INTERNATIONAL INVITATIONAL CONFERENCE

ON

MATRIMONIAL AND CHILD SUPPORT

May 27-30, 1981

Edmonton, Alberta, Canada

Conference Materials

The Institute of Law Research and Reform
402 Law Centre, The University of Alberta
Edmonton, Alberta, Canada

October, 1982

FOREWORD

The Institute of Law Reseach and Reform issued a report entitled "Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved" in two volumes in March, 1981. Volume 1, the "Summary Report", is based on Volume 2, the "Technical Reports". The report contains the results of an empirical research study carried out for the Institute by the Canadian Institute for Research, with partial funding from Health and Welfare Canada and Alberta Social Services and Community Health.

The purpose of the study was to develop the profiles of the individuals involved in maintenance payments, to document their perceptions of the legal process concerned with maintenance, and to investigate the reasons for the payment or non-payment of money under maintenance orders. To achieve this objective, five separate subsidiary studies were carried out: a study of Supreme Court (now called the Court of Queen's Bench) records in Edmonton and Calgary, a study of Family Court records in Edmonton, Calgary, Lethbridge and Grande Prairie, door-to-door surveys of the men and women involved with maintenance orders and a study of defaulters. The study was designed to obtain facts which, when analyzed, may lead to a better understanding of the problems under the existing system and a more informed approach to the solution of the problems.

Subsequently, in May, 1981, the Institute convened a conference with the following objectives:

(1) To share the findings of the study with persons interested in family law and family policies.

(2) To bring experts from other jurisdictions together to critically evaluate the findings of the study in a comparative context.

(3) To bring persons specially affected by maintenance issues together to discuss the policy implications arising from the study.

(4) To provide a forum for public debate of the policy options available with respect to maintenance payments in order to assist decision makers in the resolution of policy issues.

Participation in the Conference was by invitation, and the participants were drawn from across Canada, the United States, Sweden and England. They included practising lawyers, judges, academics in the fields of family law, sociology and social work, court and social program administrators, and representatives of such interest groups as single parents and women. The participants are listed in Part 6 of this publication.

The Conference proceeded according to its programme. The results of the Institute's study of matrimonial support failures was first presented by the members of the Steering Committee

which supervised the study and the researchers who conducted it. On the following day, five invited speakers from England, Sweden and the United States discussed their research and analyzed the results of the Institute's study. Four papers were presented and are included in this publication. Professor David Chambers of the University of Michigan Law School did not submit a paper but compared the findings of the Institute's study with his own findings published in a book titled "Making Fathers Pay" (1979).

The Conference was then divided into eight groups, each of which was representative of the Conference participants in terms of professional experience and interests. No group consisted of more than 20 participants. The purpose of the division was to provide small forums in which all participants could contribute, and each group discussed the same policy issues.

After a full day of group discussions, the reporters from the groups, in collaboration with the Conference Chairman, prepared a summary of the group discussions for presentation to the plenary session the following morning. The Summary of Group Discussions, which was debated in the plenary session, is included as Part 5 of this publication.

As the Institute's report "Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved" has already been published, it is not reproduced herein. However, this study was the subject of the Conference, and its major findings are presented below in point form in order to facilitate understanding of the papers included as Parts 1 through 4 of this publication.

The major findings of the study are as follows:

- Over two-thirds of the divorces granted in Edmonton and Calgary are for couples married in Alberta.

- Periodic maintenance awards typically involve one or two children.

- The average duration of marriage at the time of the divorce was 10.5 years.

- Slightly more than half of the women surveyed were employed full-time at the time of the study and about one woman in five was on social assistance. About a third of the women said that they had been employed for less than half of the time since their divorce/separation.

- Over 80% of the women surveyed reported net monthly incomes of less than $1000.

- Eighty-five percent of the men surveyed were employed or self-employed at the time of the study. Nearly two-thirds reported that they had been employed continuously since their divorce/separation.

- The most important factor influencing the granting of maintenance awards was the presence or absence of dependent

children. Wives were rarely granted periodic awards when no dependent children were involved. Even when there were dependent children, only 18% of the wives received periodic awards.

- About a third of the cases involving dependent children did not contain a maintenance award.

- If the husband was the petitioner, maintenance was less likely to be granted.

- If adultery was cited as a ground for divorce and the husband was the petitioner, maintenance was less likely to be granted. If the wife was the petitioner and adultery cited, maintenance was more likely to be granted.

- The income of the husband was strongly associated with the amount of awards to both the wife and children; there was no association between the income of the wife and the amount of the award.

- The amount of awards to children in cases which the wife was receiving social assistance tended to be lower than in other cases.

- The survey of women indicated that about half of all maintenance orders in Calgary were paid up at the time of the study. However only about a third of the ex-husbands paid their orders every month and in the full amount. About 30% of the women interviewed said that their husbands/ex-husbands had paid nothing in the past year.

- Thirty-eight percent of the Edmonton and Lethbridge cases had made all their payments over the duration of the case. Twenty-three percent of the Edmonton and 7% of the Lethbridge cases had made no payments at all over the duration of the cases.

- Enforcement proceedings are commonly initiated in Family Courts: 87% of the cases in Edmonton and 74% in Calgary showed evidence of some enforcement.

- There was some evidence that enforcement proceedings are followed through in many instances. Forty percent of the Edmonton cases contained unserved summonses and 14% contained unserved warrants.

- About 70% of a random sample of defaulters in Edmonton and Calgary were traced without using extensive tracing procedures.

- There was some evidence that poor record-keeping affected enforcement. The initiation of enforcement was more common in the 54% of cases in which researchers were able to locate ledger cards in Calgary than the cases for which no ledger card could be found.

- The survey of women indicated that there is a lack of faith

in the efficiency of enforcement among many women and that this may cause some not to file a complaint.

- Comments made by men suggest that better enforcement may lead to considerable resistance.

- Low income appeared to be associated with irregular payment of maintenance orders but not with non-payment in the survey of men.

- Maintenance orders for marriages of long duration were better paid than for marriages of short duration.

- There was some evidence that larger maintenance orders were better paid than smaller orders.

- There was no statistical evidence that dissatisfaction with access arrangements was associated with irregular or non-payment. However there were some respondents in the men's survey who gave this as their most important reason.

- The majority of both men and women interviewed gave a continued sense of responsibility for the children as the main reason for regular payment.

- Fear of enforcement proceedings was not a major reason for payment among men.

- Inability to afford payments was a major reason given by men for non-payment. However, the question of 'affordability' is relative: it depends upon the priority accorded by men to maintenance obligation relative to other financial obligations.

- There was a great amount of missing information in Supreme Court files. This information included: incomes of each spouse, employment status, assets and debts and whether or not a spouse was on social assistance. It seemed unlikely that the courts received sufficient validated evidence to review the fairness and appropriateness of the minutes of settlement.

- Information relating to income, assets, debts, and employment was recorded very rarely in the files of all four Family Courts visited. Record keeping systems varied from court to court and there was considerable evidence that ledger cards were not maintained well in Calgary and Grande Prairie courts.

- There was widespread dissatisfaction with the legal proceedings connected with the granting of awards and enforcement by both men and women.

- At the time of the granting of a decree nisi about one-third of the wives were on social assistance. No trends in this pattern were discovered over the eight years of files reviewed in the Supreme Court Study. The Family Court Study revealed that about a quarter of the women were on social

assistance at the time of the first show cause hearing. In the survey of women, it was found that 21% were on social assistance at the time of the study.

The delay in publishing these Conference materials, although unavoidable in the circumstances, is nevertheless regretted.

Vijay K. Bhardwaj
Conference Chairman

Edmonton, Alberta
October, 1982

ACKNOWLEDGEMENTS

The International Invitational Conference on Matrimonial and Child Support was convened and hosted by the Institute of Law Research and Reform. However, the Institute gratefully acknowledges that the Conference could not have been held without the financial assistance which was provided by:

Health and Welfare Canada,
Department of Justice Canada,
Department of Secretary of State Canada, and
Government of Alberta.

The Conference was organized by a committee composed of:

Vijay K. Bhardwaj, formerly of the Institute's legal staff and Conference Chairman,

Gayle James, Faculty of Social Welfare, University of Calgary (Edmonton Campus),

Bernard Krewski, Alberta Department of Social Services and Community Health, and

Vivien Lai, Alberta Department of Social Services and Community Health.

The Institute deeply appreciates the time and skill which these persons devoted to the organization of the Conference. Carole Worock, Ilze Hobin, and Tillie Shuster provided essential assistance in making Conference arrangements.

The Institute thanks all of those persons who participated in the Conference as guest speakers, chairpersons and rapporteurs; their names appear in the Conference Programme which follows these acknowledgements. As well, the Institute thanks the invited Conference participants. The success of the Conference depended on their active participation in its discussions. Their names appear in Part 6 of this publication.

Thomas W. Mapp
Acting Director
Institute of Law
Research and Reform

Edmonton, Alberta
October, 1982

INTERNATIONAL INVITATIONAL CONFERENCE ON MATRIMONIAL AND CHILD SUPPORT

Chateau Lacombe, Edmonton, Alberta

May 27 - 30, 1981

HOST: INSTITUTE OF LAW RESEARCH AND REFORM
EDMONTON, ALBERTA

Conference Chairman: VIJAY BHARDWAJ
Programme Chairman: W.H. HURLBURT, Q.C.

PROGRAMME

WEDNESDAY, MAY 27

5:30 - 7:00 p.m.	Registration (Hotel Foyer) Distribution of Materials
7:30 - 9:30 p.m.	Opening Session (Alberta B) Welcome by the Institute Panel on Matrimonial Support Failures: Reasons, Profiles & Perceptions of Participants Involved W.H. HURLBURT – Chairman Institute of Law Research & Reform, Edmonton VIJAY BHARDWAJ Institute of Law Research & Reform, Edmonton GAYLE JAMES Faculty of Social Welfare, University of Calgary BERNIE KREWSKI Alberta Social Services & Community Health, Edmonton VIVIEN LAI Alberta Social Services & Community Health, Edmonton RICK POWELL Canadian Institute for Research, Calgary NANCY SOPER Health & Welfare Canada, Ottawa
9:30-11:00 p.m.	Cash Bar

THURSDAY, MAY 28

INTERNATIONAL PERSPECTIVES
(Alberta A)

The speakers will critically evaluate the study of the Institute in the context of their own jurisdictions and will also present the results of their own empirical research in the area of matrimonial and child support

9:00-10:00 a.m.	The British Experience COLIN GIBSON Department of Sociology, Bedford College, University of London, England
10:00-11:00 a.m.	The Swedish Experience ANDERS AGELL Faculty of Law, University of Uppsala, Sweden
11:00-11:30 a.m.	Coffee
11:30-12:30 p.m.	The American Experience DAVID CHAMBERS Faculty of Law, University of Michigan, Ann Arbor
12:30-2:00 p.m.	Luncheon
2:30-3:00 p.m.	JUDITH CASSETTY School of Social Work, University of Texas, Austin
3:00-4:00 p.m.	LENORE WEITZMAN Centre for The Study of Law & Society, University of California, Berkeley
6:30-7:30 p.m.	Reception (Alberta B)
7:30 p.m.	Banquet (Alberta B) Guest Speaker PROFESSOR H.R. HAHLO President, International Society on Family Law

FRIDAY, MAY 29

GROUP DISCUSSIONS
(Rooms to be announced)

The conference will be split into groups of not more than 15, with a Chairperson and a Rapporteur, to discuss the issues arising out of the research study and earlier presentations

9:00-noon	Group Discussions
noon-2:00 p.m.	Luncheon (Alberta B) Guest Speaker: PROFESSOR DONALD J. MacDOUGALL Faculty of Law, University of British Columbia
2:00-4:00 p.m.	Group Discussions (continued)

SATURDAY, MAY 30

PLENARY SESSION
(Alberta B)

W.H. HURLBURT — Chairman
Institute of Law Research & Reform, Edmonton

9:00-10:30 a.m.	Reports of Group Discussions and recording views and opinions
10:30-11:00 a.m.	Coffee
11:00-noon	Reports of Group Discussions and recording views and opinions (continued) THANKS

CHAIRPERSONS:

CLAIRE L'HEUREUX-DUBE
Court of Appeal, Quebec

W.H. HURLBURT
Institute of Law Research & Reform, Edmonton

L.W. KENNEDY
Population Research Lab, University of Alberta

Wm. KERWIN
Faculty of Social Welfare, University of Calgary

BERNIE KREWSKI
Alberta Social Services & Community Health, Edmonton

R. RAMSAY
Faculty of Social Welfare, University of Calgary

CAROLE SMITH
Barrister & Solicitor, Calgary

NANCY SOPER
Health & Welfare Canada, Ottawa

W.H. WHITE
Juvenile & Family Courts, Edmonton

RAPPORTEURS

J. BURGOYNE
Sheffield City Polytechnic, Sheffield, England

A. BISSETT-JOHNSON
Faculty of Law, Dalhousie University, Halifax

AUDREY DEAN
Alberta Social Services & Community Health, Edmonton

G. GALL
Faculty of Law, University of Alberta, Edmonton

LOIS GANDER
Legal Resource Centre, Edmonton

JOHN McDERMOTT
Alberta Social Services & Community Health, Edmonton

KATRINE McKENZIE
Alberta Social Services & Community Health, Edmonton

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DERWYN WHITBREAD
Social Worker, Edmonton

CONFERENCE STAFF

ILZE HOBIN

TILLIE SHUSTER

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PART 1

PAYING OF MAINTENANCE IN SWEDEN

Anders Agell

PAYING OF MAINTENANCE IN SWEDEN

Anders Agell*

1. The aim of the paper

The objective of this paper is primarily to present some facts from a research project dealing with the practical functioning of the Swedish maintenance system in a way very similar to the comprehensive study prepared for the Institute of Law Research and Reform. Some comparisons will be made between the results from the two projects. As a background to the empirical findings it is, however, necessary to give a general survey of the basic Swedish rules on maintenance within family law, including maintenance advance as a special form of social benefit and also the rules on enforcement of maintenance claims. Some further remarks about the legal background in Sweden and about the legal political matters will be made in the last section of the paper.[1]

2. The legal background

2.1. Introduction

Questions on maintenance, like other matters within family law as a part of private law, are dealt with in Sweden by the ordinary courts. The rules on maintenance are given in the Marriage Code (Giftermålsbalken) concerning the mutual obligations of spouses and in the Code on Parents and Children (Föräldrabalken) as far as children are concerned. The system of rules on maintenance was revised through alterations of the Codes in 1978. A basic principle, which has always been applied, is that an ex-spouse and a child, who are both claiming economic support from the other spouse after divorce, are treated as different subjects in the sense that a joint maintenance allowance for ex-spouse and children at the same time never occurs. Each party is treated individually although it is possible to evaluate the economic need of an ex-spouse with respect to the fact that custody over children can decrease his or her possibilities to earn an income.

Another starting point is that the rules on maintenance are exactly the same for children born outside and within marriage. (This is not surprising in view of the modern habits of family formation in Sweden, where cohabitation without marriage is widespread and socially accepted and where 40% of all children

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* Professor of Private Law, Faculty of Law, University of Uppsala, Sweden

[1] See for a somewhat more general survey of Swedish law my contribution to "Social Security and Family Law". (United Kingdom Comparative Law Series. Volume 4.) ed. by A. Samuels. London 1979. P. 149 ff.

born in 1980 had unmarried mothers.)[2]

Maintenance allowances occur normally in the form of a duty to pay monthly allowances in advance. An allowance can be fixed either through agreement or through a court judgment.

All maintenance allowances are index regulated according to a special Act establishing an automatic adjustment tied to the rate of inflation for all maintenance allowances being paid.[3] A fixed maintenance allowance can further be changed according to general rules on the importance of "changed conditions". It may be worth underlining the possibility that unforeseen effects of the special Act on index regulation of maintenance allowances can lead to changed conditions and make a new calculation of the allowance necessary. Such may be the case if, for a period, the earnings of the payer have not kept pace with the adjustments of the allowances with respect to inflation.

2.2 Alimony to an ex-spouse

The divorce rules of the Marriage Code, which were liberal even before 1974, have since that year been based on the idea that the wish of a spouse to terminate the marriage shall always be respected. In order to prevent overhasty divorces, however, there are special rules for a so-called reconsideration-period of six months. In two cases a divorce-decree by the court presupposes the expiration of the reconsideration period, which commences through a declaration by the court. One case is when only one of the spouses wants a divorce; the other where one of the spouses has custody of a child under sixteen years of age. The conditions for a reconsideration-period mean conversely, that childless couples can obtain immediate divorce if they both want it.

The rule on alimony after divorce, which was introduced in 1978, has the following wording (Marriage Code ch. 11.sec. 14):

> "After divorce each spouse must see to his or her own support.
>
> If a spouse is in need of an allowance during a transition period, the spouse is entitled to alimony from the other spouse according to what is reasonable with respect to the ability of the spouse and to other circumstances.
>
> If a spouse has difficulties in supporting herself after the dissolution of a long marriage or if special reasons apply the spouse is entitled to alimony for a longer period than stated in par 2."

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2 On cohabitation without marriage in Sweden see Agell, The Swedish Legislation on Marriage and Cohabitation: A Journey Without a Destination. XXIX Am. Journal of Comparative Law 1981 p. 285.

