined with the realistic possibility of no-fault insurance legislation in coming years, Superior Court judges might well feel that they are faced with an embarrassing lack of work.

From the point of view of the Probate Courts, the situation is little more attractive. Although some Probate judges appear to desire full-time judicial status, along

¹²The 13th Report of the Judicial Council, Dec. 31, 1970, p. 21.

with commensurate retirement and other benefits, a number would not be willing to sit as full-time judges, especially with a case-mix heavily weighted towards domestic relations.

As a practical political matter, the lack of unified judicial support for the split-jurisdiction proposal appears to have been the principal reason why enabling legislation failed in the last session of the New Hampshire Legislature. From our interviews with New Hampshire legislators and others, we obtained a distinct impression that support from the judiciary as a whole is essential to passage of any such measure.

From the point of view of litigants, as well as sound administrative practice, the split-jurisdiction idea is also unappealing. Marital case records would suddenly have to be maintained in two separate court systems; the possibilities of forum-shopping would be greatly enhanced; and the eventual goal of a single-trial court of general jurisdiction in New Hampshire would be rendered much less attainable.

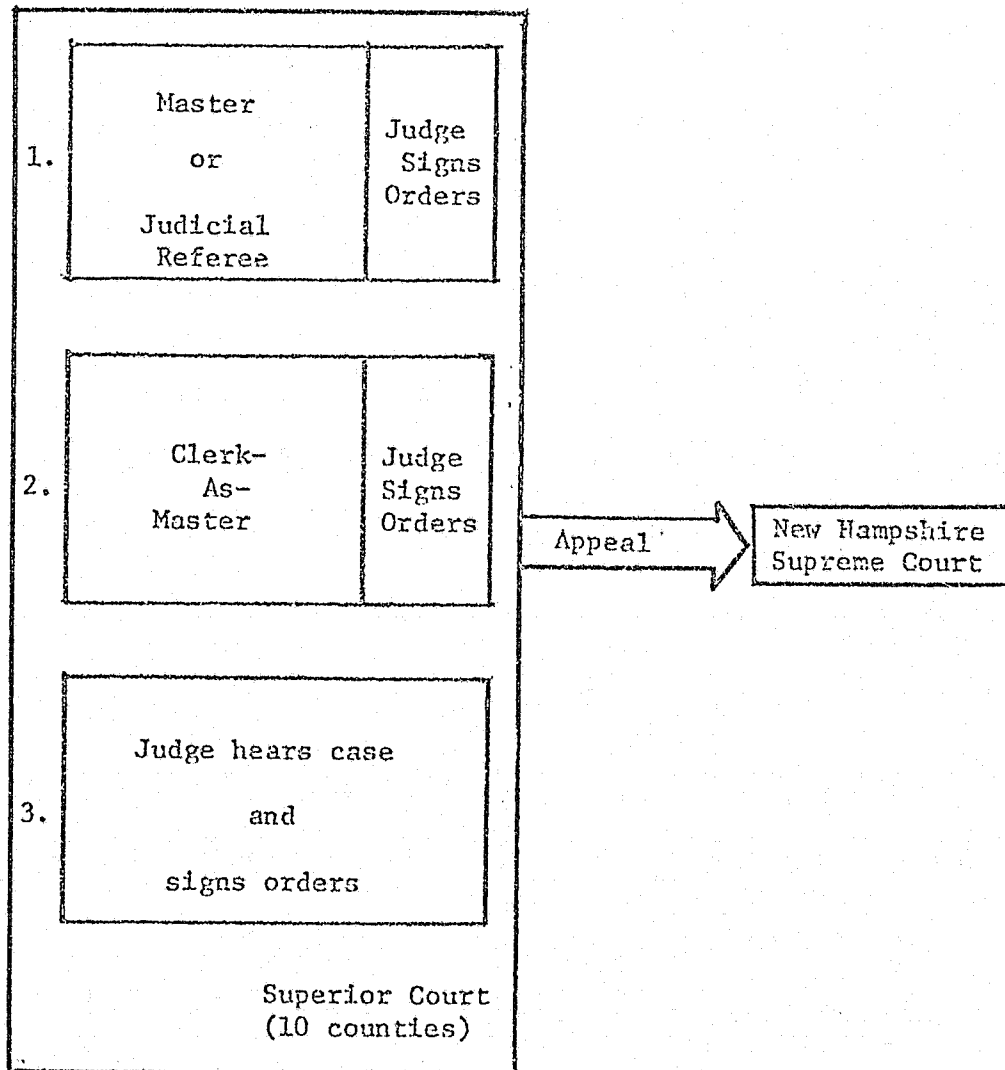
We have concluded that present problems in the processing of domestic relations cases can be solved within the present judicial framework without incurring the additional disadvantages of split jurisdiction. In our report, we examine the issues of jurisdiction, caseload and delay, judicial personnel, court finance, and dignity and thoroughness of domestic relations proceedings. After presenting our analysis of the present system in each of these areas (Part II), we propose improvements which the Superior Court can make by changes in its own policy, procedures and rules (Part III).

We then propose improvements by legislative action in the next, 1975, session (Part IV). Part V is a report including recommendations on the New Hampshire Probation Department as it relates to marital cases, by consultant Ted Rubin, formerly a Juvenile Court judge and now Director for Juvenile Justice of the Institute of Court Management. In Appendix A we briefly describe the methodology used in this study. In Appendix B we offer a short commentary on neglected-child proceedings and the role of the Welfare Department and in Appendix C a brief commentary on contempt proceedings in domestic relations cases.

PLATE I

The Present System

Domestic Relations Litigants
Have Three Possibilities:

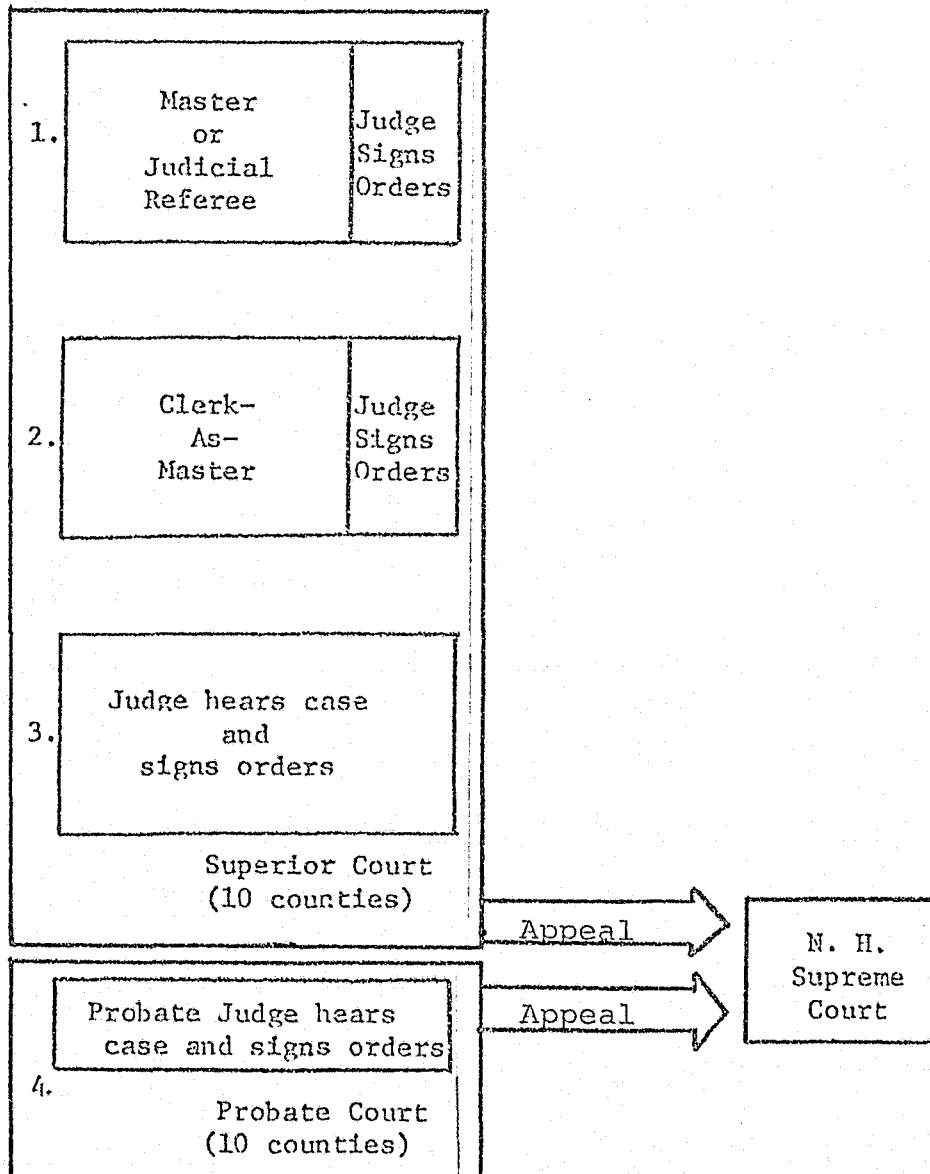


Presently, the Court may sit for only a limited session in a given county; Judges generally sit in a new county each term.

PLATE II

One Possible Change:
Give the Probate Courts
Concurrent Domestic Relations
Jurisdiction

Domestic Relations Litigants Then Would
Have an Optional Fourth Possibility:

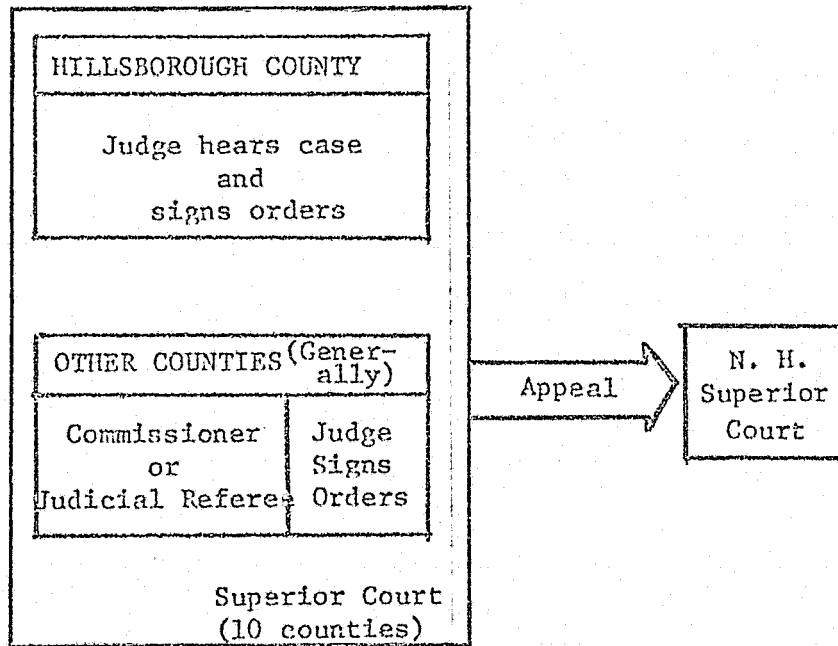


A Probate Court is accessible
in each county throughout the
year.

