

# The Chief Judge's Court Restructuring Plan, With Certain Modifications, Should Be Adopted

## TABLE OF CONTENTS

Executive Summary .....	930
Introduction .....	935
The Chief Judge's Plan .....	937
The Assembly Plan .....	939
Why Restructuring Is Needed.....	941
The TwoTier Structure .....	942
The Proposed Supreme Court .....	943
The Family Division .....	943
The Probate Division .....	945
The Criminal Division .....	947
The Public Claims Division.....	947
The Commercial Division.....	948
Other Divisions .....	949
The Proposed District Court .....	949
Housing Cases.....	950
Civil Cases .....	950
Criminal Cases .....	951
The Fifth Department .....	951
Eligibility for Appointment to the Appellate Division .....	952
Judicial Selection and Related Issues .....	953
Appointments by the Chief Executive .....	954
Selection of Housing Judges .....	954
Successors of Acting Supreme Court Justices .....	956
The Phase Out of Acting Supreme Court Justices .....	956
Grandfathering of the Existing Acting Supreme Court Judges .....	957
Method of Selection of Additional Justices .....	958
Removal of the Cap on the Number of Supreme Court Justices.....	959
Certification to Serve Beyond Age 70 .....	959
The Cost of Merger .....	960
Conclusion .....	961
Dissent of the Committee on Trusts, Estates and Surrogates' Courts to the Report of the Council on Judicial Administration on the Proposed Court Restructuring Constitutional Amendment insofar as the Amendment would Merge the Surrogate's Court into a Consolidated Supreme Court .....	963

# Report on the Chief Judge's Court Restructuring Plan

*by* THE COUNCIL ON JUDICIAL ADMINISTRATION

## **Executive Summary**

In March 1997, Chief Judge Judith S. Kaye proposed a consolidation of New York's current nine separate trial courts into a two-tier structure consisting of a statewide Supreme Court and District Court. By this proposal Chief Judge Kaye and Chief Administrative Judge Jonathan S. Lippman sought to eliminate New York's balkanized trial courts and make the court system one of the country's most efficient, instead of its most complex. In the following months, the Senate and Assembly issued restructuring plans similar to the one proposed by the Chief Judge.

The Association's Council on Judicial Administration has reviewed the court restructuring plans and has concluded that a restructuring plan should be enacted.<sup>1</sup> With certain modifications, adoption of the plans will result in a more efficient and user-friendly court system to meet the needs of New Yorkers as they enter the 21st century. The complexities of New York's fragmented court system pose many unnecessary obstacles for the millions of people who seek justice each year. A streamlined, two-tier court system will eliminate many of the shortcomings of the present system, permit the allocation of resources where they are most needed, reduce the overlapping and conflicting jurisdictions of many of the trial courts, and vastly improve the administration of justice.

Under the restructuring proposals, the Court of Claims, County Court, Family Court and Surrogate's Court would be consolidated into the present Supreme Court, thereby creating a new Supreme Court that would continue

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<sup>1</sup> This Report, reviewed and then approved by the Council, was prepared by a Task Force on Court Restructuring, composed of representatives of the Council and its constituent committees, whose names are listed on page 962.

as the general trial court of unlimited jurisdiction. Within the Supreme Court would be specific divisions for family, commercial, public claims, probate and criminal matters, plus any other divisions the Chief Administrative Judge determines to establish. Significantly, the plan, by elevating the Family Court into the Supreme Court, would eliminate the historical second-class status of courts which handle family matters, and enable one judge to hear and determine all aspects of a family case.

A statewide District Court of limited jurisdiction would be comprised of the New York City Civil and Criminal Courts, including the Housing Court, the District Courts on Long Island, and the 61 upstate City Courts. That court would handle misdemeanor criminal cases, housing cases and civil cases up to \$50,000. There would be a single District Court branch in New York City, divided into civil, criminal and housing divisions, and multiple branches outside the City.

This simplified structure would be easier for the public and the Bar to use and understand and easier for court administrators to manage. Resources would be allocated in the manner most conducive to service to the public and efficient case management.

By creating five divisions within the new Supreme Court the proposals promote efficiency and specialization—even within a consolidated system. By creating an expanded Supreme Court consisting of five existing trial courts, the proposals enlarge and diversify the pool of judges who are eligible for designation to the Appellate Division and for certification to sit beyond age 70. The proposals eliminate the present constitutional limit of one justice of the Supreme Court for every 50,000 people in a judicial district, a cap that has required the temporary assignment of lower court judges to Supreme Court in order to meet caseload requirements. The proposals eliminate the necessity to designate such “Acting Supreme Court Justices.”

The proposals create a much-needed Fifth Department of the Appellate Division, which will help to ease the burden on the other departments, especially the Second Department. The proposals create a housing division of the District Court in New York City, thereby elevating the Housing Court to constitutional status, with constitutional “judges” (instead of court-appointed referees) presiding over cases.

In the past, this Association has supported merger proposals that would have consolidated New York’s major trial courts into one court of general jurisdiction. While a two-tier structure would not achieve certain benefits that a one-tier structure would provide, the proposed two-tier system is far preferable to the present maze of nine courts, and we therefore support it.

With regard to judicial selection, the proposals adopt, for the most part, a “merger-in-place” approach: the successor to elected judges would

continue to be elected; the successor to appointed judges would continue to be appointed. While this Association strongly believes that all judges should be appointed through a nonpartisan merit selection process, it recognizes that there is no consensus in the Legislature on moving to a merit selection system. The Council does not believe it is necessary for the issue of judicial selection to be fully addressed in the restructuring context. Accordingly, we support the merger-in-place approach.

Thus, the Council strongly supports the proposals to restructure New York's court system. Consistent with our overall support, we believe that certain aspects of the proposals should be modified and/or clarified. Our major recommendations (including our suggestions where the various proposals differ) are summarized below.

- We support the Chief Judge's approach for the selection of the successors to Acting Supreme Court Justices, because it leaves open the possibility that at least some of the judges replacing the "actings" would be appointed. Moreover, we believe that an apportionment between appointment and election of newly-created Supreme Court judgeships (including the successors to the Acting Supreme Court Justices) should be fixed. Currently, roughly 60% of the Acting Supreme Court Justices are Criminal Court Judges, who are appointed, while 40% are elected judges; it would therefore be appropriate under a merger in place approach to provide that 60% of newly created judgeships be filled by appointment.

- Under the restructuring proposals, no later than December 31, 2004 Acting Supreme Court Justices would either revert to the District Court (which would include the lower courts from which the Acting Supreme Court Justices were elevated), or would have to seek selection to the Supreme Court, where most of the available slots would be filled by elections. Given the strong role of politics in judicial elections, and the fact that many of the Acting Supreme Court Justices have not been part of the political process, the Acting Supreme Court Justices may have an extremely difficult time being elected to Supreme Court. In light of the high quality service performed by the Acting Supreme Court Justices, and to avoid a wholesale one-time departure from the Supreme Court of experienced jurists, albeit in an "acting" capacity, current Acting Supreme Court Justices should be "grandfathered" for the remainder of their tenure, as long as they continue to be assigned to the court by the Chief Administrator, so that they could remain on the Supreme Court bench without having to be elected or appointed to that court. The designation to Supreme Court would, however, continue to be temporary

and subject to existing review procedures, and there would be no "successor" Acting Supreme Court Justices.

- Under the restructuring proposals, the use of Acting Supreme Court Justices would be phased out by December 31, 2004, and new, permanent Supreme Court judgeships would be created in their stead. Under the Assembly plan, those judges, and other newly-created Supreme Court judgeships, would be elected. Under the Chief Judge's plan, the method of selecting successors to Acting Supreme Court Justices would be as recommended by the Chief Administrative Judge, unless the Legislature took superseding action. If new judgeships are created, the method of selection would be determined by the Legislature.

- The restructuring plans provide for different methods of selecting judges of the housing division in the New York City branch of the District Court. Under the Chief Judge's proposal, those judges would be appointed by the Mayor of the City of New York based on recommendations of a commission. Under the Assembly plan, those judges would be elected. We strongly oppose the election of Housing Court Judges, and support the proposal that they be appointed.

- We believe that the process of appointing housing judges would be made significantly more effective if the Mayor was limited to nominating from a specific number of names put forth by the commission. The appointing process would be further improved if the commission members were appointed by more than one official, thus reducing the potential that the will of one person would dominate the selection process.

- If, as the Assembly plan suggests, judicial selection is to be considered as part of a restructuring amendment, then appointments should be made using commissions similar in structure and operation to the Commission on Judicial Nomination which recommends nominees for the Court of Appeals. Moreover, such a system should be put in place for all judges, not, as specified in the Assembly plan, just for those judges who are currently appointed.

- The proposals provide that the commercial division of Supreme Court will exercise jurisdiction over "such civil actions as provided by law so long as a claimant or a party claimed against is a corporation, partnership or association. . . ." While we believe that a "commercial case" should be defined, the definition should be made by court administrators, not in the Constitution. Any definition made by statute will be difficult to modify

as needed and may serve to limit the ability of court administrators to respond to caseload trends. We also believe creation of a tort division or a general civil division should be considered.

- The proposals would create a public claims division of the Supreme Court. However, they do not specify whether matters formerly tried in the Court of Claims, where there is no right to trial by jury, would be eligible for a jury trial in the public claims division. This issue should be resolved before the proposals are acted on by the Legislature.

- The Chief Judge's proposal provides that the Legislature is to determine the boundaries of the new Fifth Department, but that the Chief Administrative Judge may do so if the Legislature has not acted by January 1, 2001. The Assembly plan leaves the matter entirely to the discretion of the Legislature. The Council prefers the Chief Judge's approach, which would give the Legislature the initial opportunity to deal with the issue, but also establishes a deadline beyond which the authority to set the boundaries would lie with the Chief Administrative Judge. Without a deadline, the Legislature may have difficulty reaching a timely agreement on the boundaries, thereby delaying the creation of the Fifth Department.

