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April 15, 2010

Via Hand Delivery

Rep. Marjorie Smith
Attn: House Finance Committee
NH House of Representatives
107 North Main Street
Concord, NH 03301

Re: Judicial Branch Budget Cuts

Dear Representative Smith:

I am writing, as Chair of the Family Law Section of the New Hampshire Bar Association, to object to the proposed judicial branch budget cuts. It is not exaggeration or overstatement to say that cutting the funding of the courts as proposed will certainly result in harm to the citizens of New Hampshire and particularly New Hampshire families.

At present, the family division operates with eight percent (8%) of its positions vacant. The family division aspires to issue orders within thirty (30) days, and makes valiant efforts to do this (including tracking the status of orders over thirty (30) days in each court, shuffling employees from one court to another to clear backlogs, asking higher level family division employees to assist with the backlog when necessary) but there are often orders on critical issues that take much longer. In some instances, orders on issues that are of dire importance to the affected family take months to be issued. Hearings that should be scheduled within a certain period of time are scheduled much later. To a parent who does not know when or if he/she will be able to see his/her child or if he/she will be able to pay the bills, this delay is incredibly stressful. The delays associated with issuing orders and scheduling hearings will be rendered dramatically worse if the courts are crippled by the proposed cuts.

Family division cases involve matters that are critical to the litigants. For example, the family division courts issue orders relating to whether a parent should see a child and how often, whether a child can relocate with a parent, whether a child can see a particular health care provider or take certain medication, whether support will be paid and how much, who will pay which bills, which party will reside in the parties' residence or if a party can retrieve important

items of personal property. If the courts' budget is reduced by twenty percent (20%), these orders will be exponentially more delayed. The delay will prolong the cases, resulting in increased acrimony and costs in these already emotionally charged cases. Parents and children who are dependent upon the court to issue an order will be forced to wait longer than thirty (30) days to know when they will see each other, support and bills will be unpaid – potentially leading to bad credit and even repossession or foreclosure in some instances, parties will be deprived of access to their homes and necessary property such as clothing, cars, business records, computers, and there will be many other similar problems. In addition, parties who are waiting for the court to issue an order as to who will remain in the home may be forced to continue living under the same roof, which may lead to domestic violence and will be detrimental to the children involved. It is also my understanding that multi-day final hearings will be difficult to schedule and significantly delayed if the budget is further reduced. Multi-day hearings and final hearings are necessary for cases of moderate and substantial complexity. A great number of cases fall within this category. While these parties wait for their final hearing, the acrimony between them will likely escalate as they experience conflict over unsettled issues, resulting in higher legal fees and more trauma for the children of such divorces. This result is in direct conflict with the recent efforts of the family division to remove families from the court system, reduce conflict and reduce the impact of divorce on children.

The family courts are in a particularly difficult situation because in many cases, the legislature has mandated that hearings shall be held in a certain number of days, generally thirty (30) days or less, but the courts (even at present) lack the resources to comply with these mandates while providing acceptable service to the public. Moreover, when legislation (SB 88, 2009) was proposed to allow marital masters to issue orders in uncontested cases, nondispositive matters, or matters where the parties agreed to this procedure, in an effort to expedite the resolution of disputes for New Hampshire families, the legislation was passed by the House and Senate, but then vetoed by the Governor. Consequently, marital masters cannot issue orders without the approval of judges. This means that two judicial figures must review every order before it is issued. Especially in the context of uncontested matters and cases where the parties agree otherwise, this is needless.

The proposed budget cuts would require the elimination of per diem judges (and retired judges). Per diem judges are the backbone of the family division court system, allowing the approval of orders, as mentioned above, and saving the family division system money by allowing it to not pay benefits to these part time judges (health insurance, retirement, paid days off), as the family division would if they were full time. I must also note that, even at present, some family division courts have a judicial officer present only *one day per week*. That allocation of time simply cannot be reduced. At present, the family division courts receive a \$640,000 allocation of funds for per diem judges. While this may seem significant, it is important to also consider that approximately eighty-four percent (84%) of the judicial caseload is handled in family division and district court where these judges sit. *More than twenty percent* (20%) of the judicial officer time in the family division is per diem judge time. Per diem judges are not a luxury or an efficiency measure, they are essential to an already overloaded and barely functioning system. The elimination of these judges, who are a cost-effective part-time

component of the family division, would be to reduce the possible court services by twenty percent (20%). Three (3) of the busiest family division locations - Rochester, Dover and Concord - are currently staffed with per diem judges and would be without any judge in the aftermath of the budget cuts. Consequently, all orders in these courts would be delayed waiting for counter-signature and the number of potential hearings would be greatly reduced. The court system that handles the rights most critical to people, their rights to their family, their home and their assets, will be one-fifth (1/5) slower if we reduced twenty percent (20%) of its judicial workforce. This is only one impact of the budget cuts.

As mentioned above, in the context of family law cases, the legislature has mandated that the court system hear certain matters within a prescribed timeframe. To provide a few examples of such matters, the following matters are required by statute to be heard in a specified time period:

- Hearings on *ex parte* orders in a divorce, under UCCJA or relating to parenting matters shall be held within five (5) days (RSA 458:16(II)(c); RSA 458-A:5-a; RSA 461-a:9).
- Requested hearings for restraining orders on property shall be held no later than five days after request is received by the clerk (RSA 458:16-b).
- After entry of initial domestic violence order, if the accused party requests a hearing, it shall be held within three (3) to five (5) business days from date of request (RSA 173-B:4) or the order will be dismissed.
- Final domestic violence hearings must be held within ten (10) days of service thirty (30) days of filing, whichever is later (RSA 173-B:4) or the order will be dismissed.