PLATE III-A

This Study: Recommended
First Step

Domestic Relations Litigants Are Heard by a Judge in Hillsborough County and Usually by a Commissioner (or Judicial Referee) in the Other Counties:

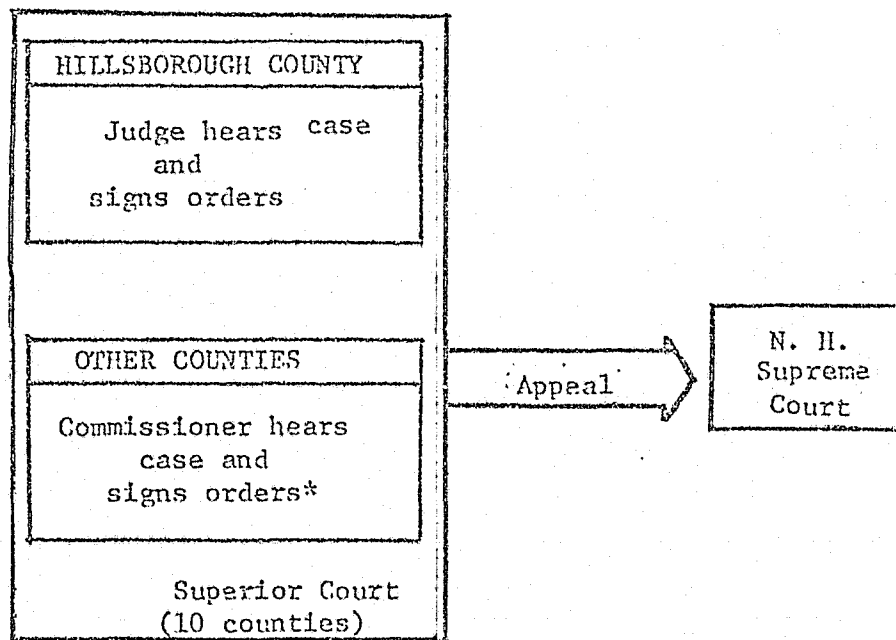


Use of Commissioners will allow regular Superior Court access for domestic relations litigants even when a Judge may not be present in a given county; in populous Hillsborough County Judges will rotate in the domestic relations assignment every four months.

PLATE III-B

This Study: Recommended
Second Step

Domestic Relations Litigants Are Heard by a Judge in Hillsborough County and by a Commissioner in the Other Counties:



*Contested custody cases are heard only by Superior Court Judges, and not by Commissioners.

II. THE PRESENT SYSTEM

A. Domestic Relations Cases In the New Hampshire Court System

Presently, jurisdiction over domestic relations matters is divided among the New Hampshire Superior Court, District Courts, and Probate Courts. Broad Superior Court jurisdiction over domestic relations matters is granted in the New Hampshire Constitution, Part 2, Article 76, and the implementing statute, RSA 491:7, which specifies that the Superior Court shall take cognizance of "petitions for divorce, nullity of marriage, alimony, custody of children and allowance to wife from husband's property for support of herself and children." This broad jurisdiction also includes the power of contempt for violation of court orders (including support orders), and Uniform Reciprocal Enforcement of Support Act cases.

Probate Courts, by contrast, have jurisdiction over very limited categories of domestic relations matters, such as conservatorships, guardianships, adoptions, changes of name and waivers of certain marriage requirements.¹³ Finally, the District Courts have jurisdiction over juveniles, including neglected as well as delinquent children, and over adults who fail adequately to control or provide for

¹³See the statutory citations and discussion in the 13th Report of the Judicial Council, p. 20.

the children in their care.¹⁴ Parties aggrieved by Probate and some District Court decisions are permitted de novo hearings in the Superior Court.¹⁵

As the Judicial Council recently reported, "New Hampshire has not escaped the unnecessary expense, delay and confusion occasioned by split jurisdiction over family matters." Although the bulk of domestic relations cases are heard in Superior Court, some situations result in adjudication in two or more courts. Observes the Judicial Council,

Divorce petitions, motions for modification, motions for temporary support, motions for restraining orders, and like matters are heard by the Superior Court. Oftentimes, the court will require a report of the Probation Department before making an order. If the non-custodial parent or a relative attempts to challenge the custody award by seeking a guardianship of the minor person, that issue will be heard before the Probate Court, which may order another investigation by the Probation officer. If the custodial parent remarries and the step-parent wishes to adopt the child as his, or her own, the cause will be heard before the Probate Court. If one of minor children commits an offense, he will be required to appear before the District or Municipal Court, which will also order an investigation by the Probation Department. Different courts and different judges in the same court are required to deal with sociological issues stemming from the same root cause in a given family relationship. In addition, an aggrieved party in the Probate Court may request another de novo hearing in the Superior Court, thus prolonging the resolution of the issue and

¹⁴See the statutory citations and discussion in A District Court for New Hampshire: Report to the Administrative Committee of the District and Municipal Courts, The Institute of Judicial Administration, January 15, 1973, pp. 15-16.

¹⁵See RSA 567:1 and 567:11, with respect to Probate Court appeals, and RSA 592a:2, 599:1, 502a:12, 502a:14, 169:24, and 169:34 with respect to District Court appeals.

forcing additional expenses upon the parties.¹⁶

District Court Judge Armand Capistran has pointed out another such troublesome situation. This involves custody of children after a divorce or separation, by decree of the Superior Court. In New Hampshire, virtually all awards of custody are made to the mother. Should the Welfare Department subsequently find that the mother seriously neglects the child, the case comes to the District Court rather than the Superior Court for a "neglected child" hearing.¹⁷ Judge Capistran points out that even if the father is shown to be reliable and potentially an excellent custodian of the child, the District Court has no power to overturn the Superior Court order and assign custody to the father. Instead, the District Court, in removing custody from the mother, may only assign custody to a suitable person other than the father (who is barred by the Superior Court decree) or to an agency such as The Child and Family Services branch of the Welfare Department. The father, in turn, may then file a custody petition in Superior Court to take the child back from Child Services.

B. Caseload and Delay in the Superior Court

Many New Hampshire commentators, including the Governor's

¹⁶14th Biennial Report of the Judicial Council, pp. 90-91.

¹⁷See Appendix B, below.

Commission on Court System Improvement and the Judicial Council, have noted with discomfort the large volume of domestic relations cases in Superior Court. Factors including the advent of "no fault" divorce, have increased the domestic relations burden on the Superior Court. The number of marital cases heard, or brought forward for further orders,¹⁸ rose from 3,794 entered in Court Year 1969 to 4,356 in 1971 and 5,636 in 1973 (the first full Court Year after no fault divorce became effective). For the complete figures, see Table I, above.

Although large in number, domestic relations cases are not presently a large burden on Superior Court time. We found that judges or masters disposed of uncontested domestic relations matters in approximately three and one-half minutes each and contested domestic relations matters, or cases brought forward for further orders, in approximately 34 minutes each, on the average.¹⁹ Our examination of 353 domestic relations cases in Belknap, Hillsborough, and Strafford Counties, indicates that generally brief entries were required to be made in most domestic relations matters. Thus, additional court time to write up the relevant orders appears to amount to only a few minutes

¹⁸Cases brought forward for further orders include petitions to hold a party in contempt for violation of a court order, Probation Department reports of violation of orders, stipulations filed by the parties for approval by the Court to change court orders, and motions for modifications of orders.

¹⁹See footnote 7, above, and accompanying text.

per case.²⁰ The widespread use of masters to hear most contested and uncontested domestic relations cases further reduces the impact of marital matters on Superior Court judge time.

Another result of the use of masters and the generally hasty processing of cases has been to reduce delay in the handling of domestic relations cases.²¹ From interviews and inspection of domestic relations cases in several counties, it appears that delay is mostly caused by inaction or indecision on the part of litigants, rather than by the courts. However, there are two notable exceptions. One is the delay caused by the statutory requirement, RSA 496:2, that writs be served and returned by a specified monthly "return date," and the related Superior Court Rules 232 and 233, requiring return of service in all marital proceedings to be entered no later than the specified return date. The practical result of these requirements is to force postponement of adjudication of a marital case for as much as a month, should the libellant somehow miss the return date by even a single day.²² The delay is especially harmful to litigants in

²⁰In fact, one judge uses a rubber stamp to reduce writing time on domestic relations cases, and a clerk in one county is experimenting with a pre-printed form indicating the final disposition of divorce cases heard.

²¹However, it should be noted that some of the expeditious handling of domestic relations cases may in fact result in more time-consuming later demands upon the Court for modification of orders, especially those involving support. See Sec. II-E below.

²²The delay may be compounded if the litigant then finds the Court out of session, for example, over the summer months in some rural counties.

cases requiring support orders or modification of the court orders. The second delay is limited to those litigants served by New Hampshire Legal Assistance, which estimates a caseload of 20% of all New Hampshire divorces last year. NHLA reports declining resources have caused a waiting list of up to six months for applicants seeking legal aid in obtaining a divorce.

Finally, attorneys and litigants face a serious and different problem of congestion not reflected by statistics on court backlogs. In many counties, clerks tend to schedule an excessive number of domestic relations cases for a single day. As a result of stipulation between the parties, many of these cases become uncontested on the hearing day itself, thus collapsing the calendar significantly. However, attorneys and litigants scheduled for a hearing day have no way to determine when they will be called, and must wait around the courthouse to have their case heard. Especially if stipulations on a given day have not reached the level the clerk anticipated, the attorneys and litigants may even wait the entire day without having their cases heard. These parties face considerable pressure to settle and effectively surrender their day in court so they will not have to retain their attorneys for another trial date at substantial fees and with litigants' time away from work. Such forced settlements, although not appearing as year-end statistics, embody the same frustration and pressures as the more traditionally recorded forms of delay and clogged calendars.

C. Personnel: Judges, Masters, and Clerks

The judges of the Superior Court generally impress an outsider as capable, conscientious, and professional. Gone are the days referred to by numerous interviewees, of the judge who regaled onlookers with witticisms, much to the mortification of litigants. We found the judges we interviewed to be perceptive and concerned.

However, only about three-fifths of the domestic relations litigants actually see a judge. As is shown in Table II, judges heard an average of 60% of the marital cases we sampled in Belknap, Hillsborough and Strafford Counties. The court clerks, acting as masters, heard an average of 32% of the cases, and other masters or, less frequently, judicial referees, heard 9% of the cases. (Percentages rounded. See Table II.) Although masters primarily hear uncontested cases, no formal Superior Court policy explicitly precludes hearings by masters of even the most serious cases, for example, custody. The fact that judges sign the final orders in cases heard by masters is of itself an insufficient check on the process, if the qualifications of the masters and quality of hearing procedures are not assured. Again, there is no articulated uniform policy of judicial scrutiny of masters' findings and recommendations.

Neither statutes nor Superior Court rules appear to specify qualifications necessary for appointment of an individual to be a referee or master. Whether to keep the calendar clear,

TABLE II

WHO HEARS DOMESTIC RELATIONS CASES?

We sampled every fourth marital case disposed of in Hillsborough and Strafford counties, and every other case disposed of in Belknap County in Court Year 1972. They were heard as follows:

Heard By:	Belknap	Hillsborough	Strafford	Total**
Judge	71%	54%	68%	60% (59.5)
Clerk-as-Master	10%	37%	30%	32% (31.8)
Other masters and judicial referees	19%	9%	1%	9% (8.7)
Total marital cases sampled	83	197	73	353

*These cases are all divorces. Four annulment proceedings were excluded from this data. Three were heard by judges and one by a clerk-as-master. For the state as a whole uncontested cases numbered 2,888 and contested cases numbered 181 (less than 6% of the total) in Court Year 1972. Of sampled cases, only 15 were contested. Of these, judges heard 12 cases; clerk-as-master, 1 case; and other masters and judicial referees, 2 cases.

**We averaged the three counties in proportion to their reported domestic relations cases heard during Court Year 1972.

serve the parties when the judge is absent, or to supplement his salary with a master's fee, it is the Court Clerk who frequently takes on the additional task of master as a matter of routine. Indeed, all Superior Court clerks presently happen to be attorneys and are often capable of adjudicating such domestic relations matters. The Clerk has been frequently called upon to be master because he is always available, while a nonclerk master, or even a judge, may not be. However, the clerks have been appointed to oversee ministerial tasks relative to the Superior Court, not to hear cases. Frequently talents of administration necessary for efficient scheduling of cases, accuracy of court financial records, and maintenance of orderly court files are not associated with the talents necessary to hear a case in a fair and proper manner. Moreover, there is a basic conflict between the Clerk, who may be responsible for ordering the calendar for movement by the courts as expeditiously as possible, and an adjudicator, who should seek to do justice regardless of the time involved. Other serious drawbacks include the lack of accountability when clerks accept master's fees from litigants (see Part II-D below), and the litigants' feeling of being treated perfunctorily when their case is heard by a clerk acting as master, rather than by a judge (see Part II-E below).