3 Lag om andring av vissa underhallsbidrag (Act on Change of Certain Maintenance Allowances), 1966

The new rule reflects a development which had already taken place in case law before. For rather a long time alimony has occurred mainly in two types of cases: to wives who have worked in the home during a long marriage, and to young wives with small children, who can constitute a reason for the wife not taking full-time work outside the home. The basic rule, that each spouse must see to his or her own support after divorce, can be seen in connection with the liberal divorce rules and the accompanying idea that the economic connections between the spouses as a matter of principle shall be cut off when the marriage has come to an end.

Previously a periodical allowance ceased automatically on the remarriage of the recipient. A notable change is that this rule has been abolished through the legislation of 1978. The remarriage, as well as entering into permanent cohabitation without marriage with a new partner, can, however, be considered as a fact which can lead to a re-examination of the obligation according to a special rule on the importance of "changed circumstances" (ch. 11 sec. 15). One reason for letting the alimony payments continue has been that no right to alimony should ever exist unless it can be said that the old marriage has caused the need for alimony after divorce. Another argument has been the desire not to give remarriage an automatic, negative effect for the entitled spouse, such as to give her reason not to marry but just to cohabit with a new partner.

2.3 Maintenance to children and maintenance advance

A starting point is that both parents are jointly responsible to support their children according to what is reasonable with respect to the needs of the child and the economic situation of the parents (ch. 7 sec. 1 in the Code on Parents and Children). According to the legislation of 1978 the maintenance obligation ceases when the child reaches 18 years of age. If, however, the child is attending school at this point of time or if it resumes its education before it reaches 19 years of age the parents have a maintenance obligation until the child reaches 21 years of age, as long as the education continues. "Education" includes here studies only in the elementary school or the secondary school and other comparable elementary education. The limitation of the duty of the parents to elementary education of the children has to be seen in connection with the availability of public support, although mainly through study loans, for higher education.

Two purposes especially underlay the legislation of 1978 concerning maintenance to children. One objective was to alleviate the economic burden of parents paying maintenance. The payers were supposed to be often too much oppressed by their obligation. Another aim was to introduce more uniform norms for the calculating of maintenance allowances. Undoubtedly the amount of maintenance allowances decided upon by the courts could vary markedly even when the underlying facts were similar. The new principles for calculation of maintenance allowances were, however, not applicable at the time when the research project, outlined below, was carried through. A short account for the new principles will, therefore, not be given until the last section

of the paper. Moreover it is perhaps not necessary, as a background to the research project, to give any further information here about the rules on maintenance to children. In order to answer in advance some possible questions, which might be raised by the reader, I prefer to give some more information about the legal background.

The general duty of the parent can form the basis for a court order to pay support to a child if the parent either has no part in the legal custody nor lives permanently with the child. The parent can, however, be obliged to pay maintenance allowances to a child even when he and the other parent have joint custody over the child, but the child lives permanently only with the other parent (ch. 7 sec. 2). (Divorced and unmarried parents can get joint custody through a court degree if they both want such an arrangement.) If a parent lives permanently with the child he is supposed normally to fulfil his duty to give support by payments of current costs for the child. In such a case there is, however, a possibility (which is seldom used) to base a court order also on neglect of the duty to support the child (ch. 7 sec. 6).

Since it is common today that a child lives with a step-parent it is worth mentioning also that there is a duty to maintain a stepchild (ch. 7 sec. 5). The duty is, however, subsidiary to the obligations of the biological parent, who does not live with the child. An innovation, in the legislation of 1978 is, however, that the rule has been extended to cover not only stepchildren in a formal marriage but also children of both parties in a free cohabitation between a man and a woman, provided the parties have been married to one another or that they have one biological child together. Much could be said about this solution which has been expressly justified on the grounds that all children in the same family shall have the right to the same treatment. An underlying, although here not openly expressed, idea, seems also to have been the special Swedish idea of neutrality of the legislators to the forms under which a couple cohabits.

A short outline must also be given, of the so-called maintenance advance which is a social benefit to children under 18 years of age who are not living with more than one of the parents.[4] The maintenance advance is constructed to fulfil two different purposes. In the first place the benefit means that the State, acting through the local insurance offices, pays out in advance a maintenance allowance to children if the person responsible for paying the allowance--normally the child's father--has not properly paid the maintenance which on the basis of a court judgment or an agreement he was responsible for paying. This advance payment is made, however, only up to certain, index-regulated, amount. In Oct. 1981 full maintenance advance thus amounted to 590 kr[5] per month for each child receiving an allowance. If the advance has been provided, the local insurance office tries to recover what has been paid out

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[4] See Lagen om bidragsförskott (Act on Maintenance Advance), 1964.

[5] A Canadian Dollar is worth over 4 kr (Swedish crowns).

from the person responsible for paying maintenance. At the same time the office can act as representative for the custodian for the enforced payment of the maintenance amount above 590 kr per month that the one providing maintenance may be obliged to pay.

In the second place, ever since 1964 the maintenance advance has meant the further benefit to the single custodian that the state pays a supplementary allowance if the maintenance allowance established is lower than full maintenance advance. The system guarantees therefore that the single custodian is always sure of receiving once a month at least 590 kr (June 1981) for each child, irrespective of what the parent paying maintenance is obliged to pay and of what he has actually paid.

It should be emphasized also that the maintenance advance is provided irrespective of the income and the assets of the custodian as well as of the child itself. As a consequence of this construction and of the fact that the economic duty of a stepfather is subsidiary to the obligation of the biological father (cf above) the remarriage of the custodian never diminishes the maintenance advance. (This means in other words that the economic liability of a stepfather is seldom burdensome.)

The right to full maintenance advance is, however, conditional on the fact that the maintenance allowance corresponds to the ability of the debtor. The right to the benefit is also conditional on the willingness of the mother as custodian to cooperate in the establishment of the paternity of the child.

2.4 Attachment of earnings

A payer of maintenance, who neglects his obligations, cannot be imprisoned in Sweden. That possibility existed previously but was abolished many years ago.

For execution of debts and other legal claims there is a special organization, which is administered by one central authority (RiksskatteverKet) and is composed of about 100 offices (kronofogdemyndigheter) all over the country. The organization is quite independent of the courts although a claim for execution has normally to be based on a judgment or a decision by a court. Execution of maintenance allowances can, however, be based also on a written obligation to pay a certain allowance, which is undersigned by the payer and two witnesses. It is the local execution officer (utmatningsmannen) who applies the rules of execution in general or on attachment of earnings as the most practical case as far as maintenance claims are concerned. A party can, however, go to an ordinary Court of Appeal if he wants to get a reversion of a decision by an execution officer.

Continuing attachment of earnings is available for a limited number of claims.[6] This form of execution can take place not only for maintenance and alimony, claims which are given priority, but also with respect to unpaid taxes and fines. A

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[6] See Utsökningsbalk (Code on Execution), 1980, ch. 15.

maintenance allowance can lead to attachment either when the payer is in arrears for unpaid allowances or when he has omitted to pay an allowance in due time at least twice during the last two years and there are reasons to believe that the delay will be repeated. (In practice the decision for attachment is nearly always based on existing arrears.) Attachment of earning is not allowed for unpaid allowances which are older than two years.

When the execution officer has received a request for attachment of earnings he makes an investigation. Not only the payer of maintenance but also his employer is asked for information about the income of the payer; the payer shall also give information about his family situation. If the execution officer orders attachment of earnings he has to decide upon two different amounts of special importance, namely the amount for attachment and the reserved amount.

The amount for attachment is the sum which the employer has to deduct from the income of the payer for each month. When the payer is in arrears the amount for attachment can exceed the current allowance. An order for attachment makes no exclusive distinction between arrears and current allowances. The amount for attachment is calculated with respect to what is considered reasonable. Payments made are, however, in the interest of the creditor, considered to be payments of arrears in the first place.

The reserved amount is that part of the earnings of the payer which he is always entitled to keep for "his own support and the need of his family". The amount is calculated according to specific guidelines published by the central authority and revised every year. The guidelines are coordinated with the rules on subsistence level as a limitation of the duty to pay taxes. Suppose that the amount for attachment has been fixed by the execution officer at 2,000 Kr/month, and that the reserved amount is 2,500 Kr/month. In such a case the full amount for attachment cannot be deducted by the employer if the earnings of the payer during a certain month are less than 4,500 Kr.

The fact that the reserved amount includes the basic need not only of the payer personally but also the need of his family means that the present family of the payer is given priority to his earning capacity compared with the economic claims from an older family of his. (It may be added that not only wife and children can form the "family" of the payer as far as execution is concerned. For example, even parents or a woman who permanently cohabits with the payer without marriage can, depending on the circumstances, be counted as members of his family and thus have an influence on the reserved amount.)

The employer has to abide by the decision made by the execution officer. If it is possible with respect to the reserved amount the employer must deduct the amount for attachment from the earnings of the payer and send the sum to the execution officer, who delivers it to the creditor. The employer risks not only a fine but, what is perhaps more important, also personal liability for the payment if he omits to deduct the prescribed amount from the earnings of the payer.

3. The research project

3.1 Introduction

The research at my own Faculty of Law, comparable to the research project at the Institute of Law Research and Reform, deals with the situation as it was already in 1975. The study concerned a nation-wide random selection of on the one hand divorced couples who were divorced in 1971 and on the other hand unmarried parents who had children in 1971 and who were not cohabiting with each other in 1975. An additional condition was that an obligation to pay maintenance allowances had to exist in 1975. This obligation could in the divorce group refer not only to children but to spouses or to spouses and children as well. The rather complicated selection procedure cannot be described here. The information in the study was obtained both from authorities (district courts, child welfare committees and social welfare committees) and from the individuals involved. (Since it was assumed that a questionnaire to fathers of children born out of wedlock could have a disturbing effect in certain cases these fathers were excluded from the inquiries made directly to the individuals.)

All data were desidentified and computerized.

The responses from the individuals, who were first interviewed in a mail inquiry and then in a telephone inquiry suffer from a non-response since only 60-70% of the individuals actually participated in the study. In order to statistically compensate for the non-response the responses of those who did not answer the mail inquiry (in spite of two reminders) but who consented to a telephone interview were weighted numerically in such a way that the telephone answers were made to represent the non-response as well. Data from the authorities were available for practically all cases. By using these data (concerning e.g. marital status, assessed income, and social assistance) it was in certain respects possible to analyse the non-response and the reliability of the procedure used to weight the material. The analyses did not indicate that the results in general suffered from any major errors due to the non-response among the individuals.

Besides the main study, just described, we performed also a special investigation on attachment of earnings in 1975. That additional investigation was planned in cooperation with the central authority for the execution offices. It was based on a random sample from all offices in the country. The sample consisted of one case out of every 100 which were pending for attachment of earnings in November 1975. Thus, the sample of more than 500 cases represented over 50,000 cases. The investigation dealt with the outcome of the attachment of each case for that part of 1975 under which the case had been pending at the authority. In what follows I will deal mainly with the results from the main study but some references will be made also to the special investigation about attachment of earnings.

3.2 Alimony to ex-spouse

In accordance with the information already given about the rules on alimony in the Marriage Code (under 2.2 above) alimony after divorce, is rather unusual in Sweden to-day. When it occurs it means, normally, as can be expected, that it is the ex-husband who has to pay to the ex-wife.

In divorce cases from 1971 provisions conerning alimony combined with maintenance to children existed in every tenth of the cases. In approximately every second of the cases in which alimony occurred the obligation would cease before 1975, the year which was put in centre for our study. Thus an obligation to pay alimony 4 years after the divorce existed only in one case out of 20. Within that small group with a comparatively long term obligation to pay alimony it was approximately twice as common that the obligation concerned only the other spouse as it concerned both spouse and children at the same time. The following information refers only to the former group without dependent children.

The cases in which the obligation to pay alimony still existed 4 years after the divorce in 1971 usually concerned marriages of long duration. The median duration of the marriage before the divorce in 1971 was 27 years. A large group of marriages was of approximately this duration; 35% had lasted for 25-29 years. A total of 32% had lasted longer than 30 years. Consequently the spouses were considerably older than divorcees in general. Almost 2/3 of the wives were 51 years or more during the year of divorce (1971).

In 1975 almost half of the ex-husbands lived in a new marriage or in an unmarried cohabitation with a new woman. Less than 10 percent of the ex-wives had entered into a new cohabitation. It should however be observed that the right to alimony at that time ceased in cases of remarriage (cf sec. 2.2 above). Consequently no remarried ex-spouse still entitled to alimony after the divorce in 1971 could by definition exist in 1975. The information about the size of the alimony allowance in 1975 varied slightly between the parties, which may be explained by the fact that answers had sometimes been given by persons in different couples. According to the answers from the maintenance creditors the median for the maintenance allowance in 1975 was 380 kr per month and according to the answers from the maintenance debtors 300 kr. (The average was 490 respectively 550 kr, i.e., an inversion of the size.)

Also the information about the degree of payment of the current alimony for 1975 varied slightly but apparently the full amount had normally been paid. 12% of the ex-wives and 6% of the ex-husbands answered that full payment was not made. Arrears seem to have been rather unusual and existed at the end of 1975 in 16% of the cases according to the ex-wives and in 8% according to the ex-husbands.

As can be seen alimony plays a very limited role in Sweden. It occurs certainly still more seldom today than in 1971. The background is the strongly increased habit of wives to have an

employment outside the home. Alimony after divorce is apparently more common in Alberta than in Sweden. A rough estimation shows that in the studies of Supreme Court Records and Family Court Records alimony to an ex-wife occurred in between 30 and 50% of the examined cases. (See Volume 2 p. 49 table 10.2 and p. 97 table 8.9.)

Even in Sweden, alimony can be of importance for an ex-wife, who has difficulties in supporting herself after a long marriage. The findings just mentioned indicates, however, that the average amount of the alimony, when it occurs for more than a transitional period, is comparatively modest in most cases but also, on the other hand, that the obligation to pay is normally fulfilled. However, the ex-husbands within the special group now under consideration usually had, 4 years after the divorce, a better economic situation than the ex-wives. One expression for that is that only 7% of the ex-husbands compared with 15% of the ex-wives received general social assistance at least at one occasion in 1975 (compared with 5-6% of the whole of the population). (General social assistance as a last resource plays on the whole a limited role in Sweden today and represents only 1% of the total costs for social security in a wide sense.)

3.3 Maintenance to children

3.3.1 Introduction and background factors

In the Swedish divorce sample from 1971 there were about 450 cases concerning mnaintenance obligations in 1975 towards children only. The ex-husband was the payer in 94% of the cases. The sample of unmarried parents from 1971 included more than 300 cases in which the parents did not cohabit in 1975 and the father had to pay maintenance allowances for the child to the mother (who was always the custodian).

The material concerning children may form a basis for some comparisons with the study at the Institute of Law Research and Reform. References will be made also to our special study of the system for attachment of earnings (cf sec. 3.1 above). However, a complicating factor is that a part of the Canadian material covers maintenance to children and ex-wives at the same time and that it contains also a smaller group of cases, exclusively containing alimony to a former spouse. Since the Canadian study in some respects deals with different obligations at the same time, but the Swedish does not, it is difficult to carry through a perfect comparison. It must also be kept in mind that the Canadian study consists of several separate investigations, and that the selection of cases was made in different ways in the Swedish study compared with the different Canadian substudies. In trying, nevertheless, to make some comparisons between the two studies, it is necessary to keep this uncertainty in mind.

I have already pointed out that alimony to an ex-spouse is apparently more common in Alberta than in Sweden, (sec. 3.2 above). It can be added about Sweden that only 5% of all cases which in November 1975 were pending for attachment of earnings with respect to maintenance claims, concerned alimony after

divorce; 50% concerned maintenance claims to children after divorce and 45% maintenance to children of unmarried mothers.

In the Swedish divorce group from 1971 concerning maintenance to children only the median age of the payers at the time of the divorce was found in the interval 31-34 years and the median age of the custodians in the interval 27-30 years. Almost half of the marriages had lasted 5-9 years. The parents who were not cohabiting with each other in 1975 and who had children born out of wedlock in 1971 were younger. The median age in 1971 was found in the interval 23-26 years for the fathers and 19-22 years for the mothers.

In 1975, the key year in our study, the median ages were 4 years higher than in 1971. Although the study for the Institute does not contain the median age but the average age of the persons in the different groups, which were studied in Alberta, the ages of the men and women involved in the paying of maintenance seem to have been about the same in both materials. (See Volume 1 p. 12 with references.)

Another introductory observation is that the average number of children awarded maintenance in each case usually seems to be lower in Sweden than in Alberta. According to both the main study (of the situation 1975 for divorce cases from 1971) and the special study (of attachment of earnings in 1975) the number of children, entitled to maintenance from one parent after divorce, was one child in almost 50%, 2 children in about 35% and 3 or more children in about 15% of all cases. The different studies in Alberta indicates a lower proportion of maintenance to one child only (about 35%) and a higher proportion of maintenance to three or more children (over 25%). (See volume 2 p. 50 table 10.5, p. 97 table 8.9 and p. 157 table 5.4.) The average number of children in a family is probably bigger in Alberta than in Sweden. I abstain from commenting on the possible causal connections between this fact on the one hand and on the other the employment rate among women as well as the existence of alimony after divorce.