In summary, by restructuring the court system, the proposals, with the modifications and recommendations discussed in this Report, will result in the following:

- a straightforward, two-tier system that will be far easier for the public to understand and use, bringing an end to the confusing array of nine separate courts;
- a more efficient administration of the courts;
- elimination of the necessity of stopgap measures to meet caseload requirements, such as the designation of Acting Supreme Court Justices;
- parties having one court available to obtain complete relief, thereby avoiding multiple litigation that can be bewildering, time-consuming, expensive and stressful;
- the ability to assign judges and support personnel to those courts where they are most needed;
- the Family Court—a tribunal charged with handling cases in-

volved some of our most pressing and serious problems, including issues such as custody, visitation, domestic abuse and juvenile delinquency—becoming a division of the Supreme Court, thereby ending the historical second-class status of this court;

- the court hearing housing cases in New York City becoming a constitutional court, unlike the present situation;
- creation of a Fifth Department of the Appellate Division, thereby lessening the burden of the other Departments; and
- an increase in the size and diversity of the pool of judges eligible to serve in the Appellate Division, as judges of the current Family Court, Court of Claims, Surrogate's Court and County Court become Supreme Court Justices.

## Introduction

Although the New York State Constitution calls for a “unified” court system, the system is unified in name only. As Chief Judge Judith S. Kaye recently noted: “Unless we overcome the institutional resistance to change, the idea of a unified court system will remain, as it is today, a noble-sounding but utterly lifeless, meaningless sentence in our Constitution.”<sup>2</sup> Today, there are nine separate trial courts, each with its own jurisdictional boundaries and rules of procedure. This judicial maze often prevents one court from hearing all aspects of a dispute, and blocks citizens—especially those involved in family disputes—from obtaining complete relief in one court. Our court structure is one of the most fragmented, cumbersome and inefficient in the nation.<sup>3</sup>

This Association has long supported proposals to consolidate and restructure the state’s major trial courts.<sup>4</sup> Its efforts have been predicated on a firm belief that a truly unified court system will be more efficient and

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<sup>2</sup> Testimony of Chief Judge Judith S. Kaye Before Joint Legislative Hearing on Court Restructuring, October 7, 1997.

<sup>3</sup> See, e.g. Berkson & S. Carbon, “Court Unification: Its History, Politics and Implementation,” National Institute of Law Enforcement and Criminal Justice, at 3 (1978), in which New York and Indiana were rated as the only states to lack “any and all characteristics of trial court unification.”

<sup>4</sup> September 27, 1977 Association Statement to the Assembly Committee on the Judiciary by Michael A. Cardozo (Chair, Committee on State Courts of Superior Jurisdiction); April 24, 1979 Association Statement to the Senate Judiciary Committee by Merrell E. Clark, Jr. (President); “Legislative Proposals on Court Merger and Merit Selection of Judges,” by the Committee on State Courts of Superior Jurisdiction, 35 *The Record* 66 (1980);

result in justice that is better, swifter, and less expensive than the current patchwork of courts. Roscoe Pound wrote as early as 1903, "multiplicity of courts is characteristic of archaic law."<sup>5</sup> We see consolidation as an absolutely essential reform for the benefit of both the court system and the members of the public who turn to that system for relief.

While efforts to merge the trial courts in New York date back to the mid-nineteenth century,<sup>6</sup> in the last thirty years the movement has gained increasing force, with study after study calling for merger.<sup>7</sup> Over the years, however, those proposals have been mired in what has been described as "legislative gridlock."<sup>8</sup> Indeed, since the structure of the courts was last changed over 35 years ago, only one merger proposal has achieved first passage in the Legislature (in 1986),<sup>9</sup> and no proposal has achieved second passage and been put to the voters for approval.<sup>10</sup>

For the first time in a decade, however, momentum for court reform may be growing. A consensus began to emerge in March 1997, when Chief Judge Kaye and Chief Administrative Judge Lippman proposed a constitutional amendment to restructure the courts.<sup>11</sup> The centerpiece of their

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December 5, 1983 Association Statement to the Senate and Assembly Judiciary Committees by Michael A. Cardozo (Chair, Council on Judicial Administration); September 30, 1985 Association Statement to the Senate Judiciary Committee by Bettina B. Plevan (Chair, Council on Judicial Administration).

<sup>5</sup> As quoted in Vanderbilt, *Cases and Materials on Modern Procedure and Judicial Administration* 3d 1952. For national studies calling for court consolidation, see e.g., National Conference on the Judiciary, "Consensus Statement of the National Conference on the Judiciary," in W. Swindler (ed.), *Justice in the States* 266 (1971); National Advisory Commission on Criminal Justice Standards and Goals, *Courts* 164 (1964); American Bar Association, *Standards Relating to Court Organization* 17 (1974).

<sup>6</sup> One author has identified at least 25 separate commissions and over 30,000 pages of reports during the period 1846-1953. See Karlen, Delmar and Harris, Allan, "Judicial Administration in New York: Developments in the Last Twenty-Five Years," 15 *Buff. L. Rv.* 319, 322 (1965).

<sup>7</sup> In addition to the Reports and Statements cited in n4. *supra*, see: "And Justice for All; Report of the Temporary Commission on the State Court System" (1973) ("the Dominick Commission report"); "Report of Action Unit No. 4 (Court Reorganization) to the State Bar Association House of Delegates on Trial Court Merger and Judicial Selection," p.22.

<sup>8</sup> "Lawmakers Are Confident a Court-Reform Will Pass Next Year," the *New York Times*, 10/22/97, pg. B1.

<sup>9</sup> A merger bill passed both houses in 1986, but was not acted upon in 1987 and never appeared on the ballot. 1986 Session Laws of New York (State Constitution, Proposed Amendments at xxviii)(McKinney's).

<sup>10</sup> A constitutional amendment requires passage by two separately elected legislatures, followed by voter approval. Article XIX, §1.

<sup>11</sup> See "Optimism Grows for Court Reform," *The Legislative Gazette*, 9/29/97, p. 1.



proposal is a consolidation of the state's nine trial courts into a straightforward system of two courts: Supreme Court and District Court. In the following months, the Senate and Assembly issued consolidation plans similar to the one suggested by Judges Kaye and Lippman,<sup>12</sup> and scheduled joint legislative hearings on court restructuring.

At the first of those hearings, on October 7, 1997, the Association, by the testimony of its President, Michael A. Cardozo, expressed its endorsement of the broad concepts reflected in the court restructuring proposals. Those concepts include a two-tier court system, the creation of a Fifth Department of the Appellate Division, the elimination of the cap on the number of Supreme Court Justices per 50,000 residents in a judicial district, and the creation of an enlarged pool of justices eligible for designation to the Appellate Division. Perhaps most significantly, the proposal would merge the Family Court into the Supreme Court, thereby ending the second-class status of the Family Court and allowing family disputes to be resolved by one court. As Mr. Cardozo noted, the proposal would eliminate the present situation whereby the Family Court is "charged with dealing with the future of our society—our children—but termed an inferior 'lower court' and allocated inadequate resources compared to the 'Supreme Court'."<sup>13</sup>

This Report reviews the proposals in detail, considers arguments for and against certain key provisions, and sets forth the Association's position on the restructuring plans. We believe that, with certain modifications, the plans will result in a more efficient, streamlined court system that will be far easier for the public and Bar to navigate. As we head toward the twenty-first century, the citizens of New York State are entitled to a user friendly court system which responds to their needs.

### **The Chief Judge's Plan**

Under the Chief Judge's plan the state's nine major trial courts would be consolidated into a two-tier structure, consisting of a statewide Supreme Court and a statewide District Court.<sup>14</sup> The new two-tier structure is intended

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<sup>12</sup> S.4226, sponsored by Senator Judiciary Chair James J. Lack, tracks the Chief Judge's proposal. The Assembly has not yet introduced a bill; its plan, which proposes changes similar to those in the Chief Judge's proposal, is contained within a report by the Assembly Judiciary Committee entitled "Judicial Reform, Integrity and Access to Justice Act." Certain significant differences between the Assembly plan and the Chief Judge's are discussed later in this Report.

<sup>13</sup> Testimony of Michael A. Cardozo Before Joint Legislative Hearing on Court Restructuring, October 7, 1997.

<sup>14</sup> Earlier proposals supported by the Association provided for a merger of the State's major trial courts into one Supreme Court. See reports cited at n4 - *supra*.

to "create a far more accessible justice system" in which "judges and staff could be easily reassigned to provide more efficient and speedier justice."<sup>15</sup> The effective date of the plan is January 1, 2000.

The current Court of Claims, County Court, Family Court and Surrogate's Court would be merged into the present Supreme Court, thereby creating a new Supreme Court which would continue as the general trial court of unlimited jurisdiction. The Supreme Court would be comprised of commercial, criminal, family, public claims and probate divisions, plus for the balance of the caseload, any other divisions the Chief Administrative Judge determines to establish.

The judges of the abolished Court of Claims, County Court, Family Court and Surrogate's Court would become Supreme Court Justices.

The New York City Criminal and Civil Courts, including the Housing Court, the District Courts on Long Island, and the 61 upstate City Courts, would be merged into a statewide District Court of limited jurisdiction. The court would handle misdemeanor criminal cases, housing cases and civil cases up to \$50,000. There would be a single District Court branch in New York City, divided into civil, criminal and housing divisions, and multiple branches outside of the City.