Finally, brief mention should be made of the three judicial referees, who are Supreme or Superior Court justices retired at three-fourths of their full-time salaries. Judicial referees may hear especially complex cases, although

referrals of domestic relations cases do not appear to be numerically significant.²³

The broad range of domestic relations adjudicators -- judges, judicial referees, outside masters, clerks-as-masters -- highlights an issue described by many of our interviewees. This is the matter of judge-shopping. Wide variations exist among judges of the Superior Court, for example, on the proper level of support or the sanction for the failure to comply with a court order. The rotation of judges, term by term, makes judge-shopping a rewarding and frequent practice.²⁴ Advocates point to the need for judge-shopping to offset wide differences in case outcome, depending on the luck-of-the-draw of judge, as it were. Others are concerned with the disparity among judges' decisions, to say nothing of divergencies among the other adjudicating officials.

D. Financing the Process

Financial support for the handling of domestic relations cases in Superior Court is divided among the state, county, and litigants themselves. The state presently pays the salary and expenses of Superior Court judges.²⁵ The counties

²³RSA 491:23. See also the 13th Report of the Judicial Council (1970), p. 75.

²⁴RSA 496:1 specifies the Court shall hold at least two terms (sessions for hearing cases) annually in each county as prescribed by Superior Court Rule.

²⁵See RSA 94:1, setting salaries for the Chief Justice and Associate Justices of the Superior Court.

pay the bulk of expenses, including courthouse construction and maintenance, salaries and expenses of Superior Court clerks and their staffs, the cost of court transcripts, decrees and orders, and salaries and expenses of masters and referees. (This local burden is offset by considerable income to cities and towns, especially from District and Municipal Courts, from fines and forfeitures.)²⁶ Finally, in some domestic relations cases the litigants may pay modest court fees (see RSA 499:18), and possibly for the services of a master to hear the case.

Although Statute RSA 498:13 provides for county support of masters,²⁷ the practice of collecting master's fees from litigants is expressly authorized by the Superior Court Rule 76.²⁸ Partly as a result of this ambiguity, the practice varies from county to county in domestic relations cases.²⁹ In Hillsborough County, the clerk routinely

²⁶In calendar year 1971, for example, the District and Municipal Courts had income from fines and bail forfeitures of \$1,799,540.02, while total expenses for operation of these courts for the same year (exclusive of salaries and courtroom maintenance) was \$186,321.48, resulting in a net profit of \$1,593,218.54 in that year. See the 14th Biennial Report of the Judicial Council, Table XI, pp. 112-113.

²⁷RSA 498:13 reads as follows: "Fees of Masters, etc. The Court may allow a reasonable compensation to masters for their services and expenses, including stenographers' fees, in cases where the employment of a stenographer is authorized by the Court, which shall be paid by the county."

²⁸The third paragraph of the Superior Court Rule 76 reads as follows: "Commissions to auditors, masters, or referees shall be charged to the plaintiff to be taxed in his bill of costs if he shall prevail." RSA 525:1 and 525:2 authorize the Superior Court to tax costs in its discretion.

²⁹Although the Superior Court has established guidelines of \$100/day for outside masters, and \$10/uncontested divorce heard by clerks-as-masters, the fees vary, according to master and type of case, as authorized by the presiding justice in each county.

acts as master, just in order to keep the calendar clear, and rarely charges fees. In one of the more rural counties, the Court sits only part of the time. If the Court is not in term, and it is impossible to get a judge a party may request a hearing before a master. In this instance, a master's fee is charged to the requesting party. In fact, the clerk is frequently the master and reports he declines to charge fees if a party is not willing or able to pay. In yet another county, something of a disagreement has arisen between county officials and the clerk, who frequently acts as master. The county officials contend, in essence, that the clerk -- from his clerk's salary and income from master's fees -- makes more income than Superior Court justices. The clerk, on the other hand, contends his income from fees is quite modest.

This controversy, regardless of the particular merits, points up yet another role conflict when the clerk serves as master (see Section II-C above). Under the statutes³⁰ the Superior Court clerk is responsible for presenting the court budget to county trustees, including budgeted master's fees. The clerk is also responsible for receiving fees paid into the Court (which in part offset county expenses).³¹ When the clerk also accepts the fee himself

³⁰See RSA 499:5 and 499:6, and RSA 30:1-5.

³¹See Statutes, *ibid.* When we examined the financial report of a clerk in one county, we found it impossible to determine the precise amount allocated for master's fees since the presentation included court expenses already offset by fees paid into the Court.

as master, the role conflict becomes unseemly.

The same individual, then, may present the court budget as to projected allocation of funds, accept money paid into the Court as fees, receive fees for his services rendered and account to the county for disbursement. A system with less accountability would be difficult to devise. Our examination of records kept at the office of Secretary of State reveals the receipt of master's fees is not reported to that office as part of the clerk's personal financial statement filed there, pursuant to RSA 30:5.

E. The Dignity and Thoroughness of
Domestic Relations Proceedings

Domestic relations cases are the largest single category of Superior Court work. In Court Year 1973, the 7,603 marital cases amounted to 50% of all Superior Court civil cases entered. In fact, this figure understates the impact of domestic relations cases on the courts. The 5,636 marital cases heard or brought forward for further orders during 1973 amounted to 76% of all civil cases heard or tried in the Superior Court. Moreover, even this is an understatement as it does not include the large number of temporary orders heard in domestic relations matters.³²

How does the Superior Court cope with its overwhelming domestic relations workload? The response has been pragmatic.

³²See Table I, above.

First, the Court spends minimal time hearing uncontested marital cases. Second, the Court delegates a large proportion of domestic relations matters to masters for hearing.

For many years this practical solution has enabled the Superior Court to avoid a significant backlog of cases (see Part II-B) and to save judges much of the routine dull domestic relations work which they would prefer to avoid. This solution is also highly controversial. On one hand, a New Hampshire Legal Assistance attorney wants all divorce and separation proceedings to be as simple as a "bank teller operation." On the other hand, many attorneys felt that the process was seriously lacking in dignity. Indeed, several of our interviewees found the present Court requirement³³ of two character witnesses for the libellant in an uncontested divorce action desirable only because it adds some minimal formality to an otherwise too-simple routine. One attorney has gone so far as to recommend abolition of uncontested divorce hearings altogether, because, as he explained, the present uncontested divorce procedure is "extremely artificial and presents to lay persons an image of the judicial system which should not continue."

A court proceeding lasting only 3.5 minutes which terminates a state of marriage can only impress the

³³ Superior Court Rule 242 specifies that "in divorce cases heard uncontested, including those where there is an appearance or stipulation, two character witnesses will ordinarily be required." The Superior Court has several times considered and rejected proposals to eliminate this requirement.

litigant as perfunctory and a sign that the Court holds both litigant and the case in quite low regard. Second-class status, however, means more than the mere hasty disposition of marital cases. Many are heard in back rooms of the Court, in conference rooms, or even the clerk's own office. Outside, corridors and waiting rooms are crowded with milling groups of three, the litigant and two character witnesses. The scheduling of as many as thirty cases in a single day, not an infrequent occurrence in the more populous courts, means a very high ratio of waiting time to hearing time for most litigants.

Finally, secondclass status means many uncontested cases are heard before a master rather than a judge. Table II presents the results of our study of a random sample of 353 divorce cases decided in Belknap, Hillsborough, and Strafford Counties in Court Year 1972. In these three counties, 40% of the divorce cases -- and 41% of the uncontested divorces -- were heard by a master. Applying the percentage to the 1973 statewide figures, this probably means over 4,000 New Hampshire citizens (a libellant in an uncontested case, and two character witnesses, assuming no overlap, and not counting affected children who might be present or other friends) saw the Superior Court as a 3.5-minute hearing in a back room before a non-judge, held after a long wait in a roomful of other people being similarly processed. At this yearly rate (and with divorce rates on the increase) it will not be long before the Superior Court presents this image to a substantial

percentage of the state's population.

Moreover, considerably more than dignity is at stake. Due-process rights of litigants may be lost in the shuffle of cases. For example, one master described hearing a contested case in which only one of the parties was represented. The master told the unrepresented libellee, in effect, "Relax, I'll take care of you." Then the master proceeded to assess the level of support to be entered in the court order against the unrepresented litigant. Arguably, the attorney's fees might have consumed anything the husband might have saved by retaining counsel. On the other hand, so long as domestic relations proceedings remain adversarial, litigants' rights to counsel deserve emphasis in court.³⁴

Along with lack of dignity, many of these cases lack thoroughness in their adjudication. Today, with "no-fault" divorce and the New Hampshire tradition of assigning custody to the mother in almost all instances, the bulk of the cases revolve around the issue of money. Superior Court Rule 245 provides that the parties in contested cases must supply a financial affidavit to support claims for support or division of property.³⁵ Although some judges and masters do attempt to probe the financial basis for the level of support sought or stipulated in uncontested marital cases,

³⁴In the cases sampled in Belknap and Strafford Counties, we looked at the issue of representation of litigants. Of 108 cases in those two counties which involved an issue of support, 2/5 of the cases had counsel for the libellant (the plaintiff), without counsel for the libellee (defendant).

³⁵The Superior Court is currently changing Rule 245 to apply to non-contested cases as well.

this is extraordinarily difficult to determine in a hearing lasting only 3.5 minutes.

The Court does have the option of calling for an in-depth investigation by the Probation Department into the circumstances behind a stipulation or requested support order. In fact, this resource is used relatively infrequently by the Court. In calendar year 1972, the Probation Department investigated only 331 -- or about 5-10% -- of domestic relations cases (including custody, support, and enforcement of support).³⁶ By contrast, 25 years ago the courts called upon the Probation Department to conduct investigations in some 499 domestic relations cases -- over 50% more than today -- even though there were substantially fewer domestic relations cases before the Court at the time.³⁷

A number of domestic relations litigants have no incentive to return to Court for modification of an unrealistic support order. This issue appears to be of special concern to the Court when the wife is receiving Aid For Families with Dependent Children (AFDC). In cases where the husband cannot afford to make greater payments than are available to the wife and children from Welfare, the wife has no

³⁶See Probation's Helping Hand, 18th Biennial Report, Jan. 1, 1973, p. 22. It is impossible to ascertain the precise percentage of marital cases referred for Probation Department investigation since the Probation Department uses calendar year reports while the Superior Court reports statistics on a "Court Year" basis. (See Footnote 53 below and accompanying text.)

³⁷Compare ibid., with The Second Report of the Judicial Council, Dec. 31, 1948, p. 19, and Helping People in Trouble, 6th Biennial Report, Jan. 1, 1949, p. 16.

financial stake in fighting to increase the support order. On the other hand, the State, which bears the cost of Welfare payments, has a substantial interest in raising the level of support payments to offset the greatest possible fraction of that cost. In a number of other cases the parents similarly cannot be relied upon to represent their children's best interests in Court.³⁸

However, even so, a large number of cases do return to the Courts for modification of orders. In our survey of domestic relations cases in Belknap, Hillsborough, and Strafford counties, we found over one-sixth of the uncontested marital cases before Superior Court within a year of the decree, either on motion to modify orders, reports of violation of orders, or petition to hold a party in contempt for violation of orders. Hearings in these cases frequently run considerably longer than the 3.5-minute hearing on the original decree.

Many of these cases undoubtedly came back to court because of new financial circumstances of the parties resulting from the turbulence following divorce or separation. However, one must ask how many of these cases might have been kept from returning to court if only the original order had been based on information gleaned from the parties by intensive questioning from the bench and full supporting financial affidavits, instead of a perfunctory hearing. The high

³⁸See G. Wells Anderson, "New Hampshire's Divorce Reform Act of 1971," N. H. Bar Journal, Spring 1972, pp. 170-171. See the cases cited and discussion of the new provision for a guardian ad litem in domestic relations proceedings, RSA 458:17a.

proportion of violations reported by the Hillsborough County Probation Office (see Part V, below) raises again the question of whether the operative court order simply did not adequately reflect the circumstances of the parties.