In Sweden as well as in Alberta a rather big rate of ex-spouses live together with a new partner a number of years after the divorce. According to the substudy "Survey of Women" in Alberta ex-wives entitled to maintenance to children were remarried in 8 or 16% (in Edmonton and Calgary respectively), cohabiting without marriage in 18 or 14%, and living alone in 74 or 70% of all cases. (See Volumne 2 p. 178 table 11.1.) Among the custodians of children in Sweden who were divorced in 1971 and entitled to maintenance for children in 1975 the corresponding percentage was 22% (remarried), 20% (cohabiting) and 58% (alone). The custodians in Sweden seemed in other words to have formed a new family to a somewhat higher degree than was the case in Alberta. The observation must, however, be considered as uncertain.

A comparison may also be made between the situation in Sweden in 1975 for the payers of maintenance to children after divorce in 1971 and the information about new relationship of divorced husbands in "the Survey of Men". In both groups the men

had entered into a new relationship to a higher degree than the women. The numbers were similar. According to the survey of men over 49% of the sample indicated that they were involved in a new permanent relationship; within that group 25% of the total sample had re-married and 24% were cohabiting without formal marriage. (See Volume 2 p. 287.) The corresponding numbers in the Swedish divorce-study were 54, 23 and 31%.

Even with respect to employment rates there were similarities between the two countries. The employment rate in 1975 for custodians in the Swedish divorce sample from 1971 was very similar to the situation in Edmonton and Calgary according to "the survey of women" (see Volume 2 p. 148 table 2.3.). Only one table from the Swedish study will be shown here in order to illustrate the strong connection between the number of children, living with the custodian, and the employment rate within the sample.

Table 1

Employment status 1975 for custodians after divorce in 1971

Employment 1975	Alone 1 child	Alone more than 1 child	Cohabiting 1 child	Cohabiting more than 1 child	Total
Unemployed	13	12	22	43	23
Part-time	5	26	9	32	22
Full-time	76	56	62	23	51
Part-time and full time	7	6	7	2	5
%	101	100	100	100	101
Cases	58	97	30	79	264

It goes without saying that the employment rate is higher among men, paying maintenance, than among female custodians, although some men are employed at least periodically. No comparison of payers of maintenance in Alberta and Sweden will be reported here.

Nor am I willing to venture a comparison of the amounts of the maintenance allowances to children in Sweden and in Alberta. It seems too difficult to compare the information from different samples and from different years. It can also be added here that the amounts of maintenance allowances to children certainly has gone down since the new rules on calculation of the allowances came into force in 1979. (Cf sec. 3.4 below.)

3.3.2 The incidence of payment and non-payment of maintenance

For an understanding of the Swedish situation it is necessary to know that the maintenance advance from the state plays a role not only for children and their custodians but even for the payers of maintenance. (Cf sec. 2.3 above.)

In the two Swedish samples of custodians from 1971 maintenance advance was paid in 1975 in roughly 60% of all cases. (The percentage seems, according to other available information, still to be about the same among all children who are entitled to maintenance.) In all such cases the State through the local offices for social insurance takes over the maintenance claims against the payer. That means that a majority of the payers are obliged to pay the current allowances as well as future arrears not directly to the custodian but to an authority. When a request for attachment of earnings is put forward to the execution officer it is normally the authority which raises this claim. (In 1975 the maintenance advance was administered not by the local insurance offices but by the social welfare boards in the municipalities. This difference has, however, no importance as a matter of principle.)

Table 2

Different ways for paying maintenance to children in 1975 (% of all cases)

	Divorce cases from 1971	Children born out of wedlock 1971
Directly to custodian	42	37
Directly to the municipality	13	22
Through attachment of earnings	27	25
Through writ of execution	3	4
Through authorities or other alternative	4	6
No payments	16	14
%	105	108
Number of cases	372	244

As the system functions maintenance can be paid in different ways. In 1975 payments could be made voluntary either to the custodian or to the municipality (when maintenance advance has been paid). Another possibility is enforcement of payment through attachment of earnings. Sometimes also ordinary execution can take place. Exceptionally it can also occur that maintenance allowances are paid to some other authority with a responsibility to take care of the interests of the child.

Table 2 shows different ways of paying maintenance to children in the two Swedish samples for the main study. The table does not give any information about the degree of payment in different cases. We can observe, however, that attachment of earnings took place in 25% of all cases and that no payment at all for the whole of the year was made in about 15% of the samples. It can also be added that calculations, based on the total available information, gave an average rate of payments of 70% for the whole of 1975, estimated on the total sum of current allowances in all cases in the samples.

However, the degree of payment in individual cases is shown by table 3. The table is based on a rather complicated placing together of information from the authorities (when maintenance advance has been paid out) and from the custodians. Since our experience was that the custodians did not tend to exaggerate the degree of payments, as the papers sometimes were inclined to do, the percentages in the table should be reliable for the samples. The degree of payment means here the percentage which the paid amount in each case for the whole of 1975 constitutes of the sum of current allowances for the same case and year. The group of persons who paid more than 90% of the sum of the allowances, consists of payers either to the custodian or to the municipality (when the child had received maintenance advance); the payments have been made either voluntarily or through enforcement. The group of persons who paid more than 100% of the current amounts consists of some of the persons in arrears.

Table 3

Payment status 1975

Degree of payment of allowances to children, %	Divorce-cases 1971	Children born out of wedlock 1971
0	17	15
1-30	8	8
31-60	8	10
61-90	9	10
91-100	49	42
101-	10	14
Total %	101	99
Cases	369	244

The best foundation for a comparison of the Swedish results concerning the rate of payments with the research done in Alberta seems to be what is called "payments status" in the survey of women. (See Volume 2 p. 169 and p. 171 with table 9.6.) The conclusion of such a comparison must be that the degree of payment was somewhat higher in the Swedish samples.

3.3.3 The relationship between enforcement and payment

The degree of payment was studied also through the special investigation of a random sample of all Swedish cases of attachment of earnings for maintenance claims in 1975. Table 4 shows the efficiency of the system of attachment of earnings. More than 90% of the sum of the current allowances for the period January-October 1975 was enforced in more than 60% of all cases. More than 60% of the same sum was enforced in over 80% of the cases. The fact that more than 100% of the current allowances was paid in many cases is due to payments of arrears and current allowances at the same time. As has been described above (sec. 2.4) the execution officer fixes the amount for attachment according to what is reasonable with respect to both current allowances and arrears. The outcome of the attachment with respect to the orders by the execution officers is shown in column B. It goes without saying that the payment rate is lower in column B than in column A. An additional piece of information is the total outcome for all cases of attachment of earnings for the period January-October 1975. The enforced amount corresponded to 90% of the sum of current allowances in all cases and to 80% of the sum for attachment according to the decisions by the execution officers.

Table 4

Payments of maintenance in Sweden January-October 1975 through attachment of earnings

Degree of payments in percentage of	A. current maintenance allowances	B. decided amounts for attachment
0	3	3
1-30	6	7
31-60	9	16
61-90	19	24
91-100	21	43
101-130	30	7
131-160	7	0
161-	5	0
%	100	100
Cases	532	515

Since permanent attachment of earnings does not exist in Alberta it is impossible to make any quite clear comparison based on the Swedish findings. The comparison, lying most closely at hand, is to look at the "family court records study", which is also based on information from an authority with responsibility for enforcement of maintenance claims. The results are however, reported in a somewhat different way in the two studies. It must

also be underlined that the sample for the family court records study also includes payers who, in accordance with the order of the court had paid voluntarily. This group of persons will as a matter of principle increase the payment rate for the whole sample compared with the Swedish sample, exclusively consisting of persons under attachment of earnings. Nevertheless, a free estimate indicates that the degree of payment is somewhat higher within the Swedish system of attachment of earnings than according to the Canadian study under consideration. (See for the family court records study Volume 2 p. 81 ff.) One illustration is that payments for a single month were made in hardly 50% of all cases in Edmonton and Alberta (in November 1979; see p. 82 table 4.5) but in certainly more than 75% of all cases in the Swedish material on attachment of earnings (valid for October 1975).

Without details it should also be added that a majority of payers, subject to attachment of earnings, were in arrears. Almost 45% of the payers were in arrears exceeding 3,000 Kr at the beginning of 1975. Due to varying degrees of payment the arrears in different cases could either increase or decrease in a similar way to the findings of the study of family court records. (See Volume 2 p. 82 with table 4.3.)

The amount of 3,000 Kr at the beginning of 1975 formed a crucial boarder line in the Swedish study on attachment. In a majority of cases larger debts tended to increase, smaller to decrease during the rest of the year.

3.3.4. Factors relating to and the reasons for payment and non-payment of maintenance awards

In the Swedish study of divorce cases from 1971 and of children born out of wedlock in the same year the statistical connection between the payment rate for 1975 in each case and a number of other factors were studied. A statistically significant connection existed for a number of factors. Similar comparisons are reported in the study for the Institute of Law Research and Reform. The following information is a summary of some of the Swedish findings.

The payment rate clearly tended to decrease when the number of children in a divorce case increased. That connection can be considered as quite natural. Less self-evident is the significant fact that for children born out of wedlock larger maintenance allowances were better paid than small ones. The explanation is certainly that the ability to pay is small when the allowance is small. Apparently even a smaller allowance for one child meant a heavier burden for a payer with a small income than a larger allowance for a man with a better economy. Within the divorce group, where maintenance often had to be paid for more than one child, there was not the same, simple connection between the payment rate and the sum of the allowances.

A strong correlation existed between the income of the payers and the payment rate. A very strong connection could further be established between the existence of arrears and the payment rate. In other words, these payers who were already in

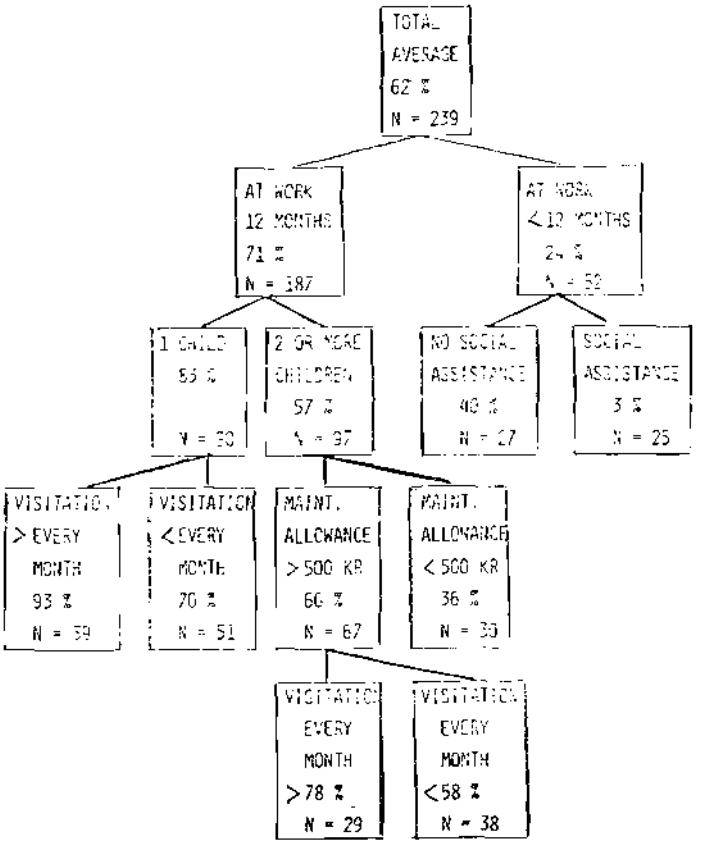
arrears went on, in most cases, to pay badly.

A correlation was also found between the access arrangements between the payer and the child. Payers who never met the child paid significantly worse than others. A significant correlation existed also between the new family situation of the payer and the payment rate. Payers who were remarried or lived in a marriage-like cohabitation were more often excellent payers than payers living alone.

Only one diagram will be presented in this section, namely a so-called AID (automatic interaction detector)-analysis. That analysis is used here to give an overall survey of different factors which had the best explanatory value for the rate of payments of maintenance to children in 1975 for divorce cases from 1971. The method means that the whole group of cases, included in the analysis, is divided into two sub-groups with respect to the factor (predictor) which has the strongest statistical connection with the payment rate. Thereafter each sub-group is divided step by step into two new sub-groups with respect to the factor which now, within each sub-group, has the strongest statistical connection with the payment rate for persons within the sub-group in question.

Diagram 5

Degree of payments of maintenance to children 1975
AID-analysis. Divorce cases (239) from 1971



As can be seen from diagram 5 the average payment rate for the 239 divorce cases under analysis was 62% of the sum of the current allowances for the whole of 1975. (Payments, due arrears, exceeding 100% of the current allowances have no counted.) The factor, which had the strongest influence on the payment rate for the whole group, was whether the payer was at work for the whole of the year. The average payment rate among the sub-group of persons, who were at work for a shorter period than 12 months, was as low as 24%. We can further see that the strongest influence for the next split within the sub-group of bad payers comes from the question whether the payer had received general social assistance in 1975. It is, however, not permissible to draw the conclusion that the existence of social assistance is the causal explanation for the bad payments. Nor

is it certain that there is a connection the other way round. In the interpretation of the analysis common sense has to be used.

As far as the first sub-group of good payers is concerned, we can observe the influence on the payment rate of the questions of whether maintenance had to be paid for one or for more than one child, of the intensity with which the payer used his visitation right etc. The analysis may speak for itself. Only one further piece of information should be added. The factors (predictors) whose explanatory value for the payment rate was analysed were, among others, the following ones: Number of children entitled to maintenance, the amount of the current allowance, intensity of the payer's visitation of the child, number of months at work in 1975, the payers school education, whether he got social assistance in 1975, age, civil status (or cohabitation) of the payer, the same status of the custodian, income of the payer and domicile of the payer within one of six regions in Sweden. All these factors were taken into account by the computor at each step of the analysis.

3.3.5 Marriage breakdown and social assistance

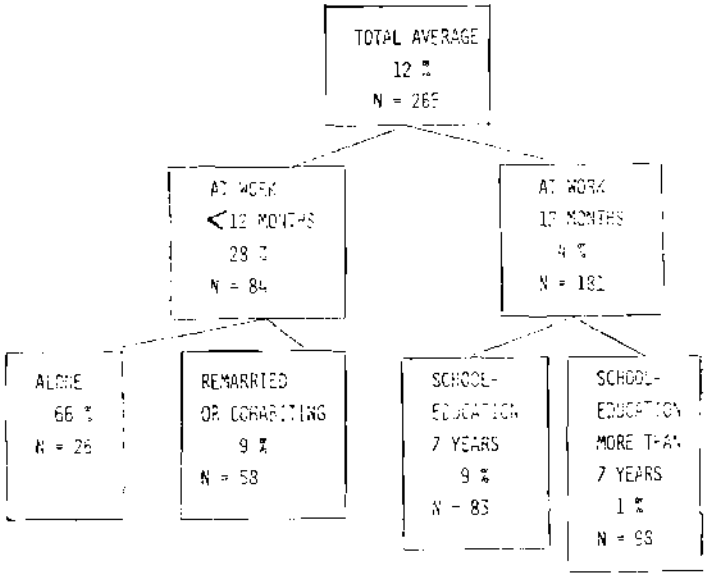
In a discussion of the proportion of divorced couples, who receive general social assistance as a last resort, it must be kept in mind what other social benefits are available. In Sweden every custodian, who does not live with the other parent, can get maintenance advance from the state with up to 590 Kr per month (June 1981; cf sec. 2.3 above). Every child in the country, irrespective of the income of the child and its parents, is also entitled to a general child allowance of 250 kr per month. The majority of families with children are entitled also to housing allowances from the State. In this system of different benefits general social assistance plays only a supplementary role. (Social benefits of other types such as unemployment support etc. are left out of consideration here.)

General social assistance at least once during a year is normally paid to 5-6% of the population. 13% of the custodians, divorced in 1971, received social assistance at least once in 1975.

Diagram 6 shows an AID-analysis of the factors which had the greatest explanatory value for the reception of social assistance among the divorced custodians, who were entitled to maintenance to children.

Diagram 6

Social aid 1975 to custodians of children
AID-analysis. Divorce cases (265) from 1971



The diagram shows very clearly that the most important factor for the payment of social assistance was whether or not a custodian had a job for the whole of the year. The different forms of social benefits cannot change this fact although they certainly have an important, supplementary function. Within the group of persons who were at work for less than 12 months 28% received social assistance at least once. As can be read in the diagram the percentage varied widely depending on whether the custodian lived alone or together with a new partner. Within the other main group, formed by custodians who were at work for the whole of 1975, the length of school education had the strongest explanatory value for the occurrence of social assistance. (The "predictors" under consideration in the analysis were: number of children entitled to maintenance, type of dwelling, costs for the dwelling, occurrence of housing allowances, number of months at work in 1975, length of school education, age, civil status or cohabitation, income, domicile within one of six regions.)

It should also be added that the proportion of custodians who received social assistance in 1975 was much higher among unmarried mothers from 1971 than among divorcees from 1971. The percentage was 13% and 30% respectively. It seems probable that the higher rate of social assistance among the unmarried mothers was due mainly to the fact that the young, unmarried mothers with 4-year-old children had more often than the divorced custodians

with children of varying age a short school education and an uncertain position on the labour market.