Judges of the abolished New York City Civil and Criminal Courts and Housing Part, and the upstate City Courts, would join the corps of District Court Judges.

The local town and village courts are not covered by the proposal.

The plan would eliminate the long-standing limitation on the number of Supreme Court Justices, as well as the constitutional authority for assigning lower court judges temporarily to Supreme Court. Currently, the number of justices in any judicial district may not exceed one per 50,000 residents. Since this limit has been reached in Manhattan, court administrators, in order to meet caseload needs in New York City, have resorted to the practice of temporarily assigning lower court judges to the Supreme Court.<sup>16</sup>

Under the plan, the use of so-called "Acting" Supreme Court Justices would be phased out by December 31, 2004, and new, permanent Supreme Court judgeships would be created. Each Civil and Criminal Court Judge who is on temporary assignment as an Acting Justice of the Supreme Court on December 31, 1999 would continue in that capacity until the sooner of his or her departure from office, discontinuation of the temporary assignment by the Chief Administrative Judge or December 31, 2004. To deter-

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<sup>15</sup> Statement by Unified Court System, "Proposal to Reform New York State Court System Submitted to Legislature," March 19, 1997.

<sup>16</sup> According to the Office of Court Administration, there are currently 109 Acting Supreme Court Justices within New York City.

mine the actual judgeship needs in New York City over the first five years in which the plan would be effective, the Chief Administrative Judge would conduct a study and, by April 1, 2000, certify the number of additional justices needed in the City. The number of justices certified by the Chief Administrative Judge would be added on or after January 1, 2002. The method of selecting these judges, and the effective dates on which they would take office, would be as recommended by the Chief Administrative Judge unless the Legislature took superseding action by January 1, 2001.

The two-tier court structure under the plan would dramatically increase the pool of judges eligible for designation to the Appellate Division, as all justices in the expanded Supreme Court could be designated to the Appellate Division. Similarly, the pool of justices eligible for certification to serve beyond age 70 would increase.

The plan calls for the creation of a Fifth Department of the Appellate Division of the Supreme Court as of January 1, 2002. The Legislature would be directed to determine the boundaries of the new department by January 1, 2001; if it failed to do so, the Chief Administrative Judge would determine the boundaries.

The plan provides that nonjudicial personnel of abolished courts be continued, to the extent practicable, without decrease in salaries and with the same status and rights; and also that especially skilled, experienced and trained personnel, to the extent practicable, be assigned to like functions in the Supreme Court.

The plan does not fully deal with the issue of judicial selection in the restructuring context. Instead, it provides that all judges affected by the consolidation and their successors would continue to be elected, or appointed, as they were under prior law.<sup>17</sup> The Legislature would have the authority to determine the method of judicial selection for all positions on the Supreme Court bench to be created in the future.

### **The Assembly Plan**

As of this writing, the Assembly proposal has not yet been introduced in bill form. The general outlines of its proposal are set forth in a

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<sup>17</sup> The current state constitution does not specifically provide for a Housing Court. The current Housing Court was created by state statute, New York City Civil Court Act Section 110. The Housing Court is a division of the Civil Court, and its "judges" are actually referees who are appointed by the Chief Administrative Judge. Under the Chief Judge's restructuring plan, housing cases would be heard by judges of the new District Court who would be appointed by the Mayor of the City of New York. Thus, while the plan addresses the method of selecting the newly-created housing judgeships, it does not change the method of selecting any permanent judgeships that currently exist.

report by the Assembly Judiciary Committee entitled "Judicial Reform, Integrity and Access to Justice Act."

The Assembly plan would establish a two-tier court structure identical to the one proposed in the Chief Judge's plan, and overall, the plans are similar. There are, however, some significant differences relating to judicial selection, the number of Supreme Court justices in certain judicial districts, and the Fifth Department.

The Assembly plan provides that all judges would be selected by election or appointment as under current law. However, while the Chief Judge's plan leaves in place the method of appointment, the Assembly plan would establish a statutory screening process for the appointed judges.<sup>18</sup> The Commission which now recommends candidates for nomination to the Court of Appeals would also review and report on prospective nominees for appointment by the Governor to the statewide Supreme Court (former Court of Claims Judges). A new screening panel would be established to recommend nominees for designation by the Governor to the appellate divisions, and another new screening panel would be established to recommend nominees for appointment by the Mayor to the offices in the Supreme Court and District Court previously held by judges of the New York City Family and Criminal Courts.

The Assembly plan also has a different method of selecting judges of the housing division in the New York City branch of the District Court. Under the Assembly plan, those judges would be elected. Under the Chief Judge's plan, those judges would be appointed by the Mayor of the City of New York upon recommendation of a commission.

While both plans authorize the creation of a Fifth Department of the Appellate Division, the Assembly proposal leaves the setting of the division's boundaries entirely to the Legislature. The Chief Administrative Judge would not have the authority to set the boundaries if the Legislature did not do so by January 1, 2001, as provided in the Chief Judge's plan.

The Assembly plan specifies the number of justices who would be added to the Supreme Court in several judicial districts, and to the housing division of the District Court branch in New York City. The Chief Judge's plan leaves those determinations to a future date.

Three additional items which are included in the Assembly Plan,

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<sup>18</sup> Under current law, there is no constitutional or statutory requirement that nominees for the judgeships affected by this proposal be screened. However, candidates for appointment to the Court of Claims and designation to the Appellate Division are currently screened pursuant to executive order of the governor; Executive Order No. 10. Pursuant to executive order of the Mayor, nominees for the New York City Criminal and Family Courts are chosen by the Mayor after recommendation of the Mayor's Advisory Committee on the Judiciary, provided such persons have been found qualified by this Association. Executive Order No. 10.

but which are not provided for in the Chief Judge's proposal are: (1) a permanent mechanism to fund civil legal services in the amount of approximately \$40 million a year; (2) a significant increase in the rates paid to assigned counsel in criminal matters; and (3) opening disciplinary proceedings before the Commission on Judicial Conduct to the public after a finding of probable cause.

We endorse all three items.<sup>19</sup> The need to provide funding for civil legal services was emphasized by Michael Cardozo in his recent testimony:

Indeed, the time has long since passed to debate whether such funding is needed. At a time when federal funding for civil legal services has declined more than 30%, and the need for legal services is greater than ever, it is essential that a permanent mechanism be put in place ensuring that the State will carry out its obligation to fund legal services. The unrepresented poor will not be able to navigate a restructured and unified court system significantly better than they can represent themselves in the present system today. Our goal of equal justice under law will elude us until we correct this inequity by providing funds for lawyers to represent the poor.<sup>20</sup>

### **Why Restructuring Is Needed**

This year, according to the Office of Court Administration, case filings in New York's court system are expected to near the four million mark. Clearly, we need an efficient court system to adequately handle a huge and ever-increasing caseload. Yet, we have a fragmented court structure that makes the judicial system difficult to understand, expensive and inconvenient to use, and wasteful of precious resources. Our antiquated, cumbersome court system is simply too inefficient to meet the needs of millions of New Yorkers who seek justice each year.

Our system of nine separate trial courts, each with rigid jurisdictional boundaries, often prevents litigants from obtaining complete relief in

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<sup>19</sup> 1) The Association of the Bar of the City of New York (Committee on Pro Bono and Legal Services), "Statement on the Need for Permanent Increased Funding of Legal Services by New York State," June, 1997.

2) Committee on Criminal Advocacy, "Compensation of Counsel Assigned to Represent Indigent Criminal Defendants in New York," March, 1997.

3) Committee on Professional Discipline, "Confidentiality of Disciplinary Proceedings" 47 *The Record* 48 (1992).

<sup>20</sup> Testimony of Michael A. Cardozo Before Joint Legislative Hearing on Court Restructuring, October 7, 1997.

one court. This is particularly true in the area of domestic relations, where cases must often be litigated in both the Supreme Court and the Family Court. Similarly, tort cases involving a private defendant and the State must be litigated in both the Supreme Court and the Court of Claims. For many litigants, this duplicative process leads to expense, delay, and the potential for inconsistent results. For the court system, it leads to a squandering of limited resources.

Under the current system, judges cannot always be moved efficiently from court to court to meet caseload needs. As a result, for example, many judges in the Family Court—where filings have increased dramatically in recent years—are overburdened with disproportionately large and difficult caseloads. Administrators must often resort to stopgap measures, such as designating lower court judges as Acting Supreme Court Justices, in effect, borrowing judges from certain courts to meet the needs of another. Each such reassignment requires bureaucratic effort, with sometimes three judges being shifted to add one judge to a particular court. Each reassignment also leaves court administrators open to charges of political or other forms of favoritism.

All in all, New York's court structure makes the system slow to react to the ever-changing needs of particular courts, and to shifts in the volume, type and complexity of cases that are being filed.

### **The Two-Tier Structure**

In the past, the Association has supported merger proposals which would have consolidated New York's major trial courts into one court of general jurisdiction.<sup>21</sup> The recent proposals, by contrast, would create a two-tier system that would not achieve certain benefits that a one-tier structure would provide. For example, there would still be litigation to determine whether, pursuant to CPLR § 325(d), certain civil cases belong in the Supreme Court or the District Court. However, the increased \$50,000 jurisdiction of the District Court (as opposed to the current \$25,000 jurisdiction of the Civil Court and the \$15,000 jurisdiction of the District Court and City Courts) should result in less litigation over the court in which a particular civil case belongs. In addition, felony cases would still be handled in two courts: the District Court for arraignment and preliminary hearing, and the Supreme Court for plea or trial. On the other hand, using a two-tier system avoids dealing with the difficult political question, which contributed to the defeat of earlier merger proposals, of which of the state's City Courts, which vary widely in size and scope according to the size of the city they serve, should be included in a one-tier system.