In contrast to the uncontested divorce proceedings, few of our respondents had adverse comments about the dignity or thoroughness of proceedings in contested cases. Moreover, it was a virtually unanimous opinion that protracted contested litigation reflected more a lack of dignity brought to the court by the parties than anything for which the court itself was responsible.

III. PROPOSALS FOR CHANGE IN COURT PROCEDURES, POLICIES AND RULES RELATING TO DOMESTIC RELATIONS CASES

A. Jurisdiction and Caseload

Some have suggested that a family court division be created in the Superior Court. In effect, the Chief Justice of the Superior Court has the power to do so by assigning judges full-time to domestic relations cases already within the jurisdiction of the Superior Court. Conditions in New Hampshire and experienced elsewhere in the United States persuade us that permanent assignment of judges to a family division at this time would be undesirable. Chief Justice Keller told us he knew of no present Superior Court judge who would willingly accept such a permanent assignment. Such an assignment of a judge to a domestic relations division would tax a judge's emotional rather than legal capabilities and, with the exception of a few notable judicial personalities, lead eventually to frustration and possible dulling of legal skills. Moreover, many judges find restriction to this narrow specialty undesirable because of the limits it places on possible future advancement.³⁹

On the other hand, if the Superior Court is to retain exclusive original jurisdiction of domestic relations cases, the proceedings must be made more dignified and thorough. We have already noted a number of recommendations that such

³⁹ Compare Courts, Report of the National Advisory Commission on Criminal Justice Standards and Goals (1973), pp. 293-95.

exclusive original jurisdiction be taken away from the Superior Court.⁴⁰ In addition, full-time involvement of Superior Court judges with domestic relations issues is necessary for regular improvement of the process, both in the present and in anticipation of future changes in the circumstances in the state.

Recommendation: Superior Court Judges should be assigned on a rotating basis, for a period of four months, to hear only domestic relations cases in Hillsborough County.

This recommendation provides for full-time participation of the Superior Court judges in the domestic relations process, but for periods short enough to forestall possible frustration. Among the twelve-person Superior Court, each judge would sit for four months every three years, and the brief change of pace may well prove refreshing to many.

Hillsborough County is presently the only county with sufficient domestic relations caseload to merit a full-time domestic relations judge. Should the caseload not completely take his time, the judge could briefly visit other courthouses to hear domestic relations cases or undertake to monitor domestic relations proceedings in the rest of the state with an eye to proposing improvements. On the other hand, any excess in domestic relations caseload in Hillsborough County beyond the capability of a fulltime judge, would be taken up by masters or, if necessary, the other judges sitting in Hillsborough County. It should be noted that the likely

⁴⁰ For example, see The Governor's Commission on Court System Improvement, Recommendation #6, in the New Hampshire Bar Journal, Summer 1969, pp. 243-246; and the 13th Report of the Judicial Council, Dec. 31, 1970, pp. 19-23.

result of assignment of all Hillsborough marital cases to a single judge will be to eliminate the marital caseload of other judges sitting in that county.

Recommendation: Use of a full time domestic relations judge in Hillsborough County should be accompanied by development of a specialized supporting staff in domestic relations work.

The single judge doubtless will be able to experiment with improving use of the Probation Department for investigation of domestic relations cases. (See Part V below). The domestic relations judge can also work to improve the handling of domestic relations cases by the clerk and staff.

Recommendation: The return day required for writs should be relaxed for parties bringing domestic relations cases forward on motion to modify orders.

The requirement that writs be returned to court by the special return day is an anachronism. Due process requirements of notice and service can be satisfied without limiting the return day to one day a month. The present limit can impose substantial hardship on litigants seeking modification of orders. For example, a divorced spouse missing the return day by a single day may be required to wait an entire additional month before being heard on a motion to increase the level of child support. Since this delay may in fact require the family to seek welfare assistance, the ultimate costs may be borne by the state as well as by the family itself.

RSA 492:2 gives the court considerable discretion to

modify the return day in the interest of justice.⁴¹ The court might decide, for example, to allow two return days a month, for example, the first and third Tuesdays, for motions to modify domestic relations orders. In Hillsborough County, the domestic relations judge could experiment, under RSA 496:2, with a specified return date each week for such motions.

B. Personnel

Recommendation: Clerks should be precluded from hearing cases as masters.

The clerk's function is ministerial, including filing, calendaring and so forth. Thus, clerks are presumably selected for their administrative abilities. A good clerk may possess all of the qualifications of a good administrator yet lack the qualifications necessary to make a good master in a divorce hearing.

The clerk as master faces a major conflict role which inevitably reflects on the dignity and thoroughness of the

⁴¹RSA 496:2 reads in relevant part as follows: "Return days. The first Tuesday of every month shall be a return day in every county for writs, processing, citation and notices to appear, in all actions, bills in equity, libels, petitions and other civil proceedings, in the Superior Court...the Superior Court, may however, make such writs, processes, citations and notices returnable at other times, and may allow the late entry of any writ, process or appeal upon such terms and conditions as justice may require."

Presently, the Superior Court limits itself, in Rule 233, to the following: "Returns of service and appearances in all marital proceedings shall be entered not later than the return day named in the order of notice, and no case involving the marital relation will be heard until the proper return of service is filed."

proceedings. As clerk, he sees his primary task to be one of clearing court calendars as expeditiously as possible. In fact, the clerk of Hillsborough County acts as master primarily in order to keep the calendar moving (and only rarely collects a fee for his master's services). While a clerk in a court with a high domestic relations caseload may feel such services necessary, they are essentially a waste of his valuable time, which could better be used in other administrative tasks. On the other hand, an adjudicator cannot allow time pressure and administrative demands to interfere unduly with the doing of justice in a particular case.

Moreover, the informal role of clerk-as-master itself appears to lead to informal proceedings. Many have argued that domestic relations proceedings ought not be adversary in nature, but ought rather concern themselves with underlying social and behavioral issues where possible.⁴² Thus far, however, New Hampshire has not opted for such a non-adversary approach. It is a poor compromise to make domestic relations proceedings so informal as to reduce litigants' advantages under the adversary process, while obtaining none of the advantages of the "social case work" approach.

Recommendation: Domestic relations masters should be selected from among the experienced Bar, and especially among willing part-time judges of the Probate and District Courts.

⁴² See for example, the recommendation contained in The 14th Biennial Report of the Judicial Council, Dec. 31, 1972, pp. 89-92.

The qualifications, selection, assignments, and compensation of masters should be based on guidelines promulgated by the Court.

The argument against using clerks as masters is especially persuasive given the available alternatives. The Manchester Bar Association, for example, has recommended free assistance by experienced attorneys to sit as masters in domestic relations cases in Hillsborough County. On an irregular basis, the court in various counties has appointed attorneys to sit in domestic relations matters, awarding them compensation for the work.

We recommend that masters be selected by the court for their experience and attitudes relevant to adjudication of domestic relations matters. To assure high quality of applicants for the position, we recommend payment of a fee of \$135 per day. This is approximately the salary of a Superior Court Judge on a per day basis, and conforms to federal government compensation for skilled consultants including attorneys.⁴³ Such reasonable compensation is explicitly authorized by RSA 498:13.⁴⁴ The court may wish to consider selection of masters from the ranks of part-time Probate Court

⁴³ See for example "Financial guide for administration of planning and action grants", Law Enforcement Assistance Administration, 1970 Part. III, Sec. M P. 25.

⁴⁴ In relevant part, RSA 498:13 reads as follows: "Fees of Masters, etc. The court may allow a reasonable compensation to masters for their services and expenses..., which shall be paid by the county." The use of the term "master" as applied to domestic relations cases, has apparently gone undefined in the statutes and court rules.

judges,⁴⁵ and District Court judges.⁴⁶

Along with high standards of eligibility and commensurate compensation, the court may wish to enhance the status of the new domestic relations masters by assigning a more prestigious title. The Governor's Commission on Court System Improvement, for example, has proposed a title, "Commissioner", for persons assigned to assist the Superior Court in disposing of its non-jury caseload.⁴⁷ We agree. In return, the domestic relations commissioner would be required to set aside a minimum one or more days a month for domestic relations matters. These days would be scheduled well in advance, preferably a full year in advance, to enable the Chief Justice of the Superior Court properly to accommodate the needs of each county on an annual basis.

The clerks of each county would set aside one specific day a week as a domestic relations day. (In less populous counties, one specific day might be set aside every two weeks.) Based on their experience, statistical evaluation, and anticipated needs, the clerks would report the need for masters to the Chief Justice, who would make an appropriate assignment as far in advance as practicable. This assignment system should

⁴⁵ Possibly this recommendation could be integrated with the steps which have been taken in New Hampshire in the direction of making Probate Court Judges full-time members of the Judicial branch so as to make them eligible for retirement benefits.

⁴⁶ Possibly this recommendation could be integrated with the objectives of the District Court Bill, House Bill 491-1973, which, in the course of making a proportion of District Court Judges full-time, would leave a number of present part-time District Court Judges without judicial work load.

⁴⁷ New Hampshire Bar Journal, Summer 1969, p. 246.

also leave room for last-minute assignment of a master to an adjacent county in cases too urgent to wait until the next scheduled domestic relations day. (Of course in such cases the commissioner would be reimbursed for travelling expenses, as well as his per diem salary, just as judges are presently reimbursed for their expenses.)⁴⁸ The court should empower commissioners to hear all cases except contested custody cases and contempts. Because of their gravity, these two categories should be heard only by Superior Court judges themselves. It is expected that masters' findings of facts and rulings of law in other categories of cases, as is presently the practice, would be routinely approved by the court except in rare instances. (See Superior Court Rules 78-80).

The part-time commissioner may well also have an outside law practice. For this reason, provision should be made to safeguard against undue conflicts of interest between the commissioner's court work and outside practice.⁴⁹

A major result of these modifications will be to reduce significantly the domestic relations caseload of Superior Court judges. On the other hand, commissioners will not have

⁴⁸The statutory authority for judges' expenses is found in RSA 491:6. RSA 498:13, quoted in Footnote 47 above, authorizes payment of reasonable expenses to masters.

⁴⁹The present provisions applicable to Probate Court Judges, who may also be part-time, provide good guidance for a conflict of interest provision. Referring to the Probate Court judge, RSA 547:13 provides that, "He shall not act as counsel or advocate in any business in, or which may be brought into any probate court. No attorney shall be permitted to practice before any Probate Judge who is a partner, associate, employee or employer of said attorney, or is a stockholder in a professional corporation for the practice of law in which said attorney is stockholder."

the time pressures presently faced by clerks acting as masters, or even attorneys selected on an ad hoc basis. (In Sec. III-D below, we present recommended modifications in the hearing process itself, whether before commissioner or judge).

Recommendation: Clerks should prepare detailed caseload statistics for periodic reports to the office of the Chief Justice of the Superior Court and to the New Hampshire Judicial Council.

In order to assign commissioners and judges efficiently, the Chief Justice of the Superior Court must have accurate caseload statistics available on a relatively current basis. Presently, statistical reporting from the ten counties is given a low priority by many clerks. The "Court Year" for statistical purposes begins August 1 and ends July 31, as an intentional inducement to clerks to compile statistics during the less busy summer months.⁵⁰ Despite this benefit, some counties presently appear to report statistics without sufficient care, and without state-wide uniformity.⁵¹ We have also noted (see Table II above) the absence of statistics

⁵⁰This does cause some inconvenience. For example, the Probation Department reports figures on a calendar year basis, while financial data is often presented on a fiscal year basis. Thus, an analysis of the New Hampshire Superior Court requires translation of figures from three different time periods.