No special analysis of the rate of social assistance in 1975 among payers of maintenance to children will be reproduced here. It can, however, be mentioned that 15% of the divorcees and 22% of the unmarried fathers from 1971 received general social assistance at least once in 1975. An AID-analysis for the divorcees showed that the most important factor for the occurrence of social assistance was whether the payers of maintenance were in arrears at the beginning of 1975. The natural interpretation is that both the arrears and the social assistance expressed a bad economic situation. (Cf diagram 5 above.) Among the payers of maintenance, who were in arrears, the strongest predictor for social assistance was whether or not the payer was at work for the whole of the year. Among payers of maintenance who were at work for less than 12 months and who were in arrears at the beginning of 1975 as many as 58% received social assistance at least once in 1975. In other words, the importance of a permanent job seems, not surprisingly, to be the same for payers of maintenance as for custodians.

3.4 Concluding remarks

As a supplement to the practical findings which have been reported above I will only add a few words about three items of importance for the system of maintenance to children.

Firstly: It is an important social issue whether there should exist a type of social benefit construed to the advantage exclusively of children living together with only one of its parents as sole custodian. It is certainly a very good help for the sole custodian if she (or he) is relieved from the burden of having a maintenance claim enforced. The Swedish system of maintenance advance means that the custodian gets such a relief in a very efficient way. At the same time the special Swedish form of maintenance advance may be considered to give an over-compensation to the child and the custodian in some cases since a guaranteed amount is paid each month irrespective of the income of a step-parent. It can also be kept in mind that parents living with their children can never get a corresponding social benefit, which is independent of individual need. (Another matter is that every child is entitled to a general child allowance; cf. sec. 3.3.5.) The whole question of support to one-parent families is for the time being under consideration by a state committee in Sweden. The committee has not yet delivered any proposals. The economic problems of parents living alone with a child cannot, however, be solved exclusively with the aid of social benefits. It is of basic importance whether the custodian can get an employment and if day-care for the child is available to help the custodian obtain at least part-time work outside the home.

Secondly: It is of great importance for the system of maintenance (as for other legal claims) that there are efficient ways of enforcement. The Swedish system of attachment of earnings functions very efficiently. Details within the system can of course be discussed e.g. what amount of an income shall be

reserved for the basic living costs of the payer and his new family. A comparison between Sweden and Alberta (sec. 3.3.2 above) has shown that the payment rate of maintenance allowances is probably clearly better in Sweden than in Alberta. One important cause of the difference seems to be the absence in Alberta of a system for continuing attachment of earnings. It may be permissible for the author to find convincing the arguments for such a system which were unfolded in 1978 in the report by the Institute of Law Research and Reform on Matrimonial Support (Report No. 27, p. 133 ff).

Also other factors that the methods of execution can, however, be of practical importance. The administration of the system of maintenance advance in Sweden was taken over in 1977 by the local insurance offices of the state. The system had previously been administered by the social welfare boards of the municipalities. As the system functions today the local insurance offices through a national, computorized system see to it that each payer of maintenance, who shall pay maintenance allowance to the local insurance office, gets a paying-in form every month. That form contains not only the amount, which shall be paid at the next event, but also an account for possible arrears. The introduction of this system for notifying claims has probably increased the payment rate.

Thirdly: Another important matter, which has not at all been dealt with above, is the guiding principles for calculation of a maintenance allowance. In Sweden, where the system of maintenance advance is very advantageous for the child and the custodian, the amount of the maintenance allowance as such only plays some role on the child's side when it exceeds the guaranteed amount of the advance (590 Kr per month in October 1981). For the payer, however, the amount of the allowance is always of direct interest. When the Swedish rules on maintenance were revised in 1978, one of the objectives was, as has been mentioned previously (sec. 2.3), to introduce more uniform guidelines for the calculating of maintenance allowances to children. It may be of interest to terminate this paper with a general survey of the new principles.

The new system for calculation of maintenance allowances to children is based on some new rules in the Code on Parents and Children and supplementary statements in the legislative materials. In accordance with such statements the Government has instructed the National Board of Health and Social Welfare (Socialstyrelsen) to issue more detailed advice for calculation of normal costs for children in different age groups and also concerning other problems of the application of the model for calculation of the allowances. A first edition of such recommendations by the Board was published in 1979 and a second, revised edition will be published in the beginning of 1982. The advices are, of course, not binding for the courts, nor for other authorities which come in contact with maintenance questions. It shall also be kept in mind that other guidelines are applied for the execution offices which deal with attachment of earnings.

The starting point for the calculation of maintenance allowances to children is, as has been underlined above (sec.

2.3), that the parents shall support the child according to what is reasonable with respect to the need of the child and the economic circumstances of the parents, and that each of the parents has to share the costs with respect to his ability. While the child is entitled to the same standard as represented by the average of the parents' economic situation, the need represents no fixed amount. According to the legislative materials it is nevertheless necessary to start with a set pattern linked to the costs which are generally approved of in order to provide for the child's basic needs of food, clothes, etc.

The national Board of Health and Social Welfare has given more specific advice on the economic need of a child through recommending what is considered as being the "normal amount" for a child of a certain age, i.e. for the age group 0-6 years 0,65 "basic sum", for 7-12 years 0,80 "basic sum" and for 13 years and older 0,95 "basic sum"[7] In October 1981 these amounts corresponded to about 940, 1.150 and 1.370 Kr respectively. (The "normal amount" can be increased if the custodian has extra costs, e.g. for day care of the child.) The recommendation is based on investigations of the factual living costs carried through by the so called Consumers Office (a state authority). The said normal amount shall be apportioned to the parents according to their available income. Before that, however, the amount is reduced by the general child allowance of 250 Kr (June 1981), which is a social benefit to every child.

The payer is, however, always allowed to keep a "reserved amount" of his net income (income after tax), which is necessary for his own living and cannot be taken into account for support to someone else. (See c.7 sec. 3 par. 2 of the Code.) The reserved income for the personal payer's personal need is fixed to 1.2 basic sums plus the cost of his dwelling within reasonable limits. (The principles applied for the reserved amount by the execution officers in cases of attachment of earnings are somewhat harder to the payer.)

"If special reasons apply" the payer is allowed to keep a reserved amount of 0.6 basic sum for support of a spouse with whom he cohabits. The special reason can be that the wife is prevented from earning an income of her own because of her taking care of small children or because of illness. Especially remarkable is the fact that the rule has been made applicable not only in favour of a spouse but also to the benefit of another person cohabiting with the payer, provided they have a child together.

Although it is not expressly stated in the Code, the intention is that a similar deduction of "reserved amounts" shall

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[7] The "basic sum" (17,200 Kr in Oct. 1981) is an index-regulated sum according to the Act on National Insurance (lagen om allman forsakring), 1962, which was calculated in order to correspond to such a yearly income for which a retirement national old-age pension should be a sufficient equivalent. The basic sum has come to be used as an index-regulated basis for various legal effects.

be made on the the part of the custodian. When the remaining income after tax has been computed on both sides the necessary costs of the child have to be apportioned.

Suppose for instance that a divorced husband has to pay maintenance allowances to two children, both within the age group 0-6 years, who live with the mother, and that the remaining income per month (after deduction of tax and reserved amount) is 1,500 Kr for him and 1,200 Kr for the mother. If we apportion to each parent the supposed costs for the basic needs of the children (690 Kr for each child when the general child allowance has been deducted) we get the following obligation of the father to pay maintenance allowance for two children:

$$\frac{1,500}{1,500 + 1,200} \times 1,380 = 770 \text{ Kr per month.}$$

That leaves the mother to cover 610 Kr (1,380 -770) of the basic needs of the children (but she is also entitled to the general child allowances). In this case both parents are left with a rather important surplus, which makes it probable that the children would be considered as entitled to a standard additional amount. In other words: the allowances in the example should ultimately be fixed to a higher amount than 385 Kr per child.

The problem of how to calculate the maintenance allowance is, however, more complicated if a father has to support two children with different mothers. These matters are discussed rather briefly in the legislative materials. The main point of view is, however, that every child of the payer has a claim to equal treatment whether it lives together with the payer or not. That has led to the idea that the proportioning between the parents of the costs for the children shall in principle start as soon as the necessary amounts have been reserved for the payer personally, for his wife if special reasons apply and for the custodian. When the income of the payer is small the result could be, however, that he is not left with money enough to give a necessary minimum support to a child in his own household. Up to such a minimum level it has been considered necessary to give a child in the household preference to children who do not live in his home and who claim maintenance allowances (sec. 3, par. 4). A payer with small income will as a last resort get the result of the proportioning of costs for a child between the parents adjusted so that he is left with a reserved amount of 0.4 basic sum (plus general child allowance) for a child of his own with whom he lives.

The new system for calculation of maintenance allowances to children has undoubtedly created a basis for a more uniform level of allowances in comparable cases. At the same time the system is complicated to handle and the mathematical exactness in its application is based on what evaluations are chosen as starting points. The author is not prepared to make any final evaluation of its advantages and disadvantages.

PART 2

MATRIMONIAL SUPPORT FAILURES: REASONS, PROFILES AND PERCEPTIONS OF INDIVIDUALS INVOLVED, A COMMENTARY

Judith Cassetty

MATRIMONIAL SUPPORT FAILURES: REASONS, PROFILES AND PERCEPTIONS OF INDIVIDUALS INVOLVED, A COMMENTARY

Judith Cassetty*

I would like to begin by making some general comments regarding the Institute's remarkable Report, the research effort from which it was derived, and the larger "state of the art" of empirical enquiry in this highly critical area of social and human behavior.

First, let me say that the research which formed the basis for the report, conducted and presented by the Institute, is perhaps the most comprehensive descriptive study of the subject which I've seen to date. It is well conceived, thorough, multi-faceted, and displays a sensitivity to the complexity of issues and feelings which are inherent to the topic. It is abundantly clear that those who designed and conducted this research project were both well-informed and objective.

As to the substance of the report, I must say that I was struck by several overall aspects in regard to their findings. First and foremost was the recurring notion that, though some (to me) minor variations in form, law, and procedure may exist between the child and matrimonial support "systems" between the U.S. and Canada, the similarities in terms of results are abundantly clear. The system simply does not work very well in effecting the transfer of economic resources within formally constituted families in an equitable, adequate, and reliable fashion.

Second, and more interestingly, from the perspective of a social scientist, is my conclusion that this additional empirical evidence continues to affirm the earlier findings in this area, to the effect that compliance with support laws--be they termed alimony, child support, periodic payments, or whatever, is essentially a "supply-side" phenomenon. That is, it is becoming increasingly clear from research efforts in this area that the level of compliance on the part of the obligor is, to a very large extent, based upon his <u>willingness</u> to comply with support orders.

Now, this conclusion usually does not surprise barristers, judges, enforcement workers, and others who have first-hand knowledge of the enforcement process. As a social scientist, however, especially one who ascribes a large portion of human behaviors to responses to economic incentives and disincentives, I have been forced to repeatedly re-examine the "beliefs" which I held at the time I first began my research in this area several years ago.

At that time, I was convinced that two factors would dominate the explanation for support payments by absent parents to the former families to which they had a legal obligation, to

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wit: the relative ability-to-pay on the part of the obligor, and the relative economic need on the part of the support-dependent family. My early research, together with the subsequent efforts of Sawhill, Chambers, MacDonald, Wallerstein, Weitzman, and others has cast more than serious doubt on the strength of economic factors alone as explanations for the enormous variance in support payment levels. This latest effort by the Institute for Law Research and Reform helps to effectively put this assumption to final rest.

Consider, even, the number of children in the recipient household as an indirect measure of need, or "demand," if you will, for support. Neither my research nor that of the Institute has found that this factor alone predicts, to a significant degree, the amount of support received by the dependent family. Other measures of economic well-being which reflect the relative and absolute level of need have also been found, repeatedly, to be unrelated to the amount of support received. In fact, the Institute's findings in regard to the award status of social assistance recipients supports a suspicion that I have had for some time that in the United States, welfare recipient status actually depresses the level of awards that are sought and received for this population. A report on child support by the U.S. Census Bureau in 1979 found that welfare recipients in the States also received support for their chilren far less frequently and in significantly lesser amounts than did non-welfare recipient female heads of families. A brief comment on these findings is certainly in order, however. Our speakers this morning have offered a number of possible explanations for this consistent finding. These reasons include, to reiterate and underscore, the fact that social assistance or welfare payments in nearly every country are reduced by one unit measure for every unit measure which is collected in support from the obligor. This constitutes a 100% implicit tax rate on the support received by these families. No one can deny that this provides little incentive for either the concerned obligor to provide support which does not increase the total well-being of his family, nor does it provide an incentive for the custodial parent to cooperate with absent parent location and collection efforts. This is a critical issue, especially, for the increasing proportion of welfare recipient children whose biological fathers are not legally identifiable.**

** I must hasten to add, however, that the association between welfare status and support received is also attributable to other factors which were not included in the Census analysis and for which the Institute's study did not control, specifically those of age and education of the custodial parent. Findings from my study of child support payments in the U.S. in 1975 suggested that support neither increased nor decreased significantly when various demographic measures, including the educational attainment of the custodial parent, were introduced as control variables. These results were obtained, however, prior to the adoption of policies which raised the "implicit tax rate" on child support received by welfare recipients to 100%.

Though there was some evidence in the Institute's study, and in mine, that low income men tended to pay less often than did higher income men, there was no support found in the data for the commonly held belief that compliance with court-ordered support will decline as the amount of the award--in either absolute or relative terms--increases. In fact, my results suggested that when they do pay support, low income men pay a far higher proportion of their incomes in support than do higher income men. This is potentially an even more serious problem of inequity when one considers the fact that under-reporting of income tends to increase as income increases.

The above discussion raises the question of the methodological limitations which are inherent in virtually all of the studies of the matrimonial and child support phenomenon to date. Most suffer from two major problems--limited sample size and representativeness, and failure to test carefully specified predictive models for compliance which incorporate controls for simultaneous effects of the variables thought to be associated with payment levels. Let's take, for instance, the suggested findings in the matter of the relationship between the number and ages of children in the dependent unit and the payment of support. On the surface, many researchers' results appear contradictory.

The Institute's findings suggest that though there is no relationship between payment performance and the number of dependent children, payment performance was apt to be better for younger children than for those who were older. Weitzman's findings, on the other hand, suggest that alimony and child support awards are less for mothers of young children than for those with children six years of age or older. She concludes, and I believe rightly so, that this finding is apt to reflect other aspects of the case such as the duration of the marriage. It is possible that, were the Institute's data to be re-analyzed, incorporating controls for duration of the marriage into a predictive model for support, as did Weitzman, the apparent discrepancy in their respective findings would disappear. Thus, it is critical that all findings be evaluated in light of whether or not adequate controls were employed in the data analysis.

The point of the above discussion is that there are methodological limitations for all of the above studies which make it impossible to draw a conclusion as to which study results best reflect reality, without understanding the nature of these limitations. My study did not control for either the duration of the marriage or whether or not there was a court order for support. Additionally, my sample, while nation-wide, was limited in size and the data did not separate alimony and child support but measured them as one variable. While Chambers' and Weitzman's studies could be said to suffer from their dependence upon data from narrow geographic areas, their results were obtained by including very important control variables in their models, such as the duration of marriage. All of the studies to date, including that of the Institute, suffer from probable under-reporting of income, especially by higher income men and the self-employed.

Given these kinds of methodological limitations to comparisons of study results, what can we say about, first, the impact of measures of economic need and ability-to-pay, upon both court-ordered support and actual payment performance; and, second, what other factors contribute to award and payment levels in general.

First, we are rather safe in concluding that, overall, the relationship between measures of relative and absolute economic well-being, to both maintenance awards and payment performance, is not at all as clear as most believe it to be. Though it is possible that further study would enable us to predict, with a far greater degree of accuracy and reliability, the precise effects of measures of economic well-being on both court awards and payment performance over time, I have concluded that this kind of effort would largely be a waste of time and resources. Because we know already that neither measures of need nor ability to pay are clearly related to either maintenance awards or actual payment performance, it is my concerted opinion that we already know enough about this relationship. The question of whether or not awards and compliance should be related to these factors, however, is another question, and one to which I will return shortly.

Putting the issue of the economics of support aside for a moment, then, let's return briefly to what the aggregate research in the area of awards and payment performance tells us for certain. First, I think it tells us that, in general, there are no readily discernible implicit or explicit standards for support payments. The underlying rationale for much of the work of Chambers, Sawhill, White and Stone, Weitzman, and others in this area, has been to uncover society's standard (or standards) for post-dissolution or extra-marital familial support. These research efforts have convinced me that these "standards" do not, in fact, exist. While there is limited evidence that some individual or micro-level standards may occasionally be identified--e.g., Weitzman's "minimalist" standard, White and Stone's finding of some evidence that each judge displays some consistency in setting support according to criteria allowed by law, etc.--I feel that the larger point of this research has been missed. That point is that we have been forced to search for evidence of operant implicit standards because society has failed to make such standards explicit and to pursue their application and compliance with them in a concerted fashion.

The reasons why we lack standards for post- or extra-marital support are open to conjecture. I believe, however, that the absence of explicit support standards reflects the larger social problem of our reluctance to define and impose parenting standards in general. This reluctance is virtually a universal phenomenon.