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<sup>21</sup> See n4 - *supra*.

A two-tier system would be far preferable to the current maze of nine separate trial courts, and it appears to represent the most politically feasible approach to consolidation. Moreover, a logical basis exists as to which courts are included in the new Supreme Court and District Court. Therefore, we support the two-tier proposal.

### **The Proposed Supreme Court**

The Supreme Court would consist of the current Family Court, Court of Claims, County Court, Surrogate's Court and Supreme Court. We believe that the new Supreme Court, with divisions for family, probate, public claims, commercial and criminal cases, would function far more efficiently than the current structure of five separate courts.

The proposal respects the benefits of specialization within a merged court and a need for differentiated case management. Specialized divisions would enable the courts to make better use of judicial and staff resources by providing for the specific management and expertise needs of the different types of cases. Court administrators would be able to base assignments to the various divisions on the skills, experience and temperament of the available judges.<sup>22</sup> This is compared to the present system where, in order to add one judge to a particular court that is short-staffed, three judges sometimes have to be reassigned to new positions.

### **The Family Division**

Domestic disputes are often fraught with emotion and can be extremely difficult to resolve. The family division of Supreme Court would, at the least, provide a single forum in which these disputes can be heard.

The current system, with its overlapping jurisdiction of family related matters, is confusing and inefficient. Child custody, support and visitation matters are decided in the Family Court, while the Supreme Court (which has sole authority to grant divorces) can also resolve custody and support matters. As a result, there are frequently parallel proceedings in Supreme and Family Court, resulting in unnecessary expenses of litigation in two courts and the risk of inconsistent decisions. In fact, based on information supplied by Family Court Judges, approximately 15 to 33% of a New York City Family Court Judge's docket involves cases in which related Supreme Court proceedings are also pending.<sup>23</sup> In 1996, there were 41 Fam-

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<sup>22</sup> In many areas outside of New York City judges could, and likely would, sit in more than one division.

<sup>23</sup> These percentages are based on data provided by a representative sampling of

ily Court Judges available to hear the 225,292 cases filed in the New York City Family Court. In contrast, there were 280 Supreme Court Justices to hear 196,069 cases filed in 1996.<sup>24</sup>

As Michael Cardozo observed recently in his testimony:

“Specific instances of the horror presented by the manner in which we divide resolution of family disputes are not hard to find. It is not unusual for a spouse to seek custody of a child in Family Court, and, after forensic evaluations are complete, and a law guardian appointed, for the matter to be set down for trial. Unfortunately, the other spouse may then file for divorce. Since the Family Court does not have jurisdiction over the divorce it is by no means unheard of for the Supreme Court judge to stay the Family Court proceedings. Sometimes the Family Court judge ignores the Supreme Court order, insists on proceeding to trial, and leaves the litigants caught between two warring judges. Even when this does not occur, and the custody case is referred back to the Family Court, time is lost, money is spent on these peripheral issues, and the best interests of the child all but forgotten. All too frequently disputes involving support orders, child custody and, at times, child abuse, are analogous to ping pong balls, with cases—and the parents and children involved—bouncing from one court to the other. See, e.g., *Schneider v. Schneider*, 70 NY2d 739(1987), *affirming* 127 AD2d 491 (First Dept. 1987); *Matter of Young v. Young*, 130 M.2d 527 (Sup. Ct. of NY. Co. 1985).”<sup>25</sup>

While some of the complexity of domestic controversies arises from the tangled, emotional nature of the disputes themselves, the anguish, delays, and costs of domestic litigation unquestionably are compounded by New York’s bewildering jurisdictional schemes. Indeed, New York case law is a testament to the countless dollars and hours of judicial resources that have been squandered by the Family Court/Supreme Court dichotomy. The annotations to the Family Court Act and Domestic Relations Law provisions relating to the Family and Supreme Courts’ respective and overlapping jurisdiction consume dozens of pages and contain citations to hun-

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New York City Family Court Judges. The Office of Court Administration does not collect statistics on Family Court/Supreme Court overlap. See the *New York Times*, October 21, 1997, p. B1 and continuing.

<sup>24</sup> “The Good, The Bad, And The Ugly, The New York City Family Court,” The Fund for Modern Courts, September 1997.

<sup>25</sup> Testimony of Michael A. Cardozo Before Joint Legislative Hearing on Court Restructuring, October 7, 1997.



dreds of cases. Every one of those citations represents substantial time and money spent, not on litigating the parties' rights, but only to determine where to adjudicate them.

Moreover, the different procedures and remedies available in each court to address the same issue, i.e., support, custody or domestic violence, mean that choice of forum may affect the substantive outcome.<sup>26</sup> For example, choice of forum may be significant in applying for an order of protection. An order or temporary order of protection may be obtained in either Family or Supreme Court. However, the Supreme Court may award reasonable counsel fees and disbursements involved in obtaining the order if it is "issued or enforced," DRL § 252(1)(f); these counsel fees are not available in the Family Court.

Another example of substantive difference, pointed out by the Honorable Jacqueline Silbermann in her testimony before the Joint Legislative Hearing on Court Restructuring, is that the Supreme Court, pursuant to DRL 236(B)(8), may direct a parent to maintain life insurance to secure child support awards; Family Court lacks this power. Thus the child whose support is ordered by the Family Court is not protected in the event of the supporting parent's death. Moreover, with respect to maintenance (formerly, alimony), the Supreme Court is required to consider specific factors enumerated in DRL 236(B)(6)(a), while FCA Article 4 gives Family Court Judges wide discretion to award a "fair and reasonable sum."

A single family division of the Supreme Court would vastly improve this confusing and inefficient system. Litigants could appear before one judge, who would hear all aspects of a domestic dispute, including divorce, property rights, custody, visitation, support and orders of protection. Duplicative litigation and competing lawsuits would be eliminated. Judicial resources would be used more efficiently. The beneficiaries would be the children and families of New York State.

### **The Probate Division<sup>27</sup>**

The proposals would merge the Surrogate's Court into the Supreme Court, where the caseload would be handled by the newly-created probate division. Opponents of this aspect of the proposals argue that the Surrogate's Court should remain separate and apart from a unified court structure. Those

<sup>26</sup> See, e.g., *Bracero v. Bracero*, N.Y.L.J. 10/31/97, pg. 33, col. 1 (Family Court, N.Y. Co., H.E. Mulroy) (father placed on probation for non-support) ("Unlike DRL 245, FCA 454 does not require that the court explore non-incarceratory alternatives prior to ordering a term of commitment or probation.")

<sup>27</sup> The Association's Trusts, Estates and Surrogate's Courts Committee dissents from this section of the Report. The reasons for the dissent begin at p. 45 *infra*.

judges and practitioners believe that restructuring would result in a loss of the unique expertise of the Surrogates and staff in highly specialized and technical areas. They also argue that having separately elected Surrogate's Court Judges enhances accountability and performance.

However, the Association believes that the continuation of a separate Surrogate's Court is not consistent with the concept of court merger. The proposal expressly undertakes to respect the expertise and distinctive work accomplished by the Surrogate's Court. Under restructuring, probate cases would be handled by judges who sit in a specified probate division of the Supreme Court, and would thus continue to be handled by judges who presumably have expertise in these matters. Moreover, in large counties, the proposals specifically provide that candidates for the probate division would be elected on a ballot that designates such office as "justice of the supreme court, probate division." Since the proposals preserve the ability of candidates to run specifically for the probate division, the public's ability to elect candidates with the qualifications historically held by the Surrogates will be preserved. In addition, there is no reason why clerks and other nonjudicial personnel with special knowledge in probate matters would not be assigned to the probate division; in fact, assignment of both Supreme and Surrogate's Court clerks are presently controlled by the Office of Court Administration. Indeed, we expect that the acumen of the Surrogate's Court staff would continue to be utilized in the probate division of Supreme Court and that these clerks would continue to perform the same duties.

The advantage of including the Surrogate's Court within the Supreme Court is that judges and personnel within the probate division could also be assigned to other matters consistent with the court's needs. Similarly, resources could be channeled into the probate division as necessary. Moreover, matters within the expertise of the Surrogate's Court but now handled in the Supreme Court—such as *inter vivos* accountings—could be assigned, in a restructured Supreme Court, to the probate division. In addition, restructuring would allow adoption proceedings—presently within the jurisdiction of both the Family Court and the Surrogate's Court—to be handled in one division, where expert support personnel could be centered.

However, the concern has been raised that, in the future, probate division judges, as well as clerks and staff, will be removed from their probate responsibilities for other assignments causing disruption in the handling of probate matters. But the underlying premise of the restructuring proposal is that court administrators should allocate resources where they are needed most. If, for example, the family division, which as a family court today lacks adequate resources, and which deals primarily with unrepresented persons in need of clerk and appointed counsel assistance,

needs more staff, the Office of Court Administration should be free to consider the entire staff of the judicial system, including the probate division, in determining from which division the added family division staff should come. And there is no reason to believe that judges and clerks will be reassigned from the probate division if it is felt that such reassignment will negatively impact the workings of that division. Such personnel should only be reassigned to other divisions in cases of extreme need.

In addition, consolidation would facilitate the assignment of judges from county to county as needed to handle probate matters. Under current law, a Surrogate may not be assigned to an adjoining county to handle a matter if the resident Surrogate is disqualified or temporarily incapacitated. Instead, a Supreme Court Justice or a County or Family Court Judge must be used.<sup>28</sup> In a consolidated court, however, another probate division justice could be assigned to handle probate matters. The result would be an increased ability to meet caseload needs and to ensure that trusts and estates cases are handled by judges who have expertise in those matters.