⁵¹For example, the Superior Court reported to the Judicial Council, for Court Year 1972, a total of 245 "references to auditors, masters or referees during year." Of these, Carroll County alone reported 51, while far busier Hillsborough County reported only five references to auditors, masters or referees. (See The 14th Biennial Report of the Judicial Council, Table V, row 5, p. 99.) Just from our own sample of roughly one-fourth of the Hillsborough divorce cases during Court Year 1972, we found 90 references to a master or judicial referee, including 72 cases alone in which the clerk acted as master -- a far higher number of references than was reported from Hillsborough County.

reporting the number of Superior Court hearings on temporary orders.

The present system of assignment of Superior Court judges to different counties has been able to function on the basis of the present statistical system. However, the need to assign efficiently a larger number of commissioners, in addition to Superior Court judges, to the various counties will require more comprehensive and current statistical information. Reporting from each county on a monthly basis will reduce the large task at year's end. The establishment and administration of the necessary case filing and statistical reporting system will be one of the administrative functions clerks can better perform, once they are freed from their present time consuming duties as domestic relations masters in a number of counties.

C. Finances

Recommendation: The Superior Court should immediately institute a study of all court finances. Procedures should be established for the Superior Court in each county to be fully accountable to the Chief Justice, and for rationalization of the present system of court financial support from the state, counties, and litigants themselves.

Our brief study of domestic relations matters could not focus extensively on the question of court finances. Yet, the problems we found appear to call for extensive examination by the court of all aspects of financing and financial accountability. The Governor's Commission on Court System Improvement calls the present statutory provisions concerning referees,

auditors, and masters "confused," and with reason. The Superior Court rules, as presently drafted, do not aid in clarifying the question of finances.⁵² There is little wonder, then, that the practice for masters' fees (see Part II-D above) is divergent from county to county throughout the state. Moreover, the inequity in treatment of litigants, some of whom may masters' fees under Superior Court Rule 76, and some of whom may not, is manifestly unfair.

The problem of diminished court prestige as a result of the informal accounting for masters' fees does not merely apply when these fees are paid to clerks who also sit as masters. A system of strict and plain accountability is necessary to allay the development of any public suspicions before they begin. Only when these questions of basic accountability are addressed, can the Superior Court move on to more sophisticated analysis of the entire question of fragmented court finance from the many divergent sources in the state.⁵³

D. Dignity and thoroughness of proceedings

In our opinion, the addition of sufficient numbers of well qualified, reasonably paid commissioners alone will add considerable dignity to the proceedings by removing pressure

⁵² See Footnote 47, above, comparing RSA 489:13, providing for county payment of masters' fees, and the third part of Superior Court Rule 76, providing the masters' commission be charged to the plaintiff, to be taxed in his bill of cost if he prevails.

⁵³ This latter issue has already been raised in the state legislature. See, for example, The 14th Biennial Report of the Judicial Council, (1972), pp. 45-47.

to process cases too hastily.

Recommendation: All domestic relations cases should be heard in dignified surroundings, either in chambers or in open court.⁵⁴

Judges and attorneys disagree whether or not to hear domestic relations cases in open court. In favor of open court is the public's right to know and the power of the formal courtroom surroundings to impress upon the parties the gravity of their domestic relations case. On the other hand, litigants and counsel as well as judges sometimes tend to speak in hushed tones when discussing domestic relations cases in open court, possibly reflecting a healthy unwillingness to discuss such intimate details loudly before the public.

As a practical matter, the surroundings for hearings might vary from county to county according to available court facilities and among types of cases. A judge might choose to hear contempts in open court, but a contested custody case in chambers. Such issues might best be left to the sound discretion of the judge or domestic relations commissioner. Above all, domestic relations cases should be taken out of back rooms, conference rooms, and clerks' offices and placed into appropriately dignified surroundings.

⁵⁴ In some counties, the Superior Court may even wish to appropriate use of the small but dignified Probate Court chambers for marital hearings on days when the Probate Judge is not sitting. All records and proceedings, of course, would remain with the Superior Court regardless of physical location of the hearing. The Superior Court in Hillsborough County is presently establishing a separate domestic relations hearing room to provide dignified surroundings for domestic relations hearings while allowing the larger courtrooms to be used for other matters.

Recommendation: Commissioners (Masters) should wear robes if they also hold office as judges of Probate or District Courts. All other commissioners should wear appropriate attire.

The difference between Superior Court judge and commissioner must be expressly delineated. Litigants should always be informed that they are before a commissioner rather than a Superior Court judge and that the recommendations of a commissioner are always subject to approval by a Superior Court judge.

Recommendation: Parties to uncontested as well as contested marital cases should be required to file a financial affidavit with the Court. Except for good cause shown, both parties in uncontested cases should be available in Court for questioning by the judge or commissioner, especially with regard to financial issues.

As noted above, Superior Court Rule 245 is presently being changed to require financial affidavits from both parties in uncontested as well as contested marital cases. Even with financial affidavits from the parties, support orders cannot be well founded unless the affidavits are reliable. A number of our interviewees noted the lack of reliability of such affidavits at the present time. To make them more accurate will require systematic accountability to the Court. Presently, the brief 3.5-minute uncontested hearing does not allow for serious probing of the libellant to determine adequacy of the financial affidavits. Attorneys for the parties are often

more concerned about reaching a satisfactory stipulation than about the particular financial details presented on the affidavits. In cases where the husband realistically cannot afford to pay higher support than is available to the wife from AFDC, neither party has a stake in urging a properly high level of support order. The state, on the other hand, which has an interest, is unrepresented except by the Court itself.

In addition to systematic questioning of litigants about the facts behind their financial affidavits, the Court should make greater use of the Probation Department to investigate litigants' financial circumstances. Moreover, the Court should work with the Bar Association to improve vigilance of attorneys as to their clients' representation on the financial affidavits.

It follows from the more active role recommended for the Bench, that both parties should be required to appear in court, except for good cause shown, to respond to questions. The testimony of the libellee -- often the husband, who will be required to comply with the court order -- is important to reduce the number of unsuitable support orders and consequently the number of motions for modification and violations of support orders.

The net result will be a procedure of impressive seriousness for both parties, which will not consume excessive Superior Court Judge or commissioner time. Once a practice of attorney-aided reliability of financial affidavits has been established, judges and commissioners may be able to obtain the necessary knowledge in a relatively speedy question and answer session.

Recommendation: To assure thoroughness and dignity of proceedings, as well as a record for possible appeal, all domestic relations cases before judge or commissioner, should be recorded in Court on magnetic tape.

Electronic advances now permit tape recordings of high quality at much less cost than is required for a court reporter. For the few cases which require transcription, a typist, (for example from the clerk's office,) can be used, rather than the more expensive stenographer presently required. For the bulk of cases which will not require transcription, the recording process will have added further dignity and quality to the entire Court proceeding. Before a live tape recorder, attorneys, litigants, and others in the hearing process will be induced to maintain high standards of propriety.⁵⁵

Recommendation: To minimize variations in judgments, while assuring judicial independence among judges and commissioners, a program of judicial education should be instituted and state-wide guidelines established for the setting of orders.

With the use of many new high-quality commissioners, along with judges temporarily assigned full time to domestic relations cases, the need and opportunity for judicial education increase considerably. As a first step, the Court should distribute a simple questionnaire among judges and commissioners posing a few hypothetical domestic relations cases. Judges of the Massachusetts Probate Court (which shares domestic relations jurisdiction with the Massachusetts Superior Court)

⁵⁵ For further discussion of this issue see, for example, "Selection of a Court Reporting Method for the Oregon District Courts," State Court Report Series, Pub. No. NCSC R0003, May, 1973, published by the National Center for State Courts.

distributed such a questionnaire and presented the results to a conference of Probate judges. The variations were considerable; recognition of this divergence was an important first step to bring judges closer together on approaches to similar situations. Once judges and commissioners recognize the need to reduce uncertainty, while retaining judicial independence, an educational program is a useful second step. An intensive seminar lasting a few days, followed by regular contact among judges and domestic relations commissioners, will increase sensitivity to marital issues, tend to reduce divergencies among commissioners and judges on common issues, and help reduce the significant forum-shopping presently practiced by many attorneys in New Hampshire marital cases.

Recommendation: The present requirement for two character witnesses for a libellant in an uncontested divorce action should be abolished.

The requirement for two character witnesses is an empty ritual; it has been retained to provide some activity in an otherwise perfunctory process. Once the proceedings and surroundings of domestic relations cases have become more dignified and thorough, there is little need for such artificiality, and it should be dispensed with. Similarly, once the proceedings are more dignified, the Court should not hesitate to adopt pre-printed forms for recording dispositions of domestic relations matters.

Recommendation: The Superior Court should schedule marital cases so as to minimize waiting time for litigants and

their attorneys.

For example, court clerks might schedule cases in two-hour groupings, rather than for an entire day; this would spare litigants the presently-existing possibility of waiting an entire day for their hearing.

Recommendation: The Court should distribute a clearly-written informational booklet to familiarize litigants and potential litigants with domestic relations procedures in Superior Court. The Court might enlist the aid of the Judicial Council, New Hampshire Bar Association, or other responsible organization in preparation of this publication.

Too many domestic relations litigants, even when represented by counsel, remain bewildered by their experiences in Superior Court. It would be easy for the Court, possibly with the assistance of a responsible organization, such as the Judicial Council or New Hampshire Bar Association, to devise a booklet explaining the process in layman's terms. The publication should define and explain basic law, including divorce, separation, support, and custody, and provide an indication of some of the social problems faced by litigants, notably the difficulties of making ends meet when separated rather than together in one family. The entire process from marriage counseling to enforcement of support orders should be presented step by step. A question-and-answer format might be included with such questions as: Under what circumstances may a father obtain custody? What are children's rights in a divorce or separation? Where can marriage counsel-

ing be obtained in the state? How much will an uncontested divorce cost if no property is involved? When should one seek an attorney? Who is eligible for representation by the New Hampshire Legal Assistance Office?

It may be difficult to be completely comprehensive and comprehensible at the same time; however, such a basic publication will help remove much of the bewildering uncertainty which litigants presently face even in very simple domestic relations cases before the Superior Court.

IV. PROPOSALS FOR LEGISLATION
TO BE SUBMITTED IN 1975

A. Jurisdiction and Personnel

As the Governor's Commission on Courts System Improvement indicated, it is not clear whether the Superior Court presently has power to appoint commissioners to hear cases as if they were judges. Said the Commission:

. . . the suggestion being made here is to authorize the Superior Court, if it needs the authorization, or to induce the Court, if it has the authorization but is unable to exercise it, to use referees, auditors or masters to clear congestion when it occurs in particular counties by assigning qualified attorneys to hear and dispose of those cases in other counties where facilities exist which are not being used at the time. We add the term "commissioner" and suggest that the Court be authorized to appoint commissioners for this purpose in the sense of the appointee being given the authority to fully act with regard to the cases assigned as if he were a member of the Court.⁵⁶

The Commission recommended, further, that statutory changes be made to clarify the present ample but confused authority of the Superior Court to name additional people to act in performance of the Court's work. Having ourselves searched the statutes in an attempt to find guidance, we support this recommendation, in line with the recommendations of our present inquiry.

Recommendation: The Superior Court should recommend legislation to empower commissioners, appointed by and under authority of the Court, to hear and dispose of domestic relations cases (with a narrow exception for contested custody cases) with full authority as though the commissioners were members of the Superior Court.

⁵⁶ New Hampshire Bar Journal, Summer 1969, p. 246.

Court-appointed "commissioners" (see Section III-B above) will have gained judicial experience and formal domestic relations education over the year preceding the next legislative session in 1975. Undoubtedly, these officers will soon gain the confidence of the Superior Court and general public, much as the present informally-appointed masters have gained such confidence in more limited domestic relations cases. With this confidence, there appears little need to maintain the formality of a Superior Court justice approving commissioners' findings of fact and rulings of law.

Legislative action to allow commissioners to sign their own rulings may not be necessary. However, given the present legislative and judicial atmosphere in New Hampshire, this may be a more feasible course of action than implementation of the change by Superior Court rule alone.