The consequences of this lack of standards, however, are rather clear. There is enormous variance between and within jurisdictions in both orders for support and payment performance. This variance has been well documented and I have come to the conclusion that the reasons for it lie largely beyond those that focus upon the mechanics and procedures for setting and enforcing

the support obligation. The anecdotal material provided by studies such as those by Chambers, Wallerstein, and the Institute provide invaluable clues as to the psychological and interpersonal sources of variance in compliance with the support "norm" or "ethos."

Furthermore, I am convinced that the absence of uniform, equitable, and reasonable social standards for support contributes to research findings such as those recounted at this Conference.

As a case in point, let's look at Chambers' finding that it is the interaction between his jailing variable and his "self-starting" variable that explains most of the variance in collections, rather than the independent effects of these two variables. What this reflects, I believe, is a "cultural" or environmental factor that pervades the particular jurisdiction which reflects, in turn, the community standard supporting the notion of the social value of this manifestation of parental responsibility. Thus, the interaction effect may be, in reality, a proxy measure for the community attitude toward the support obligation and the level of their commitment to enforcing it.

Consider, also, the evidence in support of this, which comes from the rather unexpected finding in my study, that from Sweden, and that suggested by the Institute study, that men who have established new relationships are more apt to pay better than those who have not. Why should the fact of new relationship formation, which is certainly independent of the enforcement process, have the significant impact which it does upon payment performance? Could it be that men who are more apt to take on additional family responsibilities are basically those who have been more acculturated to the notion of interpersonal responsibility? Dramatic evidence of the effects of bitterness and hostility in terms of poor payment performance is found in the comments of subjects interviewed for the Institute's project. Though the information is certainly indirect, the reasons given by former wives for the poor payment performance of the obligor cannot be dismissed simply as projection or paranoia. These reasons, including "irresponsibility" and "resentment" toward her and the support obligation, are echoed, in a converse fashion, by the expressions of responsibility, concern, and affection on the part of men who were good payers.

The consistency of the overall research findings, which suggest that "volunteerism" or willingness-to-pay makes the greatest contribution to payment performance, leaves us with the question of what to do about persons who do not pay, or who do not pay well or consistently. Again, the research to date has provided us with clues. We know, for instance, that the anticipation or exercise of legal sanctions is a factor which increases--though in a negative sense--the obligor's "willingness" to pay. But for both these individuals and for those who fall beyond the reach of the courts, we need information which will guide the development of strategies for enhancing the degree of volunteerism or willingness to pay. I am increasingly convinced that reliance upon an adversarial process for setting support--a process which makes men and women into

winners and losers, at least psychologically--exacerbates an already fragile situation. Additionally, the absence of any socially defined, objective standards for support payments must surely contribute to the problem. As an analogy, I ask you to imagine what the level of compliance with income tax laws would be like in the population as a whole if there were no tax schedules and the amount of individual liability were to be established through an adversarial process on a case by case basis.

It is becoming increasingly apparent to me that the key to fostering this manifestation of parental responsibility lies in discovering ways to enhance the "culture of support." I believe that at least one of the tools for this can be found in non-punitive, equitable, and universal standards for support which can be applied in a non-adversarial setting.

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PART 3

MAINTENANCE IN BRITAIN

Colin Gibson

MAINTENANCE IN BRITAIN

Colin Gibson*

My aim is to examine some of the more important findings concerning the working of maintenance in my country; and to compare them, when appropriate, with the Alberta picture that has emerged as a result of the Institute's comprehensive and impressive surveys. The problems and issues associated with maintenance support have to be analysed within the setting of a country's demographic and social structure, and, of course, its legal framework. We also have to recognise that public and personal attitudes towards marriage and divorce may be changing. From such a perspective one can view some of the realities of the British experience (or, more accurately the experience of England and Wales--for the legal frameworks operating in Scotland and Northern Ireland are somewhat different) on matters of maintenance support.

The population of England and Wales is about fifty million, being double that of Canada. (Henceforth, for brevity, England and Wales will be referred to as England). Over the last twenty years the divorce court judges of England have been petitioned by a rapidly increasing number of unhappy spouses seeking severance of their distressful marriages. In 1961 some 25,000 marriages were dissolved; by 1980 the number of divorces had risen to some 148,000. If these divorces are presented as a rate for every 1,000 ongoing marriages the resultant figures show an unprecedented six fold increase in the resort to divorce in under twenty years: from a rate of 2-1 in 1961 to 12-0 in 1980. The present English trend suggests that between one in three and one in four of every newly formed marriage uniting single people will be dissolved by the courts.

Divorce is causing an ever increasing number of mothers and children to encounter the financially insecure world of one-parent families. The English experience has been that over the five years 1975 to 1979 more than three-quarters of a million (764,000) children under the age of sixteen witnessed the dissolution of their parents' marriages. Almost a quarter (175,000:23%) of these children were under the age of five. It is against this demographic background that one can examine the two-tier court structure that operates in England for the casualties of broken marriages. The upper tier is represented by the divorce courts and the lower tier by the magistrates courts. Both courts have authority to award maintenance though the divorce court has a wider range of powers.

The Divorce Courts

Those who want a license to marry again turn to the divorce courts that are sited in the larger towns and cities. Since 1977 all undefended divorces are dealt with by what is called special procedure. This, in fact, is the common procedure, for less than 1% of all petitions are actually defended by the other spouse.

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Under this procedure the registrar of the court examines the evidence, and if he is satisfied that a case for divorce is made out, he issues a certificate--which is de facto the decree nisi[8]--and provides a date for the judge to pronounce the decree in open court. The presence of the parties is not required at either of these two stages. The judge's function has become formal and ritualistic. Obtaining a divorce decree is now an administrative process in which both parties accept the irretrievable breakdown of their marriage. The real contest takes place over ancillary questions involving the amount of maintenance, the division of property and arrangements for the childrens' future welfare. It is the registrar, and not the judge, who adjudicates the great majority of maintenance and property disputes after the divorce has been granted. For this reason it is necessary to understand the work of the registrar in resolving matters of financial provision. But the everyday work of the registrar has to be placed firstly, within the framework of a changing legislative philosophy governing divorce law; and secondly, our limited knowledge about those who successfully obtain a maintenance order.

The more informal processing of divorce followed the introduction in 1971 of the Divorce Reform Act of 1969. The sole ground for divorce was now to be that the marriage had broken down irretrievably, as proved by one or more of five possible facts. Until 1971 English divorce law required the petitioning spouse to come to court with clean hands. The new Act now allowed a spouse who, under the old law, was at fault to seek divorce by proving that the marriage was at an end as shown by the fact that they had lived apart for five or more years. The more liberal divorce policy was anchored to the English Law Commission's belief that it was best that irretrievably broken marriages should be legally severed.[9] Critics of the Act called it a Casanova's charter (though Casanovas have never needed a charter) and feared that middle-aged wives and mothers would be left by their husbands for younger women. Safeguards were introduced so that if the respondent opposes the decree, the court has a duty to consider all the circumstances, including the conduct of the parties and the interests of the children. The court must refuse the award of a divorce if granting it would cause 'grave financial or other hardship to the respondent' and 'that it would in all the circumstances be wrong to dissolve the marriage.'[10] Over the last decade only a handful of wives have successfully used this provision to defend their husband's petition, for the courts have held that the hardship results from the breakdown of marriage and not from the granting of a divorce.

Indeed, far from being a Casanova's charter, official statistics for 1978 show that amongst those obtaining a divorce by means of the fact of five or more years separation, the majority (52%) were wives seeking dissolution from husbands who presumably had no desire for divorce. Almost two-thirds of these wives were aged 40 or more at divorce, compared to 25% for wives

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8 Day v. Day [1979] 2 ALL E.R. 187, (CA).

9 The Law Commision, Reform of the Grounds of Divorce: The Field of Choice, 1966, Comnd. 3123, para 17.

10 Matrimonial Causes Act 1973, s. 5(2).

successfully using other facts.[11] Wives and mothers can leave their dull middle-aged husbands and seek divorce. Her conduct will not debar her from a claim to maintenance unless, in the words of Lord Denning M.R. in Wachtel v Wachtel, it 'is..."both obvious and gross", so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice'.[12] Husbands and fathers who under the old law are blameless, lose their children and often the house if the wife has no suitable accommodation, and find themselves paying maintenance. Some grieved husbands have joined a pressure group called 'Campaign for Justice in Divorce'. This aspect highlights another aspect of the current maintenance dilemma.

Maintenance matters and official statistics

English official divorce statistics do not provide reliable information on the number of maintenance orders made by the divorce courts. For instance, we need to know how many wives actually seek a divorce court maintenance order either for themselves alone, or only for their children, or for themselves and their children. This leads to further questions such as how many applications are successful? What amounts are ordered and to whom? How regularly are the orders paid and for how long do such orders continue? There are no statistics concerning the resolution of matrimonial property or how such orders may be related to the court's decision on maintenance.

Some wives will not seek maintenance from the divorce court because they already have a magistrate's court maintenance order and their lawyers do not expect the divorce court to increase the amount payable. A pilot study of a small number of randomly selected maintenance orders held in one magistrates' court provided evidence that the parties were divorced in half (50 percent) of the cases involving orders that had been made by the magistrates. Such cases should be added to the numbers made by the divorce courts if we wish to obtain a more realistic picture of the extent that divorced wives possess maintenance.

It does seem surprising how little effort is made by Government Departments to seek and gather regular maintenance data. Effective and sound future legislation in the areas of family law and social policy should be based on knowledge and efficacy of current maintenance procedure. Such information is required if we are to be assured that our hunches and hypothesis are indeed correct.

The Oxford Findings

There have been two national studies that have examined the working of maintenance in the English divorce courts. Both were undertaken from the Centre for Socio-Legal Studies, Oxford. The first one was a national study of social and legal data contained within divorce petitions that were filed in the divorce

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[11] Calculations based on the Office of Population Censuses and Surveys, Marriage and Divorce Statistics, 1978 (series FM 2 no. 5), Table 4.7, pp. 91-92.

[12] [1973] Fam. 72, 90.

registries of England and Wales during the first six months of 1972. The sample consisted of 1146 randomly selected cases. This survey followed on from a similar examination of 1961 divorce petitions. A major finding that emerged from the 1961 study was that marriages in which the husband had a manual occupation formed almost two-thirds (64%) of all divorces. The greatest probability of divorce occurred within those marriages in which the husband was employed in an unskilled manual occupation (social class 5) such as a labourer.[13] Marriages in this social group had over double (2-3) the chance of ending in divorce compared with those marriages where the husband had a professional or managerial post (social class 1).[14] The 1972 survey provided an almost similar finding of increased propensity to divorce (rate of 2-4 to 1) in the lower social class grouping (s.c. 5) compared to social class one. By 1972 the proportion of divorcing husbands employed in manual occupations had risen to 68%, an increase of 4% on the 1961 survey result. I would expect similar results if the same exercise was to be undertaken now. These findings highlight one of the major realities within the current maintenance question; namely, that marriages in which husbands have the lowest incomes have the highest rate of marriage breakdown.

Maintenance and fertility patterns

The presence of children is a crucial factor in a discussion of the obligation that the law places upon a husband to maintain his wife and children. The 1972 study looked at fertility patterns and found that unskilled workers and their wives (social class 5) were far more likely to have children of the marriage (87%) than were those marriages in which the husband held a professional or executive post (social classes 1 and 2: 61%). This finding, to a large measure, reflects the fertility differential within the ongoing English married population.[15]

The problem of income distribution and family support is also intensified as a consequence of mothers from the lower social classes generally having larger families than mothers in the upper social classes. One fifth of the divorcing mothers whose husbands had unskilled occupations had four or more dependent children compared to 7% for mothers with husbands in social class one.

Wives with maintenance orders

The 1972 Oxford survey found that after divorce a maintenance order was made in 26% of all cases, while in a further 24% of all cases there was an existing magistrates' court maintenance order that continued unchanged at the time of

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13 Social class groupings were defined by the Registrar General's Classification of Occupations, 1970.

14 Colin Gibson, "The Association Between Divorce and Social Class in England and Wales", British Journal of Sociology, Vol. XXV, no. 1 (1974).

15 Colin Gibson, "Childlessness and Marital Instability: A Re-Examination of the Evidence", Journal of Biosocial Science, vol. 12, pp. 121-132, table 4 at p. 129.

divorce.[15] Altogether, a maintenance order existed for the benefit of either wife or family in half (50%) of all divorces.[17] This is a very similar proportion to the Alberta Supreme Court Records study finding of of 48%.[18]

When examining the award of maintenance it does seem more important to see how especially mothers with dependent children fare. Nearly three-quarters (72%) of all mothers with dependent children living with them after divorce (10% of children do not live with their divorcing mothers) had a maintenance order providing child support. The Institute's Supreme Court survey found 68% in Alberta.[19] But the Oxford study also found that only 40% of all mothers with dependent children had maintenance for themselves. This last finding can be re-presented to show that 56% of mothers with child support orders had additional maintenance for themselves while the remaining 44% of such mothers only had orders providing maintenance for their children. The Institute's study found exactly the same two percentages in Alberta.[20]

Only one in four (26%) of the 536 (100%) wives without dependent children in the Oxford study had a maintenance order. In 10% of these orders the amount was nominal; they formed 3% of the 536 cases. Here, in Alberta, the Supreme Court shows that 14% of wives without dependent children had a maintenance order, though in 9% of the cases the amount awarded was nominal. Thus, only 5% of these wives had a 'normal' maintenance order; this compares to 23% found in the Oxford survey.

There are several reasons for the low percentage of English divorcing wives with maintenance. Similar factors may well operate in Canada. Firstly, the courts nowadays have little sympathy for the claims of the young childless wife. Among wives in the Oxford survey who had married before twenty-five and whose marriages were dissolved within a period of ten years it was found that one-third (34%) were childless. Secondly, the present address of the husband is not known and he cannot be brought to court. Thirdly, women increasngly wish to be self supporting and not be financially dependant upon an ex-husband. Or it may be that the wife is living with, or being supported, by another man. A fourth, and more pragmatical reason is that some wives recognise that it is not worth their own or the court's time to bother to obtain an order that either will not be or cannot be complied with.

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15 Throughout this paper the realistic assumption is that it is the wife who is seeking maintenance from the husband; however, English law allows the husband to claim maintenance from his wife.

17 Further study of this research material in the light of data from a new survey completed since my paper on the 27th May has made me revise some of the then presented findings.

18 The Institute of Law Research and Reform, Alberta: Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, 1981, vol. 2, p. 49, T.9.

19 Ibid, T.9, p. 49.

20 Op. cit., T. 10.2, p. 49.

Associated with this last reason is perhaps the most important factor of all. This is the reality, for the non-earning wife, of family income support provided by the safety net of the Supplementary Benefit Commission of the Department of Health and Social Security.[21] Such wives may well feel that there is little point in bringing their husbands to court when the maintenance ordered would probably be below the supplementary allowance payable on the scale rates.

The Oxford study found that the average total amount awarded by the divorce court to a wife with two children was $25 (11.28 pounds sterling).[22] In addition this mother would then (1972) have been entitled to family allowance of 90p., producing a total income of $27 (12.18 pounds sterling). The Supplementary Benefit Commission would have paid this mother of two children aged under five (including an average rent allowance of 4 pounds sterling) a total of $32 (14.35 pounds sterling). The net result is that the wife has 18% (14.35 pounds sterling/12.18 pounds sterling) higher income through the working of social policy regulations than that produced by maintenance. These figures suggest that the wife's resort to the Government's family support provisions has produced greater financial benefits for her than if the courts' powers to enforce the husband's obligation to maintain had been sought.

The registrars' approach to maintenance

The second maintenance enquiry undertaken by the Centre for Socio-Legal Studies at Oxford was a study about the way registrars exercised their largely discretionary jurisdiction. (It has already been noted that it is registrars--as opposed to judges--who adjudicate the great majority of maintenance hearings). In particular, it was hoped to throw light on the way maintenance decisions were reached. This enqiry involved a colleague (Mr. William Barrington Baker) and myself interviewing over half (81; 57%) of the 142 registrars existing in England and Wales in 1973. The findings were published in 1977 by the Centre for Socio-Legal Studies; the monograph being entitled "The Matrimonial Jurisdiction of Registrars."[23]

The registrars held two contrasting approaches to maintenance resolution. The majority felt their role to be that of an adjudicator, as expressed by the comment "my job is to ensure that proper distribution of available resources, both capital and income, according to the statutory provision".[24] Another felt "my role is judicial--it is wrong to play a social role. In an adversary game our role must be that of judge".[25] On the other hand about a third of the registrars felt it was their duty to encourage conciliation between the parties. As one registrar observed: "the parties have to accept that they have

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21 The Commission has recently been disbanded, though the provision of benefit remains.

22 An exchange rate of $2-2 to 1 pounds sterling has been used; the result being rounded to the nearest dollar.

23 W.Barrington Baker, John Eckelaar, Colin Gibson and Susan Rakes, with a historical note by Peter Bartrip.

24 Ibid, p. 63.

25 Ibid.

been through a very unfortunate experience and I try to readjust the position so that they can lead their lives in the future in the best possible way. I try to arrange matters so that they can put their problems behind them and try to create the best environment for them to do so.[26]

With the introduction of the new divorce law in 1971 the courts were given specific instructions for the first time as to those matters they should have special regard to when deciding financial matters. These guidelines are now set out in section 25 of the Matrimonial Causes Act 1973. Amongst the matters that courts must give regard to are: "the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future". The courts are finally given the duty to place the parties "in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other". Such prognosticative powers are claimed by few mortals.