Concern has also been expressed that the restructuring proposals give court administrators too much leeway to assign justices in and out of the probate division. As noted above, however, the authority to transfer a Supreme Court Justice to sit in the Surrogate's Court already exists. Moreover, we believe that court administrators, in making judicial assignments, would continue to use factors such as caseload needs and the strengths of particular judges, and would be guided by the "probate division" ballot designation in the larger counties.

### **The Criminal Division**

The criminal division of the Supreme Court would hear all cases prosecuted by indictment, i.e., felony cases. It is therefore appropriate that the County Court, which handles felony matters in areas outside of New York City, would be merged into the Supreme Court. Within New York City, felony matters would continue to be handled in the Supreme Court.

### **The Public Claims Division**

The elimination of the Court of Claims and the creation of a public claims division will remove another area of duplicative litigation. With the consolidation of the Court of Claims and the Supreme Court, cases in which money damages are sought against the State would be heard in the public claims division of Supreme Court. Significantly, the creation of a public

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<sup>28</sup> Article VI, §26(c), (d) and (f).

claims division would allow cases against the State and a private defendant to be heard before one judge, rather than in two different courts—before two different judges—as is the case today.

There is, however, one important need for clarification in this area. The proposals do not specify whether matters formerly tried in the Court of Claims, where there is no right to trial by jury, would be eligible for a jury trial in the public claims division of Supreme Court. Inasmuch as the proposals are intended to create a more efficient court system, and not to change fundamental principles of sovereign immunity,<sup>29</sup> it does not appear that the proposals are intended to create a right to trial by jury as against the State. We suggest that this issue should be resolved before the proposals are acted on by the Legislature.

### The Commercial Division

Since 1995, a commercial division of Supreme Court has operated with five justices in New York County and one in Monroe County. The overall objective of the commercial division is to concentrate expertise in commercial litigation, so that business disputes can be resolved better and more efficiently. Since its inception, the commercial division has helped to stem the flight of commercial litigants from New York's courts, and to maintain New York's status as the premier state for the conduct of business.<sup>30</sup> The proposals would preserve the commercial division of Supreme Court, and expand the concept statewide.

The restructuring proposal provides that the commercial division will exercise jurisdiction over "such civil actions and proceedings as may be provided by law so long as a claimant or a party claimed against is a corporation, partnership or association..." We do not agree with the definition stated in the proposal. Nor do we believe that the definition of a commercial case should be set out in the Constitution.

We do believe that there should be a definition of what constitutes a "commercial case"<sup>31</sup> so that attorneys and clients can have an expectation

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<sup>29</sup> Court of Claims Act, Article II.

<sup>30</sup> See e.g., Robert L. Haig, "New York Creates Business Courts," *Business Law Today*, p.32 (Sept. - Oct. 1996); Chief Administrative Judge Jonathan Lippman, "The First Anniversary of the Commercial Division," *Metropolitan Corporate Counsel* (December 1996).

<sup>31</sup> The five New York County justices who sit in the commercial division have no commonly applicable definition of a commercial case, and they do not apply the same criteria in considering whether to retain or transfer cases assigned to them. Indeed, a transfer out of the commercial division in New York County usually occurs through a *sua sponte* decision of the justice to whom the case was assigned.

of whether their cases will be handled in the commercial division.<sup>32</sup> This definition should be made by court administrators with input from the Bar based on the volume, complexity and nature of the commercial cases in a particular district. Any definition made by statute will be difficult to modify as needed and may serve to limit the ability of court administrators to handle commercial cases efficiently and to respond to caseload trends in particular areas. The absence of a definition may result in inequality of treatment and a lack of predictability, disappointing expectations of both attorneys and their clients. It also makes the initial selection of forum—for example, as between state and federal court—that much more difficult.

### **Other Divisions**

Apart from the five divisions described above, the proposals do not specifically provide for other divisions. The balance of the caseload would be heard in a “general” term of the Supreme Court. However, the Chief Administrative Judge would have the authority to establish other divisions, as necessary to meet caseload needs. Thus, for example, a “General Civil Division” or “Tort Division” of the Supreme Court could be established.

We believe this is a sound approach. However, we recommend that either a “Tort Division” or a “General Civil Division” be specified in the Constitution so these types of cases can also be expeditiously resolved in specialized parts in a division on the same constitutional level as the other divisions. Court administrators should have the flexibility, however, within a consolidated system, to establish such other divisions as would be helpful for the efficient handling of different types of cases. The definition of such other divisions should not be stated in the Constitution, but such definitions, like that of the Commercial Division, should be reached by the Office of Court Administration with participation by the Bar.

### **The Proposed District Court**

The proposed District Court would consist of the current New York City Civil and Criminal Courts, the District Courts on Long Island, and the upstate City Courts. The District Court would handle misdemeanor criminal cases, housing cases and civil cases up to \$50,000.

We agree with the inclusion of the 61 City Courts in the proposed

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<sup>32</sup> While this Report does not address the issue of how a commercial case should be defined, that question is under active consideration by the Association’s Committee on State Courts of Superior Jurisdiction. (See “Proposed Standards for the Determination of What Should be Assigned to the Commercial Division of New York,” May, 1997).

District Court.<sup>33</sup> The civil and criminal jurisdiction of the City Courts is similar to that of the New York City Civil and Criminal Courts and the District Courts on Long Island. The creation of a statewide District Court including the City Courts would promote uniformity and consistency in the administration of justice across the State.

### **Housing Cases**

One of the major benefits of the proposal is that the tribunal which hears housing cases in New York City would become a constitutional court, as a division of the District Court, with constitutional "judges" presiding over cases.<sup>34</sup> Today, the New York City Housing Court, in which more than 300,000 petitions are filed annually, is not even a constitutional court. It is dramatically understaffed, overcrowded and overburdened. The restructuring proposals properly address that court's lack of status, and would make it easier to allocate scarce resources to it. Indeed, if housing cases are to gain true equal status with other cases, there must be a significant and meaningful allocation of resources to the housing division of the District Court, including additional judges, support staff, and improved physical facilities.

### **Civil Cases**

The civil division of the District Court would hear cases up to \$50,000. Currently, the New York City Civil Court has a jurisdictional limit of \$25,000, and the lower civil courts outside of New York City have a jurisdictional limit of \$15,000.

This \$50,000 jurisdictional limit of the proposed District Court would better reflect the monetary amounts sought in modern litigation and provide for an improved allocation of cases in the affected courts. The current limits needlessly increase the civil caseload of the Supreme Court. And while the substantial cost of prosecuting a Supreme Court action is prohibitive to many New Yorkers, the proposal will provide a relatively inexpensive forum for individuals and small businesses to go to court in matters involving up to \$50,000.

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<sup>33</sup> Under some previous merger proposals, which would have consolidated many courts into a single Supreme Court tier, there was a disagreement whether some or all of the City Courts should be included in the Supreme Court. Under a two-tier structure, however, we have no doubt that all of the 61 City Courts belong in the District Court tier. Town and village courts are not included in the proposal. These judges are sometimes part-time judges, and they are not currently part of the unified court system.

<sup>34</sup> Committee on Housing Court, "President's Letter to Members of the Legislature Concerning Court Merger, Court Structure and the Commission on Judicial Conduct," July, 1996.

### **Criminal Cases**

The criminal division of the District Court would handle misdemeanor cases, and the initial phases—arraignments and preliminary hearings—of felony cases. Once a case is sent to the grand jury, it would fall under the jurisdiction of the Supreme Court. While a merger would consolidate the courts which handle felonies within a Supreme Court, there is a clear need to maintain a separate criminal division of the District Court. The volume of cases and expertise required justify a separate division; at the same time, the ability to move judicial and court personnel from one division to another will permit greater flexibility in handling the substantial variations in the volume of criminal cases that occur from time to time. We recognize that the present situation of two courts dealing with certain aspects of felony proceedings will still not be resolved by this proposal, but understand the decision not to include the Criminal Court, in the interest of forging an achievable court reform plan.

### **The Fifth Department**

The proposals provide for the creation of a fifth judicial department. We support the creation of a fifth judicial department as a means of reducing the workload of the Second Department and of maintaining balanced departments that would represent approximately equal percentages of the State's population.

The Second Department today encompasses approximately 50% of the population of New York State and decides approximately 40% of the appeals filed. For example, during 1996, the Second Department decided more appeals than the Third and Fourth Departments combined.

To handle the increased workload, the number of Second Department justices have been increased to 21, and the Second Department has reduced the size of its panels from five to four justices. This growth has reduced the consistency of the Department's opinions. Moreover, a four judge bench potentially deprives litigants of a dissenting vote that may be needed in order to appeal as of right to the Court of Appeals.<sup>35</sup> When the appellate divisions were created, over 100 years ago, each department had seven judges and sat in panels of five. The purpose was to create some diversity while at the same time preserving a consistent court comprised of justices who were familiar with the decisions of the court. The growth in the Second Department, however, has resulted in a court which may be too large to yield a coherent body of precedent.

Moreover, despite recent increases in judges and personnel, the Second

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<sup>35</sup>

CPLR 5601(a).

Department's workload is much too large for the court to function effectively. For example, in 1996 the Second Department decided 5,254 appeals. By contrast, the First Department decided 3,106 appeals, the Third Department decided 2,110 appeals and the Fourth Department decided 2,128 appeals. In the same year, the Second Department decided 13,453 motions, compared to 7,434 in the First Department, 5,270 in the Third Department and 4,250 in the Fourth Department. In addition, during 1996 the Second Department transferred 152 appeals to other departments.

Given the substantial and disproportionate workload of the Second Department, the numerous reports, including from this Association,<sup>36</sup> urging the creation of a Fifth Department, together with a Fifth Department recommendation from the Second Department's Presiding Justice, the Council believes that the creation of a fifth judicial department is the most practical and efficient way to reduce the workload of the Second Department and to create more efficiency and balance among all of the departments.