It should be noted that there are numerous child abuse and neglect, delinquency, guardianship, juvenile and other matters that have deadlines of the nature above that are not listed herein, but that also fall under the jurisdiction of the family division. The list above is a very small example of the matters required to be heard within a statutorily prescribed period of time. Furthermore, there will certainly be cases in which undeserving and potentially dangerous parties capitalize upon the crippled judicial branch and are released from pending charges. To cite a few examples of laws providing such opportunities:

- RSA 135-E:7(I)(9)(2): Establishing dates for probable cause hearing and trial, failing which sexual violent predators will be released.
- RSA 173-B:4: Time limits for final hearings or requested hearings by accused domestic violence perpetrators must be met or the temporary order will be dismissed.
- Criminals are guaranteed the right to a speedy trial or their cases will be dismissed.

This is unacceptable when programs that do not directly jeopardize the safety of our citizens will be funded. I am particularly mindful of the outrage surrounding the Fournier case, wherein the allegedly dangerous sex offender was released because the deadline for the hearing to determine his continued dangerousness lapsed. The public has already declared their refusal to accept this

type of consequence. It is too high a price to pay, including a risk to public safety, while programs that are discretionary and not constitutionally guaranteed are funded.

An argument that litigants will or should settle out of court more frequently than they do at present is not appropriate or realistic. We do not have a private justice system. We have a public justice system that should be accessible to everyone, regardless of income. Moreover, family division courts schedule mediation in all parenting cases and mediation has been heavily advocated in the family division courts for several years. It has long been the case that attorneys settle many cases between themselves and many others with the assistance of mediators, both court-appointed and private mediators. However, the list of certified marital mediators (those who can be appointed by the court) is short, they charge for their time, each session is typically limited to two (2) hours, and mediation only works if both parties participate in good faith. Each of these reasons presents an obstacle for use of the certified marital mediator program as a remedy to the backlogged court system or further budget cuts. For an impoverished party or a party who falls just above the indigency line, multiple sessions of mediation and/or payment of even a court-appointed mediator's fee may not be an option. The court appointed mediators are permitted to charge a rate of sixty dollars (\$60) per hour on court-appointed cases, which poses a disincentive for experienced family law attorneys to fill that role. Furthermore, because the list of certified mediators is short and demand will increase as courts begin to close, those mediators will likely become overloaded and backlogged. It is highly likely that the certified marital mediators will then take more private-pay cases in light of the demand and higher rate of pay, leaving the indigent and lower-middle income parties with grossly reduced access to mediation and resolution options. Parties who cannot resolve their differences have a right to be heard by the court so that a judge or master can decide their case. Our court system should not be rendered a system that caters only to the wealthy - where only those who can afford a very experienced and capable mediator (charging accordingly) to settle a complex or difficult case can escape the otherwise multi-year wait that would be caused by the proposed budget cuts. The budget cuts will create a system of justice where only the wealthy can resolve their disputes by hiring a private arbitrator or mediator to intervene, in the absence of a functioning court.

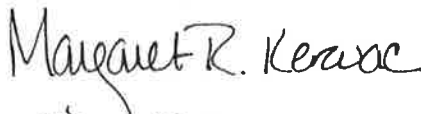
Both the United States and the State of New Hampshire have three branches of government: executive, legislative and judicial. Each is an equal branch. No branch has the right to handicap, impede or terminate the services of the other. The judicial branch, the smallest branch of government in New Hampshire, has been asked to bear a disproportionate amount of burdens and budget cuts in recent years. As a result of executive branch decisions, the judicial branch recently handled two death penalty cases and trials, rather than the virtually cost-free resolution of a life-in-prison plea bargain. The judicial branch also accepted and implemented an initial round of budget cuts that has already adversely impacted its ability to serve the public and closed all of the courts on certain days. There is simply nothing more to be taken. The proposed cuts would reduce the judicial branch budget by a total of one-third this year, eliminating such constitutional guarantees and basic assumptions of civil justice as regular public access to courts, jury trials, open courts and security in court. Court information technology, security, monitors and infrastructure are already woefully behind. The new cuts are stunning in their disregard for this equal branch of government and demonstrate the view that the judicial branch is not equal to

the executive branch or legislative branch, but instead below even luxury, discretionary and/or entertainment departments and programs. This is constitutionally unacceptable and will likely result in various forms of harm to the citizens of New Hampshire.

I recognize, as do the other attorneys here today, that this is a very difficult process and no budget cut will be easy. However, the rights that are constitutionally guaranteed to the citizens of New Hampshire and the basic necessities to preserve and ensure the safety and welfare of our citizens must be a high priority. Even in economically crippled countries where democracy is in its infancy, for example Iraq, court systems are a priority. This is because courts are essential to government, business, the resolution of civil disputes and (specific to this letter) families. Divorces and family law disputes are terrible for the parties involved. These budget cuts will make them much worse. This is a matter that will directly and dramatically impact families of every income level, county and other demographic across the State of New Hampshire. It is unlikely that could be said of any other proposed cut before you today.

Thank you for your consideration.

Very truly yours,



Margaret R. Kerouac

MRK/nv

cc: House Finance Committee
New Hampshire Bar Association Family Law Section