The Oxford researchers have observed that 'in drawing the adjudicator's mind to certain matters, the legislator hopes to "structure" his choice within a framework of specific standards'.[27] We were particularly interested to see what weight the registrars attached to the criteria laid down in the Act, especially the ultimate aim of the court as set out in the final subsection. Most of the registrars felt that the economic realities did not allow the couple's original financial position to be maintained after divorce. As one registrar emphatically observed "You cannot place them in the same position. One tries to give weight to all the matters but it is often a question of the cake not being big enough". The reality is that this legislation, in the critical words of the Finer Committee, "... has not made any contribution to the solution of the problem, in assessing maintenance as between people of small means, of how to effect an adequate distribution of inadequate resources".[28]

The Magistrates' courts

So far only the working of the divorce courts--the upper tier--has been described. But to understand the operation of maintenance in England and Wales it is also necessary to focus on the lower tier that consists of the Magistrates' courts within which justices of the peace operate their matrimonial jurisdiction. The vast majority of the 25,000 Magistrates are not legally qualified, but they do have the assistance of a legally trained clerk to advise them on matters of law. Maintenance hearings come before a domestic panel normally consisting of three Magistrates who decide whether to grant an order.

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26 Ibid, p. 64.
27 Ibid, p. 3.
28 Report of the Committee on One-Parent Families, 1974, Cmnd. 5629, vol. 1, para. 4.59, p. 87.

Within this jurisdiction maintenance for the wife (unless it is by a voluntary separation ground)[29] depends upon proof of the husband's wrong doing--either he has failed to maintain her, or he has behaved unreasonably (which includes adultery), or he has deserted her. The needs of the children of the family have to be considered as a separate issue from that of the husband's alleged fault. This means that if the mother's own claim fails she is normally still assured of a maintenance order towards the child's upkeep. Compliance with the order is not so certain.

There is no upper limit to the amount of maintenance that magistrates can order for the wife and child. They can award lump sum payments of up to $1,100 (500 pounds sterling). The court can also grant custody and decide access. But it cannot deal with property matters or grant divorce.

Wives who turn to the summary courts seldom get awarded an amount of maintenance that is in any way adequate for their day to day needs. This observation is underlined by a study of new orders made by magistrates in April, May and June 1971 that was undertaken for the Finer Committee on One-Parent Families.[30] In this survey the records of some fifty randomly selected courts in England and Wales were examined. We took the total maintenance awarded to the wife for herself and children and calculated an average family group amount by the number of children. There was no instance where the wife had a sum larger than the amount of social security benefit she would have been entitled to under the income support regulations (assuming that she was not earning) of the Supplementary Benefits Commission. The following example explains the calculations behind this conclusion. A mother with two children (let us assume both are under five and therefore obtaining the lowest level of benefit) who qualified for a supplementary benefit allowance would have been entitled in 1971 to $25 (11.20 pounds sterling)--this sum includes an allowance for rent. A maintenance order for the same family averaged out at $19 (8.43 pounds sterling), which together with the then family allowance addition of $2 (90p) for the second child totalled $21 (9.33 pounds sterling). The mother receiving social security had the additional advantage of assurity of regular payment. The study concluded that the overall findings demonstrated "beyond any possibility of dispute that amounts of entitlement under supplementary benefit exceed the amounts of maintenance available through the courts even on the assumption that court orders would be paid regularly and in full".[31] But, of course, the orders are seldom paid regularly.

The reality was not that magistrates were failing in their duty to award a proper level of maintenance to wives but that the husbands did not have the means to allow such amounts to be ordered. Examining the income of husbands of the wives with two children we found that 41% of the men had wages of less than $44

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[29] The Domestic Proceedings and Magistrates' Courts Act 1978, S. 7.

[30] Report of the Committee on One-Parent Families, Vol. 2, Comnd. 5629-1, 1974; Appendix 7 "Matrimonial Orders", O.R. McGregor and Colin Gibson, P. 299.

[31] Ibid, p. 299.

(20 pounds sterling) a week in the spring of 1971 and 89% earned less than $66 (30 pounds sterling). These earnings may be compared with the average weekly earnings of male manual workers in April 1971 of $62 (28.20 pounds sterling). The New Earnings Survey of the Department of Employment and Productivity showed that, in the same month, only 17% of manual workers in full-time employment earned less than $66 (30 pounds sterling) a week. These findings were in line with those of the earlier Separated Spouses 1966 survey which concluded that the matrimonial jurisdiction of magistrates is "used almost entirely by the working class and very largely by the lowest paid among them."[32]

In an inflationary era the value of the order is soon eroded by the rising cost of living. Accordingly, it might be expected that wives would use the variation procedure that exists to allow the courts to alter the amount payable if the circumstances of the parties should alter. But this expectation was falsified by the finding of a further survey showing that over a five and a half year period between 1966 to 1971 only 23% of the orders were varied in amount due to the changing circumstances of either spouse; in 15% of the cases the amount was reduced and in 8% it was increased. Wives simply did not use the procedure as a means of keeping their maintenance payments in line with rising prices or higher wages. Many wives no doubt felt that it was not worth while as they were either in receipt of supplementary benefit and an increase would only benefit the state, or else had an order which was not being regularly paid.

Only a minority of wives now seek a new maintenance order in the magistrates' courts; the number of applications having fallen from some 28,000 in 1970 to 6,850 in 1978. Evidence suggests that at least 70% of these wives will ultimately have their marriages dissolved.

Payment of maintenance

Evidence from the magistrates' courts suggests that less than a quarter (23%) of all maintenance orders are regularly paid. This finding comes from a further study carried out for the Finer Committee on One-Parent Families of maintenance orders in magistrates' courts that were originally in existence at the beginning of 1966 and were still being enforced on the 1st of January 1971. The sample consisted of 733 orders. The extent of arrears is reflected in the finding that over a third (35%) of all orders were in arrears by at least $220 (100 pounds sterling) and 10% had arrears of $1,100 (500 pounds sterling) or more on the 1st July 1971.[33] To allow for the fact that orders for larger amounts accumulate arrears faster than orders for small amounts if measured over the same period of default we devised an alternative method of recording the arrears situation. The new classification recorded the distribution of orders in terms of the number weekly payments in arrears. An order was defined as being in arrears if six or more weeks' payments were outstanding, this period being two weeks more than the minimum time the

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32 O. R. McGregor, L. Bloom-Cooper and Colin Gibson, Separated Spouses, 1970, p. 70.

33 O. R. McGregor and Colin Gibson, op. cit., p. 277.

Magistrates' Court Act of 1952 allows an order to fall into arrears before the court can instigate proceedings. By this measure, three-quarters of the orders were in arrears by more than six weeks and 44 percent by more than one year. Among the orders in arrears, 41% had more than two years' payments outstanding.

The Institute's Family Court survey showed that full payments were being maintained in less than half (46%) the cases registered at Edmonton and Lethbridge Courts.[34] In a third (35%) of the cases no payments had been made during the six months prior to November 1979.[35] This is a somewhat better picture than that being painted for the English magistrates' courts. But the overall conclusion from the evidence of both countries is that it is only a fortunate minority of wives who receive their maintenance regularly.

The ultimate sanction available to the English courts for non payment of maintenance is imprisonment. In the five year period 1973-77 magistrates sent 12,570 men to prison for wilful refusal or culpable neglect to pay maintenance. Strictly, their offence is one of contempt of court as displayed by disobedience to an order of the court. Consequently these men have not committed a criminal offence; indeed the Home Office's annual Prison Statistics record their numbers under the table heading "Receptions of non-criminal prisoners".[36] As civil prisoners they do not have to undertake prison work nor wear prison uniform. The most time they can serve at one stretch is six weeks. Their reception into the prison regime is an irritant to a structure that is geared to dealing with long-term prisoners under conditions of strict security. Overcrowding is a major problem within a prison service that has to accommodate an increasing number of criminals in buildings that are all too often old, run down and generally ill equipped for present needs. Yet in 1977 the 2,500 men received into English prisons for maintenance default formed 6% of all prison receptions for that year.[37]

The Maintenance dilemma

In 1857, the first year of civil divorce in England ninety seven wives petitioned the High Court for dissolution of their marriages. Their husbands normally possessed upper middle class incomes. Problems of maintenance enforcement seldom occurred, for the Court in its very early days insisted upon the husband providing security for the ordered amount. Today only a small minority of husbands have the means to provide security. Yet whether wealthy or not all husbands have been given the same legal right, that of marrying again. Some two-thirds of the 150,000 husbands annually passing through the English divorce

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34 Report, Table 4.11, p. 84.

35 Ibid, T.4.4. P. 82.

36 Prison Statistics, England and Wales 1977, Comnd. 7286, T.6.2.

37 Ibid, T.6.1 and T.4.4.
In the same year magistrates sent 21 men to prison for non-payment of income tax.

courts will utilize their licence to marry again, and take on a further obligation to support their new wives. At the same time the law expects the divorced wife and family to be maintained. However, the majority of divorced wives will eventually marry again. For many wives maintenance is only a temporary financial bridge to a hopefully happier new marriage, and survey results have to be interpreted with this in mind.

Several proposals have been made to resolve the maintenance dilemma. At one time compulsory insurance against a broken marriage seemed a possible solution, but now I feel that the practical problems and political realities reduce its appeal. Who, if not the courts, decides that the marriage has broken down? Would the public be willing to pay larger national insurance contributions for a risk that appears to have little relevance to their happy marriage.

The Finer Committee on One-Parent Families made two major recommendations. The first one was that in those cases where the wife was entitled to supplementary allowance the Supplementary Benefits Commission should assess the amount the husband would pay and make an administrative order.[38] In essence much of the maintenance work would be transferred from the courts to the Department of Health and Social Security. This was no more than a reflection of the reality that the Department already supported a very large number of separated and divorced wives and their families. The second proposal was for the introduction of a non-contributory social security benefit that aimed to provide one-parent families with a guaranteed income above supplementary benefit levels, and also to allow mothers a real choice as to whether they would seek paid employment or stay at home.[39] This "Guaranteed Maintenance Allowance" scheme would have placed one-parent families in a superior financial position to other claimant groups such as the physically handicapped and the aged. Neither proposal has proved acceptable to Parliament. There is no obvious solution to the problem that nature has created: namely only half the population can bear children.

It is clear from the similar results and issues provided by the Alberta and English studies that the casualties of broken marriages share common problems. The most evident of these is that few men have the means to maintain two households effectively.

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38 Op. cit., Pt. 4, s. 12, pp. 152-170.
39 Ibid, Pt. 5, ss. 5 and 6, pp. 276-314.

PART 4

THE ECONOMICS OF DIVORCE: SOCIAL AND ECONOMIC CONSEQUENCES OF PROPERTY, ALIMONY AND CHILD SUPPORT AWARDS

This paper was first presented at the International Invitational Conference on Matrimonial and Child Support held in Edmonton, Alberta, Canada, May 27-31, 1981.

Reprinted from
UCLA LAW REVIEW
Volume 28, August 1981, Number 6

THE ECONOMICS OF DIVORCE: SOCIAL AND ECONOMIC CONSEQUENCES OF PROPERTY, ALIMONY AND CHILD SUPPORT AWARDS*

Lenore J. Weitzman†

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 I am indebted to my co-investigators, Professors Ruth B. Dixon and Herma Hill Kay, for their continued advice and collaboration on the California Divorce Law Research Project, to Professors William J. Goode, Ruth B. Dixon, Caleb Foote, Herma Hill Kay, Michael Wald, Carol Bruch, Kingsley Davis, and Robert Mnookin for their helpful comments on earlier drafts of this Article, and to my research assistants Ed Gilliland, David C. Lineweber and Holly J. Wunder. I am also grateful for research support provided by the National Institute of Mental Health, Grant MH-27617; the National Science Foundation, Grant G1-39218; The Center for the Study of Law and Society at the University of California, Berkeley; the Boys Town Center, the Center for Research on Women, and the Hoover Institution at Stanford University; Nuffield College and the Centre for Socio-Legal Studies, Wolfson College, Oxford University; and the Rockfeller Foundation Center, Bellagio, Italy.

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INTRODUCTION

Each year over one million American marriages end in divorce, disrupting the lives of more than three million men, women, and children.[1] In California alone, the Superior Courts process over 130,000 divorce cases a year,[2] and there is no indication that the divorce rate will decline. In fact, more than 40% of American marriages contracted in the 1980s are expected to end in divorce,[3] and by the 1990s only 56% of the children in the United States will spend their entire childhood with both natural parents.[4]

The importance of divorce lies not only in its numerical growth, but also in its increasing social and economic impact on American family life. Decisions about property and support that are made at the point of divorce inevitably shape the futures of divorcing couples and their children. Yet relatively little is known about the nature of these economic decisions and their subsequent effects.

The first aim of this Article, therefore, is to provide data on the economic aspects of divorce—the current patterns of property, spousal, and child support awards. Because these awards, although decided at the point of divorce, are inevitably based on judges' and lawyers' assumptions about how each of the parties and their children will (or should) fare in the future, the second aim of this Article is to examine that future and to analyze the

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1. H. CARTER & P. GLICK, MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY 394 (rev. ed. 1976).

2. In 1980, over 132,000 decrees of dissolution of marriage were issued. Personal communication from Dr. Robert B. Mielke, Research Analyst, Department of Health Services, State of California (Oct. 27, 1981). The figures for divorce in California have exceeded 100,000 every year since 1970. *Id.*; Cal. Center for Health Statistics, Cal. Health & Welf. Agency, California Vital Statistics Trends: 1950-1975, at 22 (May 3, 1976).

3. Demographer Samuel Preston estimates that 44% of all current marriages will end in divorce. Preston, *Estimating the Proportion of American Marriages That End in Divorce*, 3 SOC. METHODS & RESEARCH 435, 457 (1975).

4. Glick, *Children of Divorced Parents in Demographic Perspective*, 35 J. SOC. ISSUES 170, 175 (1979). Dr. Paul Glick, Senior Demographer of the Population Division of the U.S. Census Bureau, projects that by 1990 half of the children will spend some time during their childhood living in a single-parent household (a definition which includes separated and widowed parents as well as divorced parents). *Id.* at 176. This represents a dramatic increase from 1960, when only a minority of the children under 18 (27%) did not grow up in a home with their two natural parents. *Id.* at 171.

Focusing on the impact of divorce alone, Dr. Glick predicts that by 1990 close to one-third of all U.S. children will have experienced a parental divorce before they reach the age of 18. *Id.* at 175. Surprisingly, even this estimate may be too low. Dr. Glick predicts a very modest increase between 1976 and 1990, from 28% to 32%. *Id.* at 174-75. If, however, the divorce rate continues to rise, as it may well do, we are likely to find that about half of all children under 18 will experience parental divorce by 1990.

ways in which divorce settlements have shaped radically different futures for divorced men on the one hand, and for divorced women and their children on the other.

The last decade has brought a major change in the legal process of divorce. No-fault divorce laws[5] have shifted the focus of the legal process from moral questions of fault and responsibility to economic issues of ability to pay and financial need. Today fewer husbands and wives fight about who-did-what-to-whom; they are more likely to argue about the value of marital property, her earning capacity, and his ability to pay. The increased importance of these economic issues suggests the need for more complete information to assist judges, attorneys, and divorcing couples in making economically sound decisions. It is hoped that the information presented in this Article will begin to serve that purpose.[6]

In an attempt to meet this need, this Article addresses two major questions. First, what has been the impact of California's no-fault divorce law on the patterns of property and support awards? Second, what are the consequences of these awards for postdivorce standards of living of the divorced parties and their children? After a brief description of the economic basis of no-fault divorce and the research methodology utilized in this study, we shall examine three types of awards: the division of property, spousal support, and child support. We shall then analyze the financial effects of these awards on the postdivorce incomes of husbands and wives, and the social effects of these awards on the postdivorce lives of children. Finally, we shall examine some policy implications of the findings.

I. Preliminary Considerations

A. *The Economic Basis of No-Fault Divorce*

With the 1969 Family Law Act,[7] California became the first state in the United States to adopt a "pure" no-fault divorce law. While the traditional divorce law required grounds based on fault, such as adultery or extreme cruelty, for dissolution of the mar-

5. All states except South Dakota and Illinois have some form of no-fault option for divorce. Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 Fam. L.Q. 229, 241 (1981). Yet traditional notions of fault continue to play a role in divorce proceedings in many states, even though these states recognize "irreconcilable differences" as a ground for divorce and can thus be classified as no-fault states. For instance, in North Dakota even if the divorce is granted on the basis of irreconcilable differences, the courts may consider the conduct of the spouses in dividing their property. Novlesky v. Novlesky, 206 N.W.2d 865 (N.D. 1973).

6. With this aim in mind, every effort has been made to make this Article comprehensible to readers with no statistical or legal expertise.