The Chief Judge's plan provides that the Legislature is to determine the boundaries of the new Fifth Department, but that the Chief Administrative Judge may do so if the Legislature has not acted by January 1, 2001. The Assembly plan leaves the matter entirely within the discretion of the Legislature.

The Council would prefer to see the Legislature determine the boundaries of the new department, but recognizes that the issue has enormous political overtones. Accordingly, we approve of the Chief Judge's approach, which would allow the Legislature to decide the issue, but would also establish a deadline beyond which the authority to set the boundaries would be transferred to the Chief Administrative Judge. Faced with such a deadline, the Legislature is likely to draw the boundaries itself, rather than leave decision of the issue to the judicial branch. Without a deadline, the Legislature may be unable to reach timely agreement on the boundaries, and creation of the Fifth Department would be delayed accordingly.

### **Eligibility for Appointment to the Appellate Division**

The State Constitution provides that justices of the Appellate Division shall be designated by the Governor from among the justices elected to the Supreme Court.<sup>37</sup> The present system, by limiting the field of potential appellate division justices to elected justices of the Supreme Court, excludes thousands of highly qualified New York attorneys from consideration, as

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<sup>36</sup> Committee on State Courts of Superior Jurisdiction, "A Fifth Department of the Appellate Division. Is it Time for a New Approach?," April, 1994.

<sup>37</sup> Article 6, Section 4(c).



well as hundreds of highly qualified judges who sit in trial level courts other than the Supreme Court. If the pool of eligible candidates included experienced attorneys and a broader range of trial court judges, the Appellate Division bench would better reflect the full breadth of talent, experience and diversity of New York's bench and Bar. This Council's recent Report, "Eligibility for Appointment to the Appellate Division," endorsed creation of a broader pool of candidates who could be designated to the Appellate Division.<sup>38</sup>

The restructuring proposals, by including five current courts within the restructured Supreme Court, would substantially broaden the pool of justices who are eligible for appointment to the Appellate Division. The pool of candidates would become more diverse, especially due to the inclusion of the Family Court, which has a particularly large number of women and minority judges. The approach utilized in the restructuring proposals strikes an appropriate balance between the desire to increase the pool of candidates eligible for designation to the Appellate Division, the need to ensure that appellate cases are heard by judges with suitable experience and background, and a desire to have the highest quality of judges.

It is true that, under the restructuring proposals, judges of the District Court would still be excluded from the pool of judges eligible for designation to the Appellate Division. The inclusion of these judges would create an even more diverse pool of candidates, and to many would be the preferred alternative. However, the two-tier structure is a practical approach to creating a much larger and diverse pool of judges eligible for designation to the Appellate Division.

### **Judicial Selection and Related Issues**

While the Chief Judge's proposal is comprehensive in scope, one issue it does not address is judicial selection. The Association has long believed that merit selection of judges, through a nomination and appointment process such as the one presently used to select judges of the Court of Appeals, would result in a more qualified judiciary that, together with court unification, would achieve an even better judicial system in this State.<sup>39</sup> However, we recognize that, while many legislators favor court restructuring, there is no consensus on moving to a merit selection system, and we therefore support the "merger-in-place" approach: elected judges and their successors would continue to be elected, and appointed judges and their

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<sup>38</sup> Council on Judicial Administration, "Eligibility for Appointment to the Appellate Division," April 1997.

<sup>39</sup> See, e.g., reports cited in n4, *supra*.

successors would continue to be appointed. While, as we discuss below, any restructuring proposal must deal with the method of selection for newly created judgeships, including Housing Court Judges and additional Supreme Court Justices, we do not believe it is necessary for the issue of judicial selection to be fully dealt with in the restructuring context.

### **Appointments by the Chief Executive**

While we do not agree with the Assembly that, except as discussed in the sub-sections that follow, selection issues should be addressed in the proposed constitutional amendment, if judicial selection is to be considered, we recommend the following:

A selection system similar to that used by for selecting judges to the Court of Appeals—not just screening panels—should be put in place. And it should be put in place for all judges, not just for those judges who are currently appointed.

There is no question there can be improvement in the procedures by which the Mayor of the City of New York and the Governor appoint certain judges. We believe the appointment should be made by an elected chief executive from a short list of names proposed by a broad based nominating committee that is appointed in such a way that no one official appoints a majority of its members and thus unduly dominates the process.

The use of this type of mechanism for all judicial appointments in the restructured court system would reduce the role of politics and better insure that the highest quality candidates serve on the bench.

### **Selection of Housing Judges**

The restructuring proposals provide for different methods of selecting judges of the housing division in the New York City branch of the District Court. Under the Assembly plan, those judges would be elected. Under the Chief Judge's proposal, those judges would be appointed by the Mayor of the City of New York based on recommendations submitted by a Commission.

We agree that some change in the method of selecting housing judges is necessary under the restructuring proposals. It is one thing for the Chief Administrative Judge to appoint the judges of the current New York City Housing Court, because these judges are actually court-appointed referees. However, it would be quite another thing for the Chief Administrative Judge to appoint the judges of the housing division of the new District Court, because those judges will be actual judges of a constitutional court. We do not believe it would be appropriate for housing division judges to be appointed by another judge.

We strongly oppose the Assembly proposal, which provides for the election of these judges. We should not add yet another category of judges who have to curry favor from political leaders, seek contributions from people who might appear before them, and put themselves before voters who have no idea who they are and no real way of learning about the candidates. Furthermore, the inflammatory rhetoric that surrounds landlord-tenant law would clearly distort the electoral process. There is good reason why judicial candidates may not give their opinions on issues that may come before them; yet a Housing Court election would invite candidates to cross that line.

Under the Chief Judge's proposal, housing judges would be appointed by the Mayor from among those candidates recommended by a commission, established by law, consisting of representatives of the real estate industry, tenants' organizations, civic groups, bar associations and the general public.<sup>40</sup> This is an acceptable approach, which we believe could be made significantly more effective if the Mayor was limited to nominating from a specific number of names put forth by the commission. This would avoid the political manipulation possible in a screening-type committee, where the appointing authority could simply reject all names until the one he or she wanted in the first place finally comes through the commission. In the polarized atmosphere of the housing court, such insulation would be beneficial. The appointing process would be further improved if the commission members were appointed by more than one official, thus reducing the chance that the will of one person would be dominant in the selection process.

We recognize that mayoral appointment might inject a political component into the selection process that does not exist under the current system, in which the judges are appointed by the Chief Administrative Judge. We also recognize the strongly polarized interests of tenant advocates and the real estate industry. Nonetheless, we believe that mayoral appointment, with a limited number of nominees designated by a broad based commission, is an acceptable solution,<sup>41</sup> and urge that the improvements we recom-

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<sup>40</sup> The advisory commission should be composed of members representative of the following groups: the real estate industry, tenants' organizations, civic groups, bar associations and the general public. The following entities should have authority to appoint three members to the advisory commission: the Mayor, the Office of Court Administration, the Public Advocate and the City Council. It is also recommended that, as is true today with respect to judges appointed by the Mayor, the qualifications of candidates for appointment to the Housing Division be reviewed by this Association.

<sup>41</sup> We note that since 1978, mayoral appointment of Family Court and Criminal Court Judges has been pursuant to a system where a limited number of names is recommended to the Mayor by his Judiciary Committee. In addition, each candidate must be found qualified by this Association.

mend be put in place, through either constitutional or statutory provision, to curb the politicization of the process.

### **Successors of Acting Supreme Court Justices**

Under the Chief Judge's proposal, the use of Acting Supreme Court Justices would be phased out by December 31, 2004, and new, permanent Supreme Court judgeships would be created. The method of selecting these judges, and effective dates they would take office, would be as recommended by the Chief Administrative Judge unless the Legislature took superseding action by January 1, 2001. Under the Assembly plan, these judges would all be elected.

The Council supports the Chief Judge's approach, because it leaves open the possibility that the Chief Administrative Judge and/or the Legislature would decide that at least some of the replacement judges should be appointed, either through a screening process or through a more rigorous Court of Appeals selection system. Indeed, we would add a requirement, discussed below, that a certain percentage of the successors of Supreme Court Justices be appointed. The Assembly plan, by providing for the election of these judges, forecloses the possibility of appointment.

The phase-out of Acting Supreme Court Justices also raises the issue of how the current Acting Supreme Court Justices should be treated. Presently, there are 69 Criminal Court Judges and 40 Civil Court Judges serving as Acting Supreme Court Justices. Under the Chief Judge's proposal, those judges would either revert to the District Court (which would include the lower courts from which the Acting Supreme Court Justices were elevated), or they would have to seek selection to the Supreme Court.

#### *1. The Phase Out of Acting Supreme Court Justices*

It is argued by some that, if Acting Supreme Court Justices are phased out, the quality of the lower courts will diminish. This is because the Acting Supreme Court Justice designation has been seen as a career path for non-political individuals (i.e., Criminal Court Judges) to reach the Supreme Court. With that path closed, some fear that there will be less incentive for highly qualified candidates to become District Court Judges.

While the Task Force appreciates the loyal and dedicated service that many Acting Supreme Court Justices have provided to the court system, we believe that the proposed phase-out of Acting Supreme Court Justices (subject, as discussed below, to provisions for "grandfathering" and the need for a percentage of new Supreme Court judgeships to be appointed) is appropriate in a restructured court system. The use of Acting Supreme Court Justices has been a stopgap measure to circumvent the constitutional

limit on the number of justices per 50,000 residents of a judicial district. With the elimination of that limit, a suitable number of permanent Supreme Court judgeships would be created. In that scenario, the continued use of the Acting Supreme Court Justices would no longer be necessary; indeed, it would run counter to the concept of a consolidated court system in which court administrators would be capable of meeting caseload needs without shifting judges from court to court, and without resorting to temporary, stopgap measures.