We recommend a narrow exception for contested custody cases because of their extreme gravity. Moreover, contested custody cases do not appear to be numerically significant.

As in the present legislative structure for masters and referees, the designation of commissioners and their assignments should rest with the Superior Court, and in particular the Chief Justice of the Superior Court.⁵⁷

⁵⁷The Legislature may wish to combine this change with proposed reforms of the Probate or District Courts, to give qualified part-time Probate or District Court judges priority in application to be commissioners. The Legislature might also consider establishing state retirement benefits for those District and Probate Court judges whose commissioner tasks bring them up to a full-time judicial workload.

B. Finances

Recommendation: The Superior Court should recommend legislation increasing domestic relations filing fees to offset increased costs resulting from appointment of commissioners to hear domestic relations cases.

The costs for these new commissioners probably ought not be borne entirely by the counties.⁵⁸ Rather it may be more equitable to shift some of the financial burden onto the litigants themselves. For example, the fee for filing a marital case libel is now \$10.00 (see RSA 499:18). Increasing the fee to, say, \$30.00 would bring in considerable revenue. The precise calculations would be a matter of judgment for the legislature after consideration of the costs for the new commissioners and some of the considerations set forth in the footnote below.⁵⁹

Recommendation: Following the study (recommended in Section III-C above), the Superior Court should recommend legislation necessary to promote a more rationalized structure for general Court finances.

The possible legislation recommended by the Superior Court will depend upon the outcome of the study recommended

⁵⁸See RSA 498:13, which provides that "the Court may allow a reasonable compensation to masters for the services and expenses . . . which shall be paid by the county."

⁵⁹There were 5,257 marital cases entered in the Superior Court in court year 1973. A filing fee of \$30.00 would be an increase of \$20.00 per case over present filing fees. If 5,257 cases were filed, that would add revenue of over \$105,000! Of course, a number of litigants would be indigent, and thereby exempt from the fee by operation of RSA 499:18-b. Moreover, an increased fee might deter some prospective litigants from actually filing in court at all. For example, in 1973 the Superior Court dismissed without prejudice almost 1500 marital cases.

in Section III-C above. The statutes which apply to financial transactions of clerks might be revised⁶⁰ and made more applicable to the demands of a modernized system of court finance.

C. Dignity and Thoroughness of Proceedings

The Court might consider sponsoring legislation concerning one New Hampshire group we interviewed which emphatically does not favor increased formality or thoroughness of proceedings. This is the New Hampshire Legal Assistance Program, which argues instead that a divorce should be as easy as a bank teller transaction. The comments of New Hampshire Legal Assistance (NHLA) are important to any analysis of domestic relations cases, since the organization, by its own estimate, handles approximately 20% of all divorce cases in the state. NHLA finds itself under such a caseload pressure that clients are urged to forego or default on hearings for temporary orders and apply instead for full AFDC grants until the matter of support is heard concurrently with the hearing on the merits. Despite such drastic means -- which may entail significant state expenditures in the form of AFDC grants which otherwise

⁶⁰ RSA 499:5 provides as follows: "Accounts, to Court. At the close of each term, the Clerk shall render to the presiding justice a full and correct account of all money belonging to the County, and of all fines, and forfeitures imposed by the Court in criminal cases, received by him and not accounted for, and of all his legal fees and charges against the County; and the Justice shall ascertain and certify the balance, which, if in favor of the County, shall be forthwith paid by the Clerk to the County Treasurer. At the time of making the above account the Clerk shall forward a copy thereof to the Executive Committee of the County Convention." See also RSA 499:6 and 499:7.

would be offset by support payments under temporary orders -- applicants must wait up to six months before NHLA is even able to accept them as clients in domestic relations litigation.

It would be unreasonable to expect that poor people awaiting the formality of a court-sanctioned divorce and observing the ease with which their more affluent brethren obtain the paper decree, would restrain themselves from acting as if their own domestic situation had not been formalized by a court. In short, unless New Hampshire sufficiently increases the legal talent and resources available for domestic relations cases of the poor, the state may be seen implicitly to condone a different standard of morality for those able to afford a legal divorce compared with those who cannot.

On the other hand, the problem of insufficient legal resources should be examined within the context of legal services programs rather than the courts. To reduce the entire divorce proceeding to a bank-teller-style operation would be to diminish the institutions of marriage and divorce for all citizens, including the poor.

PART V.

THE DOMESTIC RELATIONS CASE

and the

PROBATION DEPARTMENT

THE STATE OF NEW HAMPSHIRE

Submitted by:

Ted Rubin
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I. Organization of New Hampshire
Probation Services

Organizationally, this Department falls within the executive branch of government and is a state-administered agency which extends probation services through its ten county offices. Its staff is functionally responsible to the court system, the Superior Court, and the Municipal/District Court.

The three-member Board of Probation presently includes one Superior Court Justice and two District Court Justices. Inasmuch as the Department is not a division of a large executive branch agency, and since its three Board members are judges, there is no major issue of conflict of loyalties: Probation is responsible to the courts.

The Department's most recent biennial report reflects that the State Legislature has not funded any additional permanent Probation positions between 1967 and 1972 (p. 58). Yet, the report indicated an increased caseload of juvenile, adult, and domestic Probation cases over this period, of 46.8%. Federal funding had provided the eleven additional professional positions added by the Department in recent years.

In addition to state-administered Probation, additional Probation services are furnished by certain municipalities. RSA 504:13 provides that municipal courts in municipalities in excess of 50,000 persons shall, and in lesser populated communities may, provide Probation services for the Municipal

or District Court. Probation services to juvenile delinquents and adult misdemeanor cases represent the primary services provided by these offices. At the end of 1972, 81% of this caseload were juveniles. The larger offices are in Manchester and Nashua, while seven smaller municipalities provide a more limited Probation service. Altogether, seventeen full- and part-time Probation personnel presently service the Municipal or District Courts pursuant to this statute.

According to the State Director of Probation, the relationship between the state office and the city Probation offices has been cooperative. In an attempt to assist in meeting the Probation needs of additional Municipal and District Courts, the State Probation Department assigned the majority of the federally-funded positions to Municipal/District Courts other than those having their own Probation offices.

Municipal/District Court Probation staff, as well as State Department staff, are appointed by the Board of Probation.

The Legislature has authorized four additional Probation officers, to function as domestic relations specialists, but these positions have been frozen until no earlier than January, 1974.

II. The Functional Relationship Between the Superior Court and the Probation Department

The Probation Department provides the following services to the Superior Courts:

- a. Investigation of contested or uncontested domestic relations issues (child custody, child support, visitation): 331 investigations in 1972.
- b. Collection and disbursement of money under support orders, including bastardy actions: 5,243 active orders were in force at the end of 1972.
- c. Administration of deficiencies in support payments: 1,311 violations initiated during 1972.
- d. Pre-sentence investigation of felony defendants: the annual report shows 1,770 adult criminal investigations were requested by all courts, and does not distinguish the number requested by the Superior Court.
- e. Supervision of felony defendants on probation: the annual report shows an adult supervision caseload of 1,575 at the end of December, 1972, but does not distinguish which of the adults were Superior Court cases and which were District and Municipal Court cases.

During 1972, the Probation Department collected \$4,813,878.50, more than \$800,000 more than the prior year.

In the larger counties, a Probation officer may work full-time with a domestic relations caseload, monitoring collections, doing a limited amount of counseling, initiating

violations procedures, and performing child custody, support, and visitation investigations. At present, there are five such domestic relations officers operating on a full-time basis. In other counties, a Probation officer will perform these duties along with other Probation responsibilities.

III. The Processing of Domestic Relations Support Order Cases (Hillsborough County)

A domestic relations officer in Hillsborough County described his functioning:

His specialized caseload exceeds 900. He took on the specialized caseload in August, 1972, administering support orders. He received the additional function of performing domestic relations investigations beginning March, 1973, and had performed 58 such investigations prior to November 7, 1973. There is a second domestic relations specialist in this office with an equivalent caseload. With the added responsibility of domestic relations investigations, this officer indicated that his administration of the collection responsibility has suffered. He indicated that secretarial-clerical assistance was competent, but has fallen far behind due to the heavy workload.

It generally takes about three weeks for the Probation Department to receive a copy of the court decree which authorizes payment of support through the Department. Sometimes it has taken up to two months, occasionally less than three weeks.

The next step is for the Probation Department to send a notice out to the defendant advising him to make payments through the office, and in what amount they should be made. Simultaneously, a notice goes out to the party who is to receive the payments, advising her as to how payments will be processed. It generally takes about two weeks for the secretaries to get these notices out to the parties.

The general guideline, as to when to initiate the violation process, is when the payor is four weeks delinquent, or within two to three "if there is pressure."

An arrearage letter is mailed by the Probation Department. This takes three or four weeks to process into the mails due to secretarial shortages or other reasons. The obligor is advised by this letter to make up the deficiency within a week, to otherwise contact the office to explain the deficiency, or to otherwise face a court hearing.

If a satisfactory payment or excuse is not made, the office prepares a violation proceeding which is generally completed by the secretary in a week's time. It is sent to court the same day, and the clerk provides a date for hearing four to six weeks in the future. It takes about two weeks for the Probation Office to prepare this mailing and to send it out to the obligor.

Court hearings on these violations are each Monday from 10:00 a.m. to about 12:30 p.m. Approximately 20 cases are scheduled, averaging ten cases each for the two domestic relations officers. Each of the officers must attend throughout the calendar, since their cases are interspersed

on the docket.

This officer estimated about 20 persons on his caseload visit his office each week. Office visits last from one to ten minutes. "I give some advice, answer their questions, explain our procedures, do a little counseling." In addition, he estimates involvement with 40 to 50 phone calls each week concerning his caseload. "If we counsel too much, our enforcement suffers." This officer emphasized that his number one responsibility was to complete investigations. This is our "first duty." He suggested that child custody investigations take more time than pre-sentence investigations performed by regular Probation officers.

In his opinion, the system suffers from heavy caseload, insufficient probation and secretarial staff, the failure of some recipients to advise the office where their former husband has moved to, and the failure of the Welfare Department to continually advise the office as to recipients who are now on Welfare rolls.

During 1972, the Hillsborough office filed 552 domestic relations violations out of 1,599 active cases. While there would be some duplication in the violations filed, a one-third violations rate would suggest the need for careful examination of the entire support ordering - enforcing process.

IV. Domestic Relations Investigations

There seems agreement that child custody investigations are an important function of New Hampshire Probation officers.

Superior Court judges are increasingly requesting these, as well as child support and visitation investigations. They requested 331 such investigations in 1972, as compared with 299 in 1971. Indications are that 1973 requests will exceed those of 1972. Divorces have increased in the state, partly attributable to increased population, the new Dissolution of Marriage Act, the legal services available to the poor. It is now recognized that custody, property division, support amount, and visitation agreements are sometimes hastily decided shortly prior to the hearing on dissolution. Recently, in Dover, in an experiment with a massive one-day calendar of the bulk of divorces scheduled to be heard that term, approximately fifteen of 140 cases heard were referred for a Probation investigation of one feature or another of the agreement. In general, this judge considered that such investigations were helpful and were adequate. He was less positive about the quality of Probation supervision of offenders entrusted to Probation in that county.

V. A Study of Probation Services in
the State of New Hampshire; PRC
Public Management Services, Inc.,
McLean, Virginia

This study (hereinafter referred to as PRC/PMS), completed earlier this year, merits review in relation to the within study. PRC/PMS, among other recommendations, suggested the employment of a deputy director for administrative services, to be responsible to the internal management of the Probation Department. A second deputy director, the

present assistant director of Probation, was proposed to direct over-all field supervision services. PRC/PMS recommended a computerized domestic relations information system under the former's direction, and with all payments to be made into and out from the central office. The computer would have the ability to automatically prepare arrearage notices. The deputy director for administrative services would have other responsibilities in the management area including budget, administration of non-program personnel, record systems, etc.