7. Cal. Civ. Code §§ 4000-5174 (West 1970 & Supp. 1981).

riage, the no-fault (and no-consent) law required only that one spouse assert "irreconcilable differences which have caused the irremediable breakdown of the marriage."[8]

Under the traditional law, the economic aspects of the divorce were clearly linked to the determination of fault: being found "guilty" or "innocent" in a divorce action had important financial consequences. Alimony, for example, could be awarded only to the innocent spouse as a judgment against the guilty spouse.[9] Thus a wife found guilty of adultery was typically barred from receiving alimony, while a husband found guilty of adultery or cruelty could be ordered to pay for his transgressions with a punitive alimony award to his ex-wife.[10] The division of property was similarly tied to fault, because the courts almost invariably awarded more than half of the property to the innocent or injured party.[11] This situation served as an incentive for heated accusations and escalating charges of wrongs on both sides, in the interest of achieving the most favorable property settlement possible.[12] It also encouraged a spouse who did not want a divorce to use fault as a lever in negotiations concerning property.

Opponents of the traditional divorce argued that using matrimonial offense as a basis for determining property and alimony awards was "outmoded and irrelevant, often producing cruel and unworkable results."[13] In setting new guidelines, the reformers hoped to create conditions for more rational, equitable, and uniform settlements. Rather than rewarding virtue and punishing sin, financial settlements were to be based on the real needs and assets of both parties.[14] Thus, under the new law, spousal support is based on the financial needs, employability, and ability to pay of both parties.[15] Correspondingly, the division of property is no longer influenced by fault-linked behavior. The court is bound to divide the community property equally unless deliberate misap-

8. *Id.* § 4508 (West Supp. 1981).

9. *Id.* § 139 (West 1954) (repealed 1969).

10. Many attorneys believed that justice was best served by using alimony as a lever against a promiscuous husband or as a reward for a virtuous wife. As Eli Bronstein, a New York matrimonial lawyer, put it: "If a woman has been a tramp, why reward her? By the same token, if a man is alley-catting around town, shouldn't his wife get all the benefits she had as a married woman?" M. WHEELER, NO FAULT DIVORCE 57 (1974).

11. *See* former CAL. CIV. CODE § 146 (West 1954) (repealed 1969).

12. Hogoboom, *The California Family Law Act of 1970: 18 Months Experience*, 27 J. MO. B. 584, 586-87 (1971).

13. Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156, 156 (1970).

14. Guidelines for financial settlements were thus altered to remove evidence of misconduct from consideration.

15. CAL. CIV. CODE § 4801 (West Supp. 1981). Exactly how the different elements are to be weighted is not specified.

propriation can be proven, or unless the parties agree to an unequal division.[16]

In summary, the shift from a fault-based system of divorce to a no-fault system was, in theory, a shift from a morally based system of justice to a morally neutral system based on practical economic decisions. Whereas the traditional law sought to deliver a system of moral justice which rewarded the "good" spouse and punished the "bad" one, the no-fault law ignores the spouses' moral history as a basis for awards; it seeks instead a system of fairness and equitable distribution of resources based on the financial needs of each of the two parties, and upon equality between the spouses.

B. *Research Methods*

Because California was the first state in the nation to adopt a "pure" no-fault law, and because its records provide fairly detailed information on the characteristics of divorcing couples,[17] it offers a unique laboratory for evaluating the effects of no-fault divorce. To provide a systematic examination of the impact of California's no-fault divorce law, data from four different sources have been collected and analyzed:

1. *Court Records.* Five systematic random samples of divorce decrees were drawn from court records in San Francisco and Los Angeles Counties. The samples were drawn in 1968 (two years before the no-fault law was instituted), in 1972 (two years after the law was instituted), and in 1977 (to examine the extent of the change seven years later). Each sample included approximately 500 divorce cases per year in each city.[18]
2. *Judges.* In-depth interviews with forty-four family law ·s were conducted in San Francisco and Los Angeles

16. The parties may agree to an unequal division of the community property by written agreement or by oral stipulation in court. *Id.* § 4800(a). *See also* note 56 & accompanying text *infra.*

17. *But see* note 18 *infra.*

18. A random sample of approximately 500 cases was drawn from all final decrees of divorce/dissolution in each county in 1968 and 1972. In 1968, there were 26,603 divorces granted in Los Angeles County, requiring a sampling ratio of one in 53 (n=507). In San Francisco, with 2,328 divorces in 1968, the sampling ratio was one in five (n=498).

In 1972, there were 35,635 final decrees of dissolution granted in Los Angeles and 3,495 in San Francisco, producing a sampling ratio of one in 71 in Los Angeles (n=486) and one in seven in San Francisco (n=506).

The 1977 sample was limited to Los Angeles County where close to one-third of all California dissolutions are granted. The sample was drawn from the 15,752 decrees of dissolution granted between January 1 and June 1, 1977. Petitions filed prior to January 1, 1975 were excluded from the sample. The sampling ratio was one in 31.5 (n=500).

The statistics on the number of divorces per county and the random samples of divorce decrees were obtained from the State Department of Vital Statistics, Sacra-

Counties in 1974 and 1975.[19] More informal interviews were obtained at a statewide conference of family court judges in 1981, together with twenty-six completed questionaires.[20]

3. *Attorneys.* In-depth interviews with 169 matrimonial attorneys were conducted in the San Francisco Bay Area[21] and greater Los Angeles County[22] in 1974 and 1975.[23]

4. *Divorced Men and Women.* In-depth interviews with 114 recently divorced men and 114 recently divorced women were conducted in the greater Los Angeles area in 1978. The interview sample was stratified by length of marriage and socioeconomic status.[24]

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mento, California. We are indebted to Roger Smith and Merle Shields for their help with these tasks.

The 1977 sample was limited to decrees granted before June 1, 1977 because the California Legislature voted to abolish the collection of detailed socioeconomic and demographic information on the Certificates of Registry of Final Decrees of Dissolution (the basis for these samples) in June 1977. 1977 Cal. Stats. ch. 676, § 6. Although this legislation did not officially go into effect until January 1978, we were concerned that record keeping during the second six months of 1977 would be less rigorous. As a result of this legislation, further research in this area has been effectively foreclosed in the foreseeable future.

19. The San Francisco judges' sample consisted of Superior Court judges who were assigned to the domestic relations calendar of uncontested divorces and preliminary hearings for six months or more, and/or those who were regularly assigned contested divorce cases in 1974. The Los Angeles judges' sample included the Superior Court judges and commissioners in Los Angeles County who heard contested and uncontested divorce cases in 1975. In San Francisco, 18 of the 20 eligible judges (90%) were interviewed; in Los Angeles, 26 of the 27 eligibles (96%) were interviewed.

20. As the respondents to this questionnaire were assured confidentiality, no specific findings are reported in this Article.

21. The San Francisco Bay Area sample of attorneys consisted of all members of the American Academy of Matrimonial Lawyers, all members of the Family Law Section of the San Francisco Bar Association, and those additional attorneys identified by more than two members of the above groups as one of the three most knowledgeable *or* effective attorneys in family law in the Bay Area (n=77).

22. In Los Angeles, a similar sampling procedure would have yielded over 1,400 attorneys. The interview sample was therefore restricted to those who had served on the Executive Committee of the Family Law Section of the Los Angeles and Beverly Hills Bar Associations within the past ten years, the 20 members of an informal organization of elite matrimonial lawyers, and those additional attorneys who were identified by more than two attorneys in these groups as one of the three most knowledgeable *or* effective attorneys in family law in the Los Angeles area (n=92).

23. There was an extraordinarily high response rate in both cities: 97% in San Francisco and 100% in Los Angeles.

24. First, a random sample was drawn from final decrees of dissolution granted in Los Angeles County between May and July 1977. This sample was then stratified by length of marriage and socioeconomic status to enable us to examine systematically the effects of marital duration and income on the terms of the divorce settlement. Since most divorced couples are young and have little property at the time of the divorce, we intentionally oversampled long-married and high-property couples. Because we were able to obtain complete information on the occupations, incomes, and employment experience of women and men in this sample—information that was

II. Marital Property: Ownership and Division

A. *The Nature and Extent of the Community Property*

The first and perhaps most important fact that this research reveals about marital property is that many divorcing couples have little or no property to divide. The typical divorcing couple has relatively few community assets, and those assets are typically of a relatively low value. This is evident in all five random samples of court dockets from 1968 to 1977, and in the 1978 couples interview sample. For example, in the 1977 random sample of court dockets, less than half of the Los Angeles divorcing couples showed evidence of having *any* major assets,[25] such as a community property house, business, or a pension.[26]

Because most divorcing couples are relatively young and in the lower income groups, the scarcity of their community assets should not be surprising. Nevertheless, one may wonder whether many couples had property which they divided privately, out of court, without referring to such property in their divorce papers. The in-depth interviews with recently divorced persons allowed us to investigate this possibility, and to compare the property which these divorcing couples actually owned with the property listed on the court records. Indeed, data from these interviews, discussed in more detail below, reveal some under-reporting on court records.[27] In fact, couples who owned relatively few assets –such as household furnishings and cars—were the ones least likely to specify these assets in the court records, and were least likely to be concerned about the inclusion of assets in the interlocutory decree

generally unavailable in the court records—we have relied heavily on the interview sample in this Article.

In order to present an accurate portrait of the entire population of divorced persons, we have corrected for the over-representation of long-married high-income families in the interview sample in two ways. First, instead of using sample averages, we controlled for both length of marriage and income. Second, when we did not control for income and marital duration, we weighted the interview responses reported in this paper to reflect the proportion of each group of respondents in a normal sample of divorced persons—such as our 1977 docket sample. Details of the sampling and weighting procedures are on file at the author's office at Stanford University.

25. Major assets are derived from the property listed on the divorce petition or the property awarded on the interlocutory decree.

26. *See* Table 5 *infra.* While Los Angeles couples were more likely than San Francisco couples to list some property or debts in the court records, the differences between the two cities are minor. Because of the lack of significant differences, the 1977 docket sample was drawn only in Los Angeles, and only Los Angeles data are reported here. For a more detailed discussion of the San Francisco and Los Angeles docket data, see Dixon & Weitzman, *Evaluating the Impact of No-Fault Divorce in California,* 29 Fam. Rel. 297 (1980).

27. Contrasting estimates of community property ownership from court records and personal interviews are revealed by comparing Tables 4 and 5 *infra.*

of divorce.[28] However, the vast majority of couples who owned substantial assets (or their attorneys) have specified the nature of their property and the terms of its division in the interlocutory decree of divorce.[29] Thus it is appropriate to conclude that most divorcing couples simply did not have major community assets to be divided. Nor do most divorcing couples have separate property assets. Less than 14% of the 1977 sample of interlocutory decrees included a listing or a confirmation of separate property assets.[30]

The lack of substantial assets among divorcing couples is illustrated by data from the 1978 interview sample. When responses from that sample are weighted so that they more accurately represent the total population of divorced persons in California,[31] we find that about half of the divorcing couples in California had less than $11,000 worth of community property.[32] In fact, the average (median) value of the total community property owned by divorcing couples was $10,900.[33] The relatively small number of both divorced and married couples who have substantial assets has been confirmed by other research in the United States[34] and in England.[35]

Table 1 shows the total value of the community property (in

28. Most of the financial arrangements are specified in the interlocutory decree. Here and elsewhere, we do not distinguish between the interlocutory and final decree of divorce.

29. Among couples with substantial assets, one also finds confirmation of separate property assets in the interlocutory decree.

30. In the 1978 interview sample, the median value of separate property claimed by the husband was $10,000. The median value of separate property claimed by the wife was $2,000.

31. The weighting procedure is explained in note 24 *supra*.

32. *See* TABLE 1 *infra*. For purposes of this discussion, it is reasonable to generalize from our Los Angeles samples to the population of divorcing couples in the state of California. For a more detailed comparison of the characteristics of our sample and the statewide population, see Dixon & Weitzman, note 26 *supra*.

33. *See* TABLE 1 *infra*. If we exclude debts, the median value of community assets was $14,700. *Id.*

34. In interviews with 425 divorced Detroit mothers in the 1950s, Goode found that 40% of the divorced families had "no property" to divide (i.e., had only a few household items) and only 18% had property worth $4,000 or more. W. GOODE, AFTER DIVORCE 217 (1956).

Similarly, in a 1978 survey of the U.S. Census Bureau, less than half of the divorced women reported having any marital property to divide upon divorce. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHILD SUPPORT AND ALIMONY: 1978, CURRENT POPULATION REPORTS, SERIES P-23, NO. 106 (1980) [hereinafter cited as CHILD SUPPORT AND ALIMONY]. These data are discussed more fully at note 37 *infra*.

35. In a 1971 national survey of married and formerly married people in England and Wales, Todd and Jones found relatively little property ownership among most married couples as well. For example, only 52% of the married couples owned or were purchasing their own homes. J. TODD & L. JONES, MATRIMONIAL PROPERTY 9 (1972).

TABLE 1

TOTAL VALUE OF THE COMMUNITY PROPERTY OWNED BY DIVORCING COUPLES
(Based on weighted sample of interviews with divorced persons, Los Angeles County, 1978)

	NET WORTH OF COMMUNITY ASSETS (Including Debts)		GROSS VALUE OF COMMUNITY ASSETS (Not Including Debts)	
PROPERTY VALUE	Weighted Percentage	Cumulative Percentage	Weighted Percentage	Cumulative Percentage
Negative value	9%	9%	—	—
Less than $5,000	30	39	28%	28%
$5,000-9,999	8	47	11	39
$10,000-19,999	11	58	11	50
$20,000-29,999	5	63	9	59
$30,000-49,999	16	79	17	76
$50,000-99,999	9	88	12	88
$100,000-249,999	8	96	9	97
$250,000+	3	99	3	100
Median* $10,900			Median* $14,700	
Mean** $42,800			Mean** $45,900	

* The median is the value above which and below which lie one-half of the values.
** The mean is arithmetic average of all the values.

1977-78 dollars) owned by couples in the 1978 interview sample (weighted to represent the total population of divorcing couples). The first two columns of Table 1, listing the net value of the community property, show the percentages of divorced couples who owned property at each of eight levels of value when debts as well as assets were included in the calculation of the community's net worth.[36] The third and fourth columns, listing the gross value of the property, show the percentages of the same levels when the community debts are not subtracted from the value of the assets.

To describe the typical value of property owned by divorcing couples, the median value (the value in the middle of the distribution so that half of the cases fall above it and half below it) is probably a better index of property owned by the "average"

36. Home mortgages are not treated as debts because we have used the equity in the home (i.e., the market value minus the mortgage) in these calculations.

couple than the mean (the arithmetic average) because the mean is more strongly influenced by a few high values such as the 3% of families with assets over $250,000. Thus, the $10,900 median net worth is probably more "typical" than the $42,800 mean. In summary, although the typical divorcing couple had almost $15,000 worth of community assets, their total net worth was only $10,900 once the community debts were subtracted from the value of the assets.

The data in Table 1 underscore the relatively low value of the property owned by most divorcing couples. One out of eleven couples had a negative community balance in that debts exceeded assets. As the second column indicates, close to 50% of the couples had less than $10,000 net worth, and close to 60% had less than $20,000 net worth. This means that if the property was divided equally, each spouse would receive less than $10,000 worth of assets in 60% of the cases.[37]

Even if we exclude community debts and focus solely on the value of assets, as shown in the right-hand side of Table 1, we find that half of the divorcing couples had assets worth less than $20,000. Forty-one percent of the divorced couples had assets of $30,000 or more, while only 12% had assets of $100,000 or more.

As might be expected, the amount and value of community property increases with both marital duration and family income. Table 2, which shows the weighted value of the community property by marital duration, indicates that couples married less than five years had, on the average, about $3,000 net worth. This increased to an average of almost $50,000 net worth among couples married eighteen years or more.

Along the same lines, Table 3 shows the value of community property relative to family income. Couples with family incomes between $10,000 and $20,000 a year had, on the average, a community net worth of less than $5,000. This increased to nearly $22,000 among couples with family incomes between $20,000 and $30,000, and to $61,500 among couples earning between $30,000 and $50,000.

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37. This is somewhat higher than the amount reported in a 1978 national survey conducted by the U.S. Census Bureau. The divorced women who reported receiving any property received, on the average, a median award of $4,647. CHILD SUPPORT AND ALIMONY, *supra* note 34, at 9. Since most of these awards were in common law property states, it is possible that these women received less than half of the marital property. If so, then the total amount of marital property would be more than twice the amount of their award.

TABLE 2

COMMUNITY PROPERTY BY MARITAL DURATION
(Based on weighted sample of interviews with divorced persons, Los Angeles County, 1978)

LENGTH OF MARRIAGE	NET VALUE OF ASSETS* (including debts)	GROSS VALUE OF ASSETS* (not including debts)
Less than 5 years	$3,000	$4,600
5-9 years	14,200	21,800
10-17 years	46,100	47,000
18 years or more	49,900	62,600

* Median value, rounded to the nearest one hundred dollars.