Nor do we believe that the elimination of Acting Supreme Court Justices would necessarily lead to diminished quality in the District Court. Instead, we believe that, as is the case outside of New York City, judges would view election or appointment to a lower court as a viable career path to the Supreme Court even though they would have to mount a separate candidacy—elected or appointed—for the Supreme Court bench. In short, we believe that, even if the use of acting justices were eliminated, the District Court would attract highly qualified candidates. To ensure that well-qualified and non-political individuals would seek to become District Court Judges because of the incentive of potential future advancement to the Supreme Court, we recommend, as discussed below, that provision be made that some percentage of newly created Supreme Court judgeships be appointed.

## *2. Grandfathering of the Existing Acting Supreme Court Judges*

There is concern that the phase out of the present Acting Supreme Court Justices will end the Supreme Court service of some judges, many of whom have devoted a significant portion of their careers to service on the Supreme Court bench. A return to the lower court for these jurists would deplete the Supreme Court—all at one time—of some of its most talented and experienced judges. For example, in the Criminal Term of Manhattan Supreme Court, the Acting Supreme Court Justices accounted for 69% of all dispositions and entered 69% of the guilty pleas during 1996. It is also widely recognized that, over the past two decades, Acting Supreme Court Justices have—in addition to handling a large caseload—been assigned to handle many of the most protracted, complex, high visibility and difficult trials and investigations in the Supreme Court in New York City.

In the absence of some provision for retention, the legislation as currently written will likely result in the simultaneous departure, in the year 2004, from Supreme Court Criminal Term of forty to fifty experienced and highly competent Criminal Court Judges sitting as Acting Supreme Court Justices, and their replacement by permanent new Supreme Court Justices. The sudden and simultaneous replacement of so many experienced justices by new justices who may well be inexperienced could have a devastating impact on the administration of the Criminal Term of Supreme Court. A

more orderly and less disruptive transition would occur if the Acting Supreme Court Justices are gradually replaced over a period of years, as each Acting Justice retires from the bench.

Moreover, the difficulty of becoming a Supreme Court Justice is likely to be especially acute for those Acting Supreme Court Justices who are actually judges of the Criminal Court. Criminal Court Judges are appointed by the mayor, and many are not politically active. Given the strong role of politics in judicial elections, and the need for candidates to secure the backing of political party leaders, it may be extremely difficult for these judges to run for a seat on the Supreme Court. Even the Acting Supreme Court Justices who were elevated from the Civil Court, in which judges are elected, may find it difficult to mount a successful Supreme Court campaign at this point in their careers.

We therefore recommend that current Acting Supreme Court Justices should be grandfathered, subject to the existing review procedures, so that they could remain on the Supreme Court bench beyond 2004—without having to enter the election process for that court. The designation to Supreme Court would continue to be temporary, however, subject to their continued assignment to the Supreme Court by the Chief Administrative Judge, and the affected judges would not become permanent Supreme Court Justices (nor would there be “successor” Acting Supreme Court Justices). Under an “in-place” approach, Acting Supreme Court Justices would be in the same position as they are today. In this manner, the outstanding service of current Acting Supreme Court Justices would be acknowledged, the permanent makeup of the Supreme Court would not be affected, and the practice of appointing new acting justices would come to an end.

### **Method of Selection of Additional Justices**

Judge Kaye’s restructuring proposal contemplates that the Office of Court Administration will recommend to the Legislature how many additional justices will be needed in the merged Supreme Court. Presumably, most of these justices will be needed to replace Acting Supreme Court Justices whose positions become vacant, but there may be other needs as well. The proposal contemplates that the Legislature or, if it does not act, the Chief Administrative Judge, will decide the method of selection of those justices (under the Assembly’s proposal the successors to the Acting Supreme Court Justices will be elected). In addition, if in the future the Legislature determines more judgeships—district or supreme—are needed, the proposal contemplates that the Legislature will determine how those judges should be selected.

To avoid the possibility that most or all of the new judges (i.e. to

replace the Acting Supreme Court Justices and future new judgeships) will be selected through the election method, which this Association has long opposed, and which would represent a step backward from existing law, we suggest that there be fixed in the constitution an apportionment between appointment and election of newly created judgeship positions. Currently, approximately 60% of the Acting Supreme Court Justices are Criminal Court Judges; thus, it seems appropriate to recommend that 60% of new justices (at least those who will be replacing Acting Supreme Court Justices) be appointed and 40% elected. We suggest that the procedure discussed above for the appointment of judges (p. 34, *supra*) should appropriately apply to these additional appointments.

The apportionment approach would preserve the current balance of judicial selection. With this commitment to appointive judgeships in the future, it will also help assure potential District Court candidates (who will achieve that position by appointment) that they have a potential future as a Supreme Court Justice.

### **Removal of the Cap on the Number of Supreme Court Justices**

The existing cap on the number of Supreme Court Justices has left the Supreme Court in New York City unable to cope with its caseload, and has necessitated stopgap measures such as the assignment of Acting Supreme Court Justices. We support the elimination of the cap, and the creation of a sufficient number of permanent Supreme Court judgeships to adequately handle the caseload of the court.

There is a risk that, as a result of the elimination of the cap, the Legislature may create excess judgeships. However, given the current caseload crisis and shortage of judges, and the need for the Legislature to agree on the method of selection of new judges, this is a small risk—and one worth taking. Ultimately, any excess of judges, unlikely though it may be to occur, would be preferable to the current shortage of judges.

### **Certification to Serve Beyond Age 70**

By creating an expanded Supreme Court, the restructuring proposals would enlarge the pool of justices who are eligible to be certificated to serve beyond age 70.<sup>42</sup> Supreme Court Justices, and an expanded Supreme Court, may be certificated to serve for two year intervals until the age of 76.

It should be noted that the elimination of the cap on the number of

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<sup>42</sup> Judges of the District Court would continue to be subject to mandatory retirement at age 70. We do not address the issue of whether District Court Judges should be eligible for certification.

Supreme Court Justices, and an expanded Supreme Court, may ultimately reduce or eliminate the need to certificate justices to serve beyond age 70. However, certification would remain a viable tool for keeping the Supreme Court bench adequately staffed, and especially, of meeting short-term staffing needs. The availability of certificated justices would also act as a safety net if the Legislature has difficulty agreeing on the number of permanent judgeships to be created, the method of selecting those judges, and the areas of the State where the judges should sit.

Moreover, we believe that certification would retain its value as a means of keeping some of our most distinguished and experienced jurists on the bench. The enlarged pool of justices eligible for certification in a restructured court system would enhance the value of this process.

However, we do recommend that, in determining how many justices to certificate, particular attention be paid to the constitutional requirement of the "need" for certificated judges. Sometimes in the past this requirement has not been adequately followed. We also suggest that the Office of Court Administration provide periodic reports which take into account the need for additional judgeships and the removal of the cap on the number of justices per 50,000 residents in a Judicial District.

### **The Cost of Merger**

The Office of Court Administration has yet to provide a cost estimate for implementing the restructuring plan. In the past, however, the cost of merger has been a rallying cry for those who oppose court consolidation. Clearly, the cost of merger will be an important factor in the ultimate success or failure of the proposal.

Some aspects of the current proposal are likely to result in lower costs than the 1986 proposal which received first passage in the Legislature. For example, a two-tier structure would entail the elevation of fewer judges and their support personnel to the Supreme Court than would a single-tier structure. In addition, there are fewer pay disparities among judges than there were a decade ago. Moreover, we believe that the costs associated with restructuring would be offset within a few years by operational changes which would lead to greater efficiency and increased productivity within the court system. And, significantly, the streamlined system would be far less expensive for litigants to use.

Finally, the cost of merger must be viewed within the context of the overall cost of operating the unified court system. In recent years, the annual budget of the unified court system has totaled approximately \$1 billion. Although the costs of restructuring are likely to be far from negligible, they will likely comprise a small fraction of the overall court system budget.



The bottom line is that funds spent on restructuring the courts would be money extremely well spent.

**Conclusion**

The proposals to restructure the courts seek to end the confusing array of nine separate courts which presently exist in New York State. These proposals, with the recommendations and modifications discussed above, will improve the quality of justice, permit a more efficient administration of the courts, and create a more user-friendly court system for the citizens of New York State.

*January 1998*

### **Committee on Judicial Administration\***

Robert L. Haig, *Chair*  
John Patrick Marshall, *Secretary*

\* This Report was prepared by a Task Force on Court Restructuring, composed of members of the Council on Judicial Administration and representatives of its constituent court committees. The Task Force was composed of Jay G. Safer, Chair, and the following additional persons: Steven J. Antonoff; Helaine Barnett; Gary S. Brown; Eliot J. Cherson; Stephen G. Foresta; Christopher P. Hall; James W. Harbison, Jr.; Barry Kamins; Jerianne E. Mancini; Maria Milin; Abigail Pessen; William C. Rand; Anne Reiniger; and Alan D. Seget.

Mr. Seget, the representative on the Task Force from the Association's Committee on Trusts, Estates, and Surrogate's Courts, does not agree that the Surrogate's Court should be merged into the Supreme Court, and believes, for reasons that appear in the following dissent of that Committee, that the Surrogate's Court should be continued as a separate court.

**Dissent to the Report of the Council on Judicial  
Administration on the Proposed Court Restructuring  
Constitutional Amendment insofar as the Amendment  
Would Merge the Surrogate's Court into a  
Consolidated Supreme Court**

*by* THE COMMITTEE ON TRUSTS, ESTATES AND SURROGATES' COURTS

**Summary of Proposal as it Relates To the Surrogate's Court**

This resolution proposes an amendment to the New York State Constitution that would consolidate the state's major trial courts into a two-tier system, with a statewide Supreme Court and a statewide District Court. The Surrogate's Court, with the current Supreme Court, Court of Claims, County Court and Family Court, would be merged into a new, consolidated Supreme Court as of January 1, 2000. The consolidated Supreme Court would contain, among others, a Probate Division, which would exercise jurisdiction over all matters that were within the jurisdiction of the Surrogate's Court on December 31, 1999. The resolution does not address the issue of whether or to what extent the Surrogate's Court Procedure Act and the Estates, Powers and Trusts Law would be retained, modified or repealed.

All Surrogates in office on January 1, 2000 would serve out their terms as Justices of the Supreme Court/Probate Division in their own judicial districts. The resolution would, however, give the Office of Court Administration wide discretion to reassign all Justices of the new Supreme Court to other districts or divisions. Similarly, nonjudicial personnel could be reassigned for any reason, although the resolution provides that "especially skilled, experienced and trained personnel shall, to the extent practicable, be assigned to like functions in the district court and the supreme court."<sup>43</sup> Each county's former Surrogate's Court records would, unless otherwise provided by law, be deposited in the same county's Office of the Clerk of the Supreme Court.

**Discussion**

Throughout the history of the State of New York, the Surrogate's Court has been maintained as an independent court within the state's judicial system. There are excellent reasons for it to remain so. Merging the Surrogate's Court into the Supreme Court would be counterproductive to the goals of efficient administration and high quality justice. The reasons are rooted in the administrative and specialized nature of Surrogate's Court work. Such work requires a higher level of staffing and judicial expertise

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<sup>43</sup> S. Res. 4226, 1997-98 Reg. Session, § 19.

than required by the general Supreme Court caseload. The Surrogate's Court is not like any other court; the rules are different (see, e.g., the SCPA, the Uniform Rules for Surrogate's Court and the Official Forms Prescribed by the SCPA); the substantive law is different (see, e.g., the EPTL, IRC Ch. 1, Subch. J, Ch. 11-14, and NYS Tax Law Art. 26); and, most important of all, the Surrogate's Court functions like none of the other "trial" courts within the judicial system.

Unlike the Supreme Court, and the other Courts proposed to be merged into it, the Surrogate's Court is not primarily a forum for adversarial litigation. Rather, the work of the Surrogate's Court is primarily administrative, i.e., processing tens of thousands of uncontested probate proceedings, intestate administration proceedings, small estate administration proceedings, accounting proceedings, etc. If these were contested Supreme Court cases, the petitioners' papers would be scrutinized by opposing counsel. But since these are uncontested Surrogate's Court proceedings, specially trained Clerks and Law Department attorneys must critically review petitioners' papers for fulfillment of often complex jurisdictional and other legal requirements.

Although there are occasionally adversarial matters which are decided by trials or on motion papers, an unusually high percentage of even contested matters are resolved by settlement through the active participation of the Surrogates and their Law Assistants, Clerks and staff. The use of Surrogate's Court staff for what amounts to a de facto in-house "alternative dispute resolution" service is one of the Surrogate's Court's most important benefits to the public, and a model for the cost- and time-efficient administration of justice.

The Surrogate's Court also handles an unusually large number of small cases and pro se applicants. For example, of the 5,000 new estate proceedings filed annually in New York County alone, one third involves assets under \$10,000, and half involve assets under \$50,000. The proportions are probably much greater in our smaller counties. Such small cases and numerous bereaved pro se applicants require staff time (and understanding) disproportionately greater than required to file the papers prepared by attorneys in Supreme Court cases.

The Surrogate's Court also differs from the Supreme Court in that the Surrogate's Court's work is highly specialized, while the Supreme Court's jurisdiction is general. Surrogates are elected with or quickly develop expertise in technical areas of substantive and procedural law, including the law of fiduciary accounting, the Estates, Powers and Trusts Law, the Surrogate's Court Procedure Act, and complex areas of related federal and New York income, gift, estate and generation-skipping transfer tax. The Office of Court Administration recognizes and promotes the technical expertise of the Surrogate's Court staff by requiring specialized examinations as a condition of service.

The proposed legislation would, unfortunately, have a negative effect on all these functions. The resolution would eliminate the independence of the Surrogate's Court by permitting the Office of Court Administration to transfer Surrogates out of their elected positions and their staffs to other courts. Although this Committee has great respect for sitting Chief Administrative Judge Lippman and no doubt about his good intentions, it cannot endorse any legislation that would create the potential for misuse of this authority by his successors.

It is true that authority already exists to transfer a Supreme Court Justice to sit in the Surrogate's Court, and to assign Supreme Court cases to Surrogates. Such practices are commonplace and helpful in our less populous counties. However, in larger counties, where Surrogates have full-time Surrogate's Court caseloads, such transfers are not the norm and would be suspect because of the potential for abuse. By eliminating the distinction between the Surrogates and Supreme Court Justices, such transfers could become more commonplace in our larger counties, thereby diminishing the Surrogates' judicial independence from court administrators, and correspondingly diminishing the Surrogates' accountability to the voters who elected them. Clearly, any proposal to merge the Surrogate's Court into the Supreme Court should include strict criteria to prevent judicial transfers that could be abusive or that could diminish the specialized expertise of the Judges hearing Surrogate's Court matters.

The resolution also fails to guarantee the Surrogate's Courts' retention of their expertise and efficiency. Because all of the consolidated Supreme Court's "judges and staff could be easily reassigned to provide more efficient and speedier justice,"<sup>44</sup> the Surrogate's Court attorneys and staff members who have been specially trained (and tested) in the rules, procedures and substantive law of Surrogate's Court practice could find themselves reassigned anywhere. The pressure to provide "speedier justice" to litigants in other parts of the consolidated Supreme Court can easily be expected to cause the public served by the Probate Division to suffer.

Were the Surrogates to become Supreme Court Justices, there would be increased pressure on the Office of Court Administration to continue reducing probate division staff in order to provide greater resources to other Supreme Court divisions. For example, a primary reason that Family Court practitioners advocate merger of that Court into the Supreme Court is their hope that the Family division will obtain larger staffing than the Family Court has now.

However, the answer to understaffing in the Family Court (or such

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<sup>44</sup> Statement by Unified Court System, "Proposal to Reform N.Y.S. Court System Submitted to Legislature 3/19/97."

other underserved areas as the Housing Court) is not to strip the Surrogate's Court or any other court of the staff required for proper functioning. Rather, the answer is to seek and obtain whatever additional personnel and funding are required to enable the underserved courts to serve the public properly. If any court restructuring proposal is used as an excuse not to fund the courts properly, the result will be to diminish the quality and efficiency of court system as a whole.

Because, as mentioned above, the Office of Court Administration already has significant power to transfer Judges in and out of the Surrogate's Court, the need to do so is hardly a legitimate reason for the proposed Surrogate's Court merger. It would be worthwhile to permit temporary assignment of a Surrogate to the Surrogate's Court of an adjoining county in order to hear a case for which the resident Surrogate is disqualified or unavailable. That, however, does not require so radical a proposal as merger of the Surrogate's Court into the Supreme Court.

Much of the support for the resolution appears to be based on the simplicity of the proposed two-tier system; the public, it is argued, would be better served by a streamlined court system that would be easier to understand. But the existing Surrogate's Court is already "user friendly" and capable of dealing with both large and small matters. In the name of the public good, ironically, the proposed amendment threatens to dilute the effectiveness of the Surrogate's Court as an institution that well serves the public today.

Probate and estate matters have been within the primary jurisdiction of a separate Surrogate's Court since the late 1600s.<sup>45</sup> Every previous attempt to merge the Surrogate's Court into courts of general jurisdiction has failed.<sup>46</sup> These failures have resulted in a public better served by a Surrogate's Court whose expertise, efficiency and independence are guaranteed by law.<sup>47</sup>

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<sup>45</sup> For historical accounts tracing the independence of the Surrogate's Court, see *Runk v. Thomas*, 200 N.Y. 447, 94 N.E. 363 (1911); *In re Morris*, 134 Misc. 374, 235 N.Y.S. 461 (Surr. Ct. Kings County 1929); *In re Brick's Estate*, 15 Abb. Pr. 12 (Surr. Ct. N.Y. County 1862).

<sup>46</sup> "Historically, the Surrogate's jurisdiction was very limited, and through the years, as studies were made to determine whether to consolidate the Surrogate's Court with a common law forum, the legislators instead expanded the jurisdiction of the Surrogate's Court." MV Turano and C.R. Radigan, *New York Estate Administration* 1 (1st ed. 1986).

<sup>47</sup> In 1928, Chief Judge Cardozo recognized the efficiency of a separate Surrogate's Court in a unanimous decision of the Court of Appeals, holding that the Surrogate's Court, rather than the Supreme Court, should supervise the liquidation of a decedent's partnership assets. "Only by such relief," wrote the Chief Judge, "can there be complete justice between the parties without oppressive expense or harrowing delay." *Raymond v. Davis' Estate*, 248 N.Y. 67, 161 N.E. 421, 422 (1928) (emphasis added).

**Recommendation**

For the foregoing reasons, we disagree with the report of the Council on Judicial Administration with respect to the proposed merger of the Surrogate's Court into a consolidated Supreme Court.<sup>48</sup> This Committee expresses no opinion on the merits of any other portion of the resolution.

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<sup>48</sup> The position expressed in this dissent is joined by the Committee on Estate and Gift Taxation.