PRC/PMS recommended that this deputy director also serve as supervisor for all domestic relations officers. These officers, however, "in unusual or special circumstances," could receive casework assistance from their regional office supervisor. By inference, then, the domestic relations role was seen as more of a collection service than a social service. The officers would be under the over-all direction of the deputy director for administrative services, rather than the deputy director for field supervision services.

Four regional Probation offices were recommended, each to have two domestic relations officers by fiscal year 1975.

Except for certain additional domestic relations officers, PRC/PMS saw no need for additional Probation officers for the next three to five years, although it counted on manpower assistance from the federally-funded volunteers program. Further, it saw no need for additional secretarial positions in the Department.

The domestic relations officer would be responsible for the collection of support payments and for court-directed investigations except for child custody. The latter would be conducted by regular Probation personnel.

The report added: ". . . Almost all domestic relations activities can be performed by staff with entry level skills. . . ." It recommended, as qualifications for the position, a college degree or equivalent, an intensive period of in-service training, and follow-up training by supervisory staff.

Through skilled officers, the study anticipated a ten to fifteen percent increase in support collections. Specialized secretaries would work exclusively in support of domestic relations officers.

VI. Consultant Observations and Impressions

Despite the time and scope limitations of this consultant's study, certain observations and impressions would appear valid.

No one raved about the Probation Department. In fact, more negatives than positives were expressed.

The Department appears to stand in need of vitalization. Personnel and management are well intended, yet organization and service delivery must be seen as traditional. Legislative indifference to the Department's budget may mean many things... it certainly does not reflect overwhelming confidence in this Department.

- A. Probation personnel who were interviewed largely saw solutions through increased manpower: more domestic relations officers, more regular probation officers, more secretarial - clerical support. The apparently heavy caseload may have some paralytic effect. There was no strong thrust for systems change to heighten the effectiveness of the Department. Just adding manpower is not a sufficient answer, and the PRC/PMS study should be helpful in clarifying departmental goals and functions, and in certain reorganization.
- B. The clear priority of this Department is to complete court-ordered investigations. This may well extend over to the Department's work with youthful and adult defenders, with an emphasis on social studies and pre-sentence investigations, and an underemphasis on probation supervision, though this was not investigated by this consultant.

But, in the domestic relations area, the staff effort clearly appeared more ministerial than supervisory, more collection and investigation oriented than counseling and assisting clients. In short, protestation that the domestic relations officer requires significant counseling skills and great personal maturity was not born out, in general, by observation. Support for this analysis is found in the PRC/PMS study placing these personnel under the deputy director for administrative services rather than the deputy director for field supervision services.

- C. Accepting that this role is largely ministerial, is there merit to separating this function from the Probation Department and placing it within the Clerk's Office, thereby more clearly defining the probation role as working with juvenile and youthful offenders, investigations and supervision?

This consultant sees little value in such a transfer. However, its administration can be improved within the Probation Department. Computerization, improvements in processing paper, improved calendaring and administrative supervision can heighten the effectiveness of this program.

- D. The linkages between the Probation Department and the judges are insufficient. There is insufficient judicial knowledge of probation operations and priorities. Ways should be designed for judges to more concertedly impact upon probation organizational and service delivery priorities.
- E. There is question about the evenness of the administration of this program. One Probation officer admitted he responds to pressures to move cases more quickly, implying certain of these pressures were from the Public Welfare Agency. This is not inappropriate, but, in light of the inefficient collection - pursuit system, parties not on Welfare rolls should merit equal consideration.

It was learned that state Probation and Welfare

officials will be meeting to develop improved communication as to shared cases so that probation does not mail out duplicative checks to payees who are presently on welfare rolls. Ongoing coordination among probation, welfare, and the courts is important to attain (see Appendix C).

VII. Recommendations

A. A strengthened judicial influence over Probation Department management.

The Probation Department functions because the court entrusts to it certain responsibilities in regard to certain court clientele. As to offenders on probation, the Department has the dual duty of assuring a maximum of community protection, and of assuring a maximum of individual rehabilitation. Investigations, submitted by the Department to the judge for use at sentencing or disposition, need to be predictive tools to assist the judge in deciding whether to institutionalize an offender or place him under probation supervision. The report should also spell out a probation plan so the judge can understand what services are likely to be provided if probation is granted. In the domestic relations sphere, probation investigations should assist the intelligent decision-making of the litigants and the judge, and reduce adversary clashes. In managing court-ordered payments, probation has a duty to effectively implement court orders, to benefit the parties, the community, and the dignity of the court.

Judges have a duty to understand the basic operations of the Probation Department. They need assurance that one placed on probation will receive timely and relevant probation services. They need to agree with the Department as to the information they require from Department investigations. They are entitled to

maximal effectiveness from the Probation Department in the execution of their orders.

Concurrently, judges need to be sensitive to the problems and needs of the Probation Department. If convinced that probation manpower is being used most effectively, and genuine manpower shortages exist, then judges should advocate an expanded probation budget. Judges should not overload probation with questionable referrals which would be helpful but not vital to the court decision, unless probation is organized to handle this work without detriment to its other priorities. Its priorities should be agreed upon with the courts.

What is called for is a closer working relationship between probation and the courts. What is called for is both greater judicial knowledge of and greater judicial influence over probation priorities and program. What is not called for is judicial intrusion into the day-to-day operations of individual probation officers.

That the Board of Probation consists of three judges is an excellent starting point. These judges have the responsibility to meet periodically with the bench to clarify and recommend probation policies and priorities.

Without undermining the authority of the Probation Board, the Supreme Court Chief Justice, in his responsibility for the administration of the District Courts, and the Superior Court Chief Justice, should conduct regular meetings with state probation management.

Further, judicial education programs should include work-

shops between probation and judicial officials working toward a greater commonality of purpose.

The PRC/PMS study recommended that probation services be severed from the judicial branch and placed fully within the executive branch. That position is supported by the 1973 report of the National Advisory Commission on Criminal Justice Standards and Goals. Earlier, Arthur Little and Company had recommended the opposite view for New Hampshire, that the probation function be removed from the executive branch and ensconced within the judicial branch. This consultant favors the latter view, and urges that judges take a more active role in regard to probation, to reduce the future likelihood of a further loss of their control over probation functioning.

B. Greater efficiency in the management of court-ordered payments.

The Department is taking some strides to improve collections, and the courts are increasing their cooperation by providing more regular court time for consideration of violations. At least one court official expressed the belief that courts may approve unrealistic agreements or enter unrealistic orders (see Section II-E, above), and that a greater number of further hearings, such as modifications of decrees, violations, or contempts, occur than is desirable. Both organizations need to further evaluate and improve their approaches in this area.

The guideline should be one of "hot pursuit," so that deficiencies are processed promptly, and arrearages are maintained in a more viable amount. The judges and the clerks

must find ways of expediting the transmission of orders to the Probation Department. Probation must reduce its processing bottlenecks. Can the Probation Department's letter to the parties as to how payments shall be made and disbursed, be handed to the parties on the day of the court hearing, or mailed to a non-appearing party that very day by the clerk? Can the judges encourage the parties to go immediately from the hearing to the Probation Department to obtain further instructions? Can more realistic money orders be entered? Can payors whose job is terminated or reduced find an easier way to come back in for a reduction in the order?

C. The Specialist Domestic Relations Officer

This consultant supports the Department's direction of further specialization for this role, as concurred in by the PRC/PMS study. Consideration, however, might be given to shifting child custody investigations to the Welfare Department. Child welfare workers should have some skill in evaluating which is the more suitable parent or alternative home situation. PRC/PMS proposed that regular Probation officers perform child custody investigations. Yet, part of the problem is that regular Probation officers appear to place priority on investigations, and may perform insufficient supervision. It is easier to continue to request this service from Probation, but it is not unwise to ask Welfare Departments to accept more responsibility for critical family issues before the courts.

- D. The Department should employ paraprofessional personnel as domestic relations specialists; paraprofessional aides could also improve Probation supervision of offenders.

Heretofore, entry level educational-experiential prerequisites for a Probation position have been an A.B. degree and three years of social service experience. The Department has now agreed to an A.B. degree plus two years of experience for the domestic relations officers whose appointments are frozen, but pending. PRC/PMS saw the domestic relations officer as requiring only a college degree or equivalent, if there were adequate on-the-job training and supervision. This consultant sees no reason why this position could not be effectively handled by a qualified person with a high school degree or equivalent, so long as there were appropriate in-service training and supervision.

The job is largely ministerial. It may bore more highly educated persons. The counseling role is slight. Lesser trained persons could handle the procedures and court hearings. Savings could be achieved, to permit the employment of more persons at the same present cost, so that more efficient enforcement could be accomplished.

Many Probation Departments around the nation now employ such persons as Probation aides, working with delinquent youth and adult offenders in the community. Given reduced caseloads and a mandate to keep on top of their probationers, they have often proved extremely effective.

Further, it would be hoped that at least several persons who may be employed as Probation Department para-professional staff could be recruited from present Welfare rolls or from persons having physical handicaps, thereby assisting with an additional social objective of helping capable people become self-supporting.

- E. The calendaring of domestic relations cases should consider judge as well as Probation Department time priorities within the social objective of bringing these matters more quickly to court consideration.

Those courts which now set aside a part of a particular day each week for domestic relations matters should continue to do that. Other courts may well consider this. A regular time each week is helpful to Probation personnel in planning their time, and permits the court to regularly chop away at the domestic relations backlog. It may be worthwhile for the Superior Court to make a substantial effort to reduce this backlog by a crash effort, appointing District or Probate Court judges as acting Superior Court judges, or qualified attorneys as special masters, to systematically reduce the backlog. Undoubtedly, clerks, judges, and Probation personnel, meeting together, can discern other methods to improve the calendaring and over-all administration of these cases.

Two problems were discovered in Hillsborough County, perhaps illustrative of problems there and elsewhere, which could be ameliorated. There, the clerk schedules perhaps

twenty violations-contempt cases each Monday from 10:00 a.m. to 12:30 p.m. Both domestic relations officers must be present throughout this period, since their case may come up next. Were the first officer scheduled for the first ten cases, and the second officer for the latter ten cases, then each could save an hour for more productive use. Further, an extension of the courthouse public-address system, inserted into the Probation Department, would permit the clerk to advise the Probation Officer that his case would be heard within about five minutes.

F. In support of a recommendation for the assignment of all domestic relations cases in Hillsborough County to one Superior Court judge.

This particular recommendation is embodied more fully in an accompanying part of the over-all study report. This consultant would support experimentation with specialized judicial handling for a number of reasons, one of which shall be cited. There is need for judges in this state to sit for a period of time as specialist judges so that they can become spokesmen for systems change in the domestic relations area. Generally, there is a dilution of responsibility for advocating improvements when all judges hear all types of cases. What is needed is someone who hears these types of cases day in and day out, spots the deficiencies in calendaring and hearing processes, in legal procedures, in Probation processes, in social services, and who becomes the convenor of those groups who can achieve improvement, and the responsible advocate for finding ways to make this system work better.

- G. Parties to a divorce should not be routinely referred for social agency review prior to hearing.

It is the better strategy to utilize social agency services in the appropriate case rather than mandatorily in each case where legal processes may be invoked. Agency budgets are limited, and social services must be concerned with the most effective use of staff resources.

- H. Officials should review present Probation Department bonding practices.

According to the Director of Probation, only he and the Assistant Director have been bonded, but in his opinion, this bond covers all employees of the Department. Time did not permit this consultant to more carefully investigate this issue, but we do know that about \$5 million annually passes through this Department, that a lot of people and a number of offices handle this money, and that responsible officials should be certain that bonding provisions are comprehensive.

VIII. Longer Term Considerations

- A. The Municipal/District Court Probation Offices should be merged into the State Department of Probation.

It would seem a far better organizational approach were there to be one Probation organization under central direction. Generally, manpower can be better utilized when there is one organization rather than several. Coordinated policies, hiring screening, training, fiscal management, supervision, and many other features involved with probation, re-

inforce the recommendation that the state should take over the funding of the city offices, and their present manpower.