The data in Table 3 have important implications for the impact of property awards (as distinct from support) on postdivorce standards of living, because they show the relatively low value of the community property in contrast to wage and salary income. In just one year, the average couple can earn more money than the total value of their community assets.[38] This suggests that *the spouses' earning capacity is typically worth much more than the tangible assets of the marriage*. In fact, as Table 3 indicates, among the lower and middle income couples, who constitute 50% of the

TABLE 3

COMMUNITY PROPERTY BY FAMILY INCOME
(Based on the weighted sample of interviews with divorced persons, Los Angeles County, 1978)

FAMILY INCOME (yearly)	MEDIAN INCOME* (in group)	VALUE OF COMMUNITY PROPERTY: NET VALUE OF ASSETS* (including debts)	VALUE OF COMMUNITY PROPERTY: GROSS VALUE OF ASSETS* (excluding debts)
Less than $10,000	$ 5,000	$ 300	$ 1,000
$10,000-19,999	16,000	4,100	6,800
$20,000-29,999	23,000	21,800	24,600
$30,000-49,999	35,000	61,500	62,700
$50,000 or more	55,000	85,600	115,300

* Median value, rounded to nearest one hundred dollars.

38. Consider, for example, the typical divorcing couple: a couple earning between $10,000 and $20,000 a year. If this couple has accumulated a community of about $4,000 and has a median yearly income of $16,000, it would take them only one quarter of a year to earn $4,000—the value of their total community property.

divorcing population,[39] the median value of the community property is typically equal to only three months' family income.[40]

The type of assets owned by divorcing couples is shown in Table 4, along with the average (median and mean) value of each

TABLE 4

OWNERSHIP AND VALUE OF COMMUNITY PROPERTY
(Based on weighted sample of interviews with divorced persons, Los Angeles County, 1978)

TYPE OF PROPERTY	PERCENTAGE OF COUPLES OWNING EACH TYPE OF PROPERTY	MEDIAN* VALUE	MEAN** VALUE
Assets			
Household furnishings	89%	$ 3,000	$ 5,100
Cars or other vehicles	71	3,000	3,500
Money (bank accounts, stocks)	61	1,800	9,300
Family home	46	32,900	37,300
Other real estate	11	49,900	61,400
Husband's pension	24	3,000	8,500
Wife's pension	11	5,000	7,000
Business	11	29,900	70,900
Other property	17	3,000	7,500
Debts			
Community debts	44	3,000	5,600

* The median is the value above which and below which lie one-half of the values.
** The mean is arithmetic average of all the values.

39. The median family income for the weighted sample of divorcing couples is $20,000 a year.

40. It is only when we look at couples with yearly incomes of $30,000 or more that we find community property values that are almost twice as great as yearly income. *See* TABLE 3 *supra*. A similar analysis reveals the relatively greater value of the husband's earning capacity in comparison with the tangible assets acquired during the marriage. It takes the average divorced man less than a year to earn as much as the community's net worth at the time of his divorce. The median income for divorced men is $13,000 a year. It would therefore take about 10 months to earn $10,900—the median value of community net worth.

asset.[41] A quick review of these assets suggests that the family home (with a 1977-78 median value of close to $33,000) is likely to be a couple's most valuable asset. It is the major community asset for almost half of the divorcing couples. Other real estate and businesses are also major assets for the 11% of the couples who own them. Surprisingly, few divorcing couples have pensions of major value.

TABLE 5

COMMUNITY PROPERTY ITEMIZED ON DIVORCE RECORDS, 1968-1977
(Based on random samples of court dockets, Los Angeles County)

TYPE OF PROPERTY LISTED	PERCENTAGE OF PETITIONERS LISTING PROPERTY BY YEAR OF FINAL DECREE		
(Number of Cases)	1968	1972	1977
	(507)	(468)	(500)
Household furnishings	56%	42%	39%
Cars or other vehicles	50	42	38
Money, stock or bonds	21	21	21
Family home	26	25	32
Real Estate other than residence	8	8	10
Pensions	5	8	17
Business	5	5	7
Other property	13	11	17
Community Debts	15	9	26

The data in Table 4 also affirm the relatively low value of most community property assets. While most divorcing couples own household furnishings (89%) and automobiles (71%), neither of these assets tends to have a high monetary value. For example, the mean value of home furnishings is approximately $5,000. Similarly, even though most (61%) of the divorcing couples have some savings in the form of money in bank accounts, stocks, or bonds, these assets amount to an average (mean value) of less than

41. These values were obtained in the in-depth couples interviews. Most of the respondents relied on either the court's valuation of the asset or the value agreed upon in negotiations.

$10,000. Half of the couples have less than $1,800, the median value of savings.

The type of assets owned by divorcing couples remained quite stable over the decade of this research. Table 5 presents the percentage of Los Angeles divorcing couples who listed various types of community property on their divorce petitions in 1968, 1972, and 1977.

Despite the generally consistent pattern, two shifts in the property listings are evident. First, there is a decline between 1968 and 1977 in the percentage of couples who itemize household furnishings and cars on divorce records. This change probably reflects an increase in private settlements, especially among less well-to-do couples, rather than a real decline in property ownership.[42]

The second and most dramatic change in the type of property listed over the decade is the rise in divorcing couples listing pensions—which grew from 5% of the couples in 1968 to 8% in 1972, and to 17% in 1977. The dramatic increase between 1972 and 1977 probably reflects, in part, the California Supreme Court's 1976 ruling in *In re Marriage of Brown*,[43] recognizing the community's interest in non-vested pensions. The data in Table 5 also reflect a small but significant increase in the listing of community property homes (from 26% in 1968 to 32% in 1977), probably representing a real increase in home ownership. In fact, as noted in

42. As noted in TABLE 4, *supra*, most divorced couples own household furnishings and cars as community property. However, some of the couples sampled had few other assets, and they apparently found it easier and less expensive to divide their assets privately than to list them for formal disposition. Support for this interpretation is provided by the rise of do-it-yourself or *in pro per* divorces between 1968 and 1977. Our random sample of court dockets in Los Angeles indicates that *in pro per* filings rose from less than 1% of the petitioners in 1968, to 5% in 1972, and to 30% in 1977. Couples who file *in pro per* typically have relatively few assets and are likely to divide them without having them listed on their divorce petitions or interlocutory decrees. Thus, the equal division requirement seems to have facilitated private settlements because the equal division rule enables couples and their attorneys to predict what property division a court would order. This predictability leads, in turn, to more out of court settlements.

Increased private ordering under the new law is also reflected in the rise in marital agreements over the decade of this research. In 1968, only 19% of the cases in our sample of court dockets had separate marital agreements attached to the interlocutory decree. By 1972 they were evident in 22% of the cases, and by 1977 in 26%. Thus by 1977, approximately one fourth of the settlements reviewed in court had, in fact, been resolved in advance by private agreement. These data suggest that one advantage of an equal division rule may be the fostering of private ordering which saves court time. The results of these privately negotiated settlements are compared to those decided in court in L. WEITZMAN, THE NEW DIVORCE: THE IMPACT OF NO-FAULT DIVORCE IN CALIFORNIA (forthcoming).

43. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr 633 (1976).

Table 4, the in-depth interviews indicated that home ownership is even more widespread than Table 5 suggests: forty-six percent of the weighted interview sample reported having some equity in a family home.[44]

1. Patterns of Home Ownership

As might be expected, communal equity in a family home is closely associated with length of marriage and income level. This relationship is dramatically illustrated in Table 6.

TABLE 6

HOME OWNERSHIP BY MARITAL DURATION AND FAMILY INCOME
(Based on interviews with divorced persons, Los Angeles County, 1978)

Length of Marriage	Percentage of Couples Owning Homes by Yearly Family Income		
	Less than $20,000	$20,000-29,000	$30,000 and over
Less than 5 years	11%	30%	30%
(Number of cases)	(27)	(10)	(20)
5-10 years	21%	57%	85%
(Number of cases)	(14)	(14)	(20)
11-17 years	56%	65%	96%
(Number of cases)	(9)	(17)	(26)
18 years or more	67%	93%	92%
(Number of cases)	(12)	(14)	(38)

We can quickly see the effects of marital duration on home ownership by holding income constant. If we look at the second column of Table 6, showing families with incomes between $20,000 and $29,000 a year, we see that 30% of those married less than five years owned or were purchasing a home, compared to 57% of those married five to ten years, 65% of those married eleven to seventeen years, and 93% of those married eighteen years or more.

Table 6 also shows the effects of income on home ownership. If we hold marital duration constant and look only at those couples married five to ten years, we see that home ownership

44. *See* TABLE 4 *supra*.

rises from 21% of those with yearly incomes under $20,000, to 57% of those earning between $20,000 and $29,000 a year, to 85% of those with yearly incomes over $30,000.

Overall, using a weighted sample of interviews with divorced persons (not shown), only 31% of the divorcing couples who were married less than ten years owned homes in contrast to 83% of those married twenty years or more.[45] These data indicate that home ownership is virtually universal among long-married couples in California. On the other hand, most couples in short marriages, especially those with lower incomes, do not acquire homes.

The implications of these data are obvious: neither a home nor any other tangible asset of major value is usually available to cushion the financial impact of divorce for the typical lower income couple that divorces after five or eight years. For this couple the primary financial issues are likely to be those of spousal and child support.[46]

Family home ownership is also a lesser consideration for wealthy families, but for very different reasons. Although home ownership is virtually universal among wealthy families, their equity in the home accounts for a smaller proportion of their *total* property. Wealthy families typically have a variety of assets (other real estate, pensions, stocks, and income-producing investments), some of which are equal to—or exceed—the value of the house. For example, equity in the family home accounts for an average (median) of 47% of the community's net worth among families with yearly incomes of $50,000 or more, in contrast to 75% of community net worth among families earning less than $20,000 a year.[47] This statistic is for couples married between eleven and seventeen years, but the same pattern holds for all marital durations. Among couples married eighteen years or more, home equity accounts for 42% of the community's net worth in families with yearly incomes of $50,000 or more, but for 62% in families with yearly incomes of less than $20,000.[48]

Thus, while low-income couples typically do not own homes,

45. These overall statistics are based on weighted data so that the interview sample represents the total population of divorcing couples.

46. This is not to suggest that a home and its equity necessarily provide a sufficient financial cushion for those couples who do have homes. As TABLE 4 indicates, the equity in the home in particular, and in community property (as currently defined) in general, is of a relatively low value when compared to wage and salary income. *See also* text following TABLE 2 to note 40 *supra*.

47. This data is based on a weighted sample of interviews with divorced persons in Los Angeles County in 1978. A table showing home equity as a percentage of the net value of community property by marital duration and family income has been omitted for reasons of space.

48. *Id.*

and higher income couples typically have other assets to "offset" the importance of equity in their home, middle income couples are likely to be significantly affected by the division and/or award of equity in the family home because it is likely to be their most valuable tangible asset.

2. Patterns of Pension Ownership

Ownership of pensions and retirement funds varies greatly with gender, as well as with marital duration and family income. Husbands are much more likely than wives to have acquired pensions during marriage, and the value of their pensions is highly correlated with both income and length of marriage.[49] Among men with yearly incomes under $20,000, pension ownership rises from 12% of those married ten years or less, to 56% of those married eighteen years or more.[50] The same pattern is evident among men earning more than $20,000 a year: pension ownership rises from 30% among those in short marriages to 62% among those married eighteen years or more.[51]

Married women, by contrast, are much less likely to acquire pensions, irrespective of the length of their marriage or age. As we observed in Table 4, only 11% of the divorcing women interviewed in Los Angeles County in 1978 had pensions, compared to 24% of the divorcing men. It is primarily women with incomes of $20,000 or more a year who had pensions,[52] and only 2% of all

49. For married men, length of marriage is actually a surrogate for age and employment experience, but this does not hold true for married women.

50. PENSION OWNERSHIP* BY GENDER, MARITAL DURATION AND INDIVIDUAL INCOME
(Based on interviews with divorced persons, Los Angeles County, 1978)

MARITAL DURATION	PERCENTAGE OF HUSBANDS WITH PENSIONS BY HUSBAND'S PREDIVORCE INCOME		PERCENTAGE OF WIVES WITH PENSIONS BY WIFE'S PREDIVORCE INCOME	
	Under $20,000	$20,000 or more	Under $20,000	$20,000 or more
10 years or less	12%	30%	12%	50%
(Number of cases)	(60)	(44)	(101)	(4)
11-17 years	33%	39%	8%	60%
(Number of cases)	(24)	(28)	(49)	(5)
18 years or more	56%	62%	12%	—
(Number of cases)	(16)	(48)	(64)	(1)
Total	24%	45%	11%	60%
	(100)	(120)	(214)	(10)

* This table refers only to community property pensions. Less than 2% of divorces involved separate property pensions.

51. *See* note 50 *supra.*

52. *See id.*

divorced women earn that much yearly income.[53]

B. *Division of the Community Property*

1. The Equal Division Requirement

The Family Law Act[54] instructs the court to divide the community assets and liabilities equally.[55] While a husband and wife may agree to a non-equal division, either in writing or orally in court, in contested cases the court is bound to award each spouse half of the total community assets. The court may make an unequal division only if there is evidence of deliberate concealment or misappropriation of property by one party, or if the total of the community property is under $5,000 and if one spouse's whereabouts are unknown, or if the debts exceed the assets.[56] Basically, the rules determining the definition of community property were left intact by the Family Law Act.[57]

In requiring an equal division, the Family Law Act treats marriage as an equal partnership. It makes a conclusive presumption that the overall financial and nonfinancial contributions of the spouses are of equal worth. The drafters of the 1970 California legislation believed that an equal division of community assets was more fair than the vague standard of a "just" or "equitable" division then used in most states.[58] The latter standard, which is also found in the Uniform Marriage and Divorce Act,[59] allows a great deal of judicial discretion in the division of marital property, subject to the judge's own standards of equity.[60] The equal division rule was seen as preferable both because it limited judicial

53. This statistic is derived from the weighted interview sample of divorced men and women.

54. CAL. CIV. CODE §§ 4000-5174 (West 1970 & Supp. 1981).

55. *Id.* § 4800 (West Supp. 1981).

56. *Id.* Community obligations may be divided unequally if there are no assets to divide or if, after the equal division of the community assets, there remain community obligations to be disposed of. *See In re* Marriage of Eastis, 47 Cal. App. 3d 459, 120 Cal. Rptr. 861 (1975).

57. Under the old law, the wife's earnings became separate property after separation, while the husband's earnings continued as community property until a judgment of legal separation or dissolution was obtained. H. FREEMAN, W. HOGOBOOM, W. MACFADEN, L. OLSON & R. LI, ATTORNEY'S GUIDE TO FAMILY LAW ACT AND PRACTICE 246-47 (1972) [hereinafter cited as ATTORNEY'S GUIDE TO FAMILY LAW ACT]. A 1971 amendment made either spouse's *after separation* earnings and accumulations his or her separate property. CAL. CIV. CODE § 5118 (West Supp. 1981).

58. *See generally,* Kay, Book Review, 60 CALIF. L. REV. 1683 (1972); Kay, *A Family Court: The California Proposal,* in DIVORCE AND AFTER 215 (P. Bohannon ed. 1967); R. Levy, Uniform Marriage and Divorce Legislation: A Preliminary Analysis 168-69 (Nat'l Conf. of Comm'rs on Unif. St. Laws 1968).

59. UNIF. MARRIAGE AND DIVORCE ACT § 307(a) (Alt. A) (1973), 9A U.L.A. 142 (1979).

60. New York feminists who opposed the adoption of an equitable distribution law in New York state in 1980 argued that this standard resulted in the wife getting

discretion and because it assured each partner an equal share of their jointly accumulated property.

The overwhelming majority of the attorneys and judges we interviewed (over 80%) said they thought the equal division rule was basically fair and preferable to the fault-based standards of the old law.[61] However, close to 40% of the attorneys thought judges should be allowed more discretion in dividing the community property. Their reservations about a strict equal division rule typically focused on its effect on the family home: they contended that the equal division rule forces a sale of the home in families which have no other appreciable assets beyond the equity in their home.[62] Other commonly mentioned situations in which more discretion was seen as desirable were those involving long marriages, minor children,[63] few assets, or a combination of these factors.[64] Most attorneys, however, concluded that judges already had enough discretion, pointing to the considerable leeway judges have in assigning values to items of community property and in setting support awards.[65]

2. Overall Division of Community Property

The new law has led to a dramatic change in the distribution of community property. The random samples of court dockets indicate that under the old law the property was usually divided

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less than half and typically no more than a third of the marital assests. Freed & Foster, *supra* note 5, at 230.

61. Only 20% of the attorneys and judges we interviewed thought that property awards should be clearly linked to the spouses' behavior during the marriage, as they were under the old law.

62. As one attorney stated: "So often the only asset of any consequence is the family residence. When the couple divorces, it is ordered sold and children are deprived of their home."

63. As one attorney explained:

> Where the children are involved, a greater proportion of the couple's assets should be allocated to the wife. If the husband has a business, he can always build a new estate, but she can end up with nothing. If she needs financial help to raise the kids, she should be awarded the lion's share of the assets.

64. For example, one attorney asserted: "If the family home is the only asset, and of modest value, she should be able to keep it for the kids." Another attorney argued:

> Where there are minor children involved and the family is living in a single family dwelling, and the marriage has been of some duration, more discretion is needed to permit a spouse to stay in the family home without having to forego her support to pay him off.

65. Quotations from two attorneys are illustrative. One attorney stated: "[Judges] have broad discretion now—they can make better adjustments now. For example, if a house is at question, the wife may get it subject to a note payable to her husband. Judges have so many more ways to balance property now; they can even use good will as a balance." Another attorney argued, "Judges use spousal support to adjust inequities in property division."

unequally, with the wife, who was typically the innocent plaintiff, receiving the