B. Larger studies of court organization and structure are indicated.

The boundaries of the within study were narrow, but issues crossed over and extended into other courts. If there is interest in New Hampshire in a family court concept, then that would be best structured in the Superior Court following transfer of juvenile jurisdiction from the Municipal and District Court, and mental illness, adoption, and termination of parental rights jurisdiction from the Probate Court. These are big issues. Nationally, there is considerable interest in unification of courts and structural changes. There may be other reasons in New Hampshire which support a wide review of the present organization of the courts.

APPENDIX A

Methodology

The New Hampshire Domestic Relations Study was conducted over a period of four months (September, 1973 to January, 1974). It included the following elements:

- (1) In-depth interviews with some 45 participants in the New Hampshire judicial process, including Superior Court judges, District and Probate Court judges, court clerks, legislators, members of the private bar, and others. As a result of these interviews we were able to determine in some depth the scope of the issues to be addressed in the study of the impact of domestic relations cases on the New Hampshire Superior Court.
 - (2) Basic research into the statutory and court rule foundations for New Hampshire practice and review of practices in other jurisdictions.
 - (3) Gathering of statistics in three selected counties: Belknap, Hillsborough, and Strafford. In Belknap County, we randomly sampled approximately half of the divorces heard in Court Year 1972, and in Hillsborough and Strafford Counties we sampled approximately one-fourth of the divorces heard.
 - (4) Use of outside consultants to analyze the New Hampshire situation in light of experience drawn from other jurisdictions in the United States.
- These consultants were especially used with respect to the specialized areas of Probation and Welfare Department services as they relate to domestic relations matters in the

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Superior Court. (5) An intensive conference of consultants and members of National Center staff based upon a 44-point agenda outlining the major issues raised by our investigation of the handling of domestic relations matters in the New Hampshire courts. (6) Discussion of our findings and preliminary conclusions with some participants in the New Hampshire judicial process, including a brief preliminary presentation to Superior Court Chief Justice William Keller. (7) A final round of intensive internal discussions and drafting of the final New Hampshire report.

APPENDIX B

Neglected and Abused Children: Commentary on Representation of Children's Interests and the Roles of the Welfare and Probation Departments in Investigating Domestic Relations Cases

The issues of representation of parties and presentation of facts to the Court have already been raised in several instances. Unless probed by an alert judge or master, parties to a divorce action may stipulate an unreasonably low support order, especially if welfare benefits to the wife and family exceed the amount reasonably to be expected from the husband.¹ Commentators have also noted that children's interests may remain unrepresented in a divorce contest involving issues of custody and, especially, support.²

The inadequate representation of children's interests has been a particular problem in cases of child neglect and abuse. A close look at child neglect and abuse cases also illustrates the need for improved coordination by the courts of the use of the Probation and Welfare Departments for juvenile and domestic relations investigations.

RSA 169:37 provides that any person becoming aware of a neglected, abused or deserted child shall report the fact to the Bureau of Child and Family Services of the New Hampshire Welfare Department. Such referrals come from doctors who treat children, school systems, police departments, neighbors, and even relatives and family. Upon such report, the

¹See Section II-E, above.

²See "Children of Divorce," Patricia C. Hill (draft copy), pp. 9-11, and the brief comment in G. Wells Anderson, "New Hampshire's Divorce Reform Act of 1971."

Bureau investigates and, when necessary, reports the case in turn to the District Courts for appropriate action.³

The caseworkers investigate the family surroundings of the allegedly neglected or abused child, and determine whether the situation is potentially dangerous to the child. The Bureau presently has the policy of providing social counseling to the family as to proper child care requirements. The caseworker might, for example, be a nurse and teach the wife essentials such as basic home maintenance, cooking, cleaning, and management of household finances. Underlying this policy is the Bureau's belief that if parents can be helped to cope with a threatening environment, they will be less likely to take their frustrations out in abusive acts against their children. Although the Department reports a number of successes in establishing better family relations, family problems may be so severe that the caseworker finds it necessary to file a petition in court to remove the child from the threatening home environment.⁴

In the District Court, the Bureau purports to represent

³See discussion and statute cited in "Social Services In New Hampshire Available to the Legal Profession," by Charles A. De Grandpre and Albert E. Chicoine, N. H. Bar Journal, Spring 1972, p. 199.

⁴Eighty-four such cases were heard in Manchester District Court during Court Year 1972. Thirty-four of these were newly filed, while the remaining fifty cases were brought forward for review. The cases affected a total of 174 children.

the "best interests of the child," as determined by the Bureau. This may lead to incongruous results. For example, the caseworker concerned about removing the child from the custody of parents seen as dangerous is only rarely interested in enforcing the law and instituting prosecution against the parents for the crime of child neglect.⁵

At the hearing, the caseworker who did the original investigation and filed the petition actually appears in District Court to represent the state and "the best interest of the child." Unfortunately, as the caseworker is not an attorney, the best interest of the child and the state's interest both go inadequately represented even given the informal nature of juvenile proceedings. In past years, when the District Court judge found the case to be of an especially serious nature, he would appoint a guardian ad litem to protect the rights of the child from infringement. However, since the guardian ad litem was paid by the Court, judges were too often concerned with financial rather than purely judicial considerations. The parents, unless they were not at all interested in keeping the custody of the child, generally would retain counsel.

The Department of Welfare, in an effort to eliminate

⁵For example, in Court Year 1972 in Manchester District Court, only three such cases were heard; and they resulted in convictions.

the unfairness of hearings in which the state was unrepresented by legal counsel, supported House Bill 443 in the 1973 Legislature. The bill provided that the caseworker would be afforded counsel and that the state's interests (seen to be congruent with "the best interest of the child") would have been properly represented. However, House Bill 443 failed to pass. Instead, the Legislature chose to enact Senate Bill 78, which became effective July 1, 1973.

Senate Bill 78 provides that all children who are alleged to be neglected or abused will be entitled to appointed counsel regardless of indigency considerations. The Senate Subcommittee articulated the fear that the children in neglect and, especially, abuse cases, were very young and likely to lose their rights in the legal battle between parents and state officials.⁶ It remains to be seen how well this new solution will work. At a minimum, we can expect that previously unrepresented interests of children will now be brought to the court much more forcefully than was the case under past procedures.

While the Legislature has now squarely addressed the problem of providing counsel to previously unrepresented or underrepresented children's interests, neither the Court nor the Legislature have dealt with the issue of coordination between Probation Department and Welfare Department investigative services in any satisfactory manner. RSA 169:9 provides that no formal disposition shall be made in neglect proceedings until an investigation has been completed and a report sub-

⁶See Governor's Commission on Laws Affecting Children, Final Report, September 4, 1973, p. 22 (Joseph P. Nedeau, Subcommittee Chairman).

mitted, setting forth "house conditions, school record, mental, physical and social history of the child and circumstances of the neglect." The statute further prescribes that it is the Probation Department which should provide the Court with this needed investigation and report. This is in accordance with the traditional role of the New Hampshire Probation Department in serving the Court as an investigative bureau.

It appears to be a serious duplication of effort and an additional burden on an already overworked New Hampshire Probation Department to carry out such investigations and make reports in neglect cases which already have been investigated by concerned caseworkers in the Welfare Department. Moreover, a City of Manchester Probation officer states that the Probation report in a number of child-neglect cases is taken directly from information provided by the Welfare worker.

We recommend the elimination of the duplication of functions between Welfare and Probation departments in investigating such neglect cases and propose that RSA 169:9 be amended to provide that the Welfare Department rather than the Probation Department do the relevant investigations and reports to the Court. Moreover, presently the Department of Welfare has a Bureau of Child and Family Services which is better staffed and more experienced in the area of family matters and custody issues. In the overworked Probation

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Department (see Part V, above) domestic relations cases frequently receive quite a low priority. New Hampshire's children are her most valuable resource; they should not be lost in a shuffle between administrative agencies. Any future comprehensive study of the New Hampshire State Court System should include as a high priority analysis of the interaction of various agencies such as the Probation and Welfare departments which serve the courts.

APPENDIX C

Contempt Proceedings In Domestic Relations Cases

If a litigant does not obey a Superior Court order, he may be held in contempt and penalized, including being sent to jail. In domestic relations cases, litigants may violate custody or visitation orders; however, our inspection of domestic relations cases in Belknap, Hillsborough, and Strafford Counties substantiates the feeling among our interviewees that the primary subject of domestic relations contempt proceedings is support.

A number of cases of non-compliance with support orders are for valid reasons. If an ex-husband loses his job, for example, he may suddenly be unable to meet the order. Inability to pay is a real and complete defense to a contempt citation.¹ Sometimes the parties may agree between themselves to modify support payments. This would save the parties attorneys' fees required to go to court to formally modify the decree as well as some of the delay which might be involved (see Sections II-B and III-A, above). One interviewee discussed the case, for example, of an ex-husband who bought an air conditioner for a child in ill health in lieu of making several scheduled payments

¹Philip P. Houle and Eugene Z. Dubose, "The Non-Support Contempt Hearing: Constitutional and Statutory Requirements," N. H. Bar Journal, Summer 1973, pp. 172-174.

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to the wife. However, those scheduled payments were collectable through the Probation Department, and no notice of the alteration had been provided the Department. The unsuspecting ex-husband suddenly found himself in court, and paying attorneys' fees to his lawyer.

On the other hand, animosity between the ex-husband and the ex-wife may lead to a violation of a support order without valid defense. Where the Probation Department is responsible for collecting support payments, and finds these suddenly cease, the Department may file a "Report of Violation" with the Superior Court. When the Probation Department is not involved, the aggrieved wife may file a contempt petition against the husband for non-support.²

The Superior Court judge hearing a contempt case has relatively few options. He may find the defendant in civil contempt and order him committed to jail until support arrearages are paid. Or, for especially flagrant violations, he may hold the defendant in criminal contempt, sending him to jail for a specified term, regardless of the fact that the arrearage might be promptly repaid.³

The sanction of a jail term is awesome but limited. The offense is non-support; a defendant in jail cannot earn money which he needs to pay support. Similarly, the sanction of fining the defendant is useless, since this only deprives the non-supported ex-wife of further money.

²This is in addition to the ex-wife's alternative remedy of filing a complaint of criminal non-support in District Court. Some of our interviewees contend the contempt proceeding in Superior Court makes criminal non-support a redundant remedy which should be abolished.

³See Houle and Dubose, pp. 166-168.

New Hampshire Superior Court judges have responded to this dilemma in varied ways. One judge is known as exceptionally strict; the credible threat of jail induces many hold-outs to pay rather than face incarceration. Another judge, of some dramatic ability, schedules a series of contempt cases and calls the most serious case first. To that defendant he delivers a stinging and fearsome lecture possibly accompanied by a heavy penalty. After the first defendant is disposed of, he reports, the others are often quite willing to disgorge support payments without further challenge. Finally, judges often require cash bail for a defendant, as an alternative to going to jail. The amount of bail, not coincidentally, is sufficient to repay a substantial proportion of the arrearage, and, if paid, is turned over to the wife.

Through such devices, New Hampshire Superior Court judges manage to reduce the numbers of litigants who otherwise might be sent to a period of unproductivity in jail. Attorneys report that arrearages are frequently forgiven, and that it is virtually impossible for many litigants to make them up while meeting present support commitments. On the other hand, New Hampshire non-support proceedings have come under articulate attack as being "statutorily and constitutionally deficient," and requiring additional safeguards.⁵ Moreover, the wide divergencies among Superior Court judges in treating

⁵See Houle and Dubose, above, footnote 1, and their discussion of safeguards required to remove these deficiencies.

contempt matters is well-known in New Hampshire⁶ and may result in substantial inequities among defendants guilty of the same offense.

⁶See "Children of Divorce: An Exploration of Children's Rights in the New Hampshire Legal System," by Patricia C. Hill (draft copy), revised 1973, p. 7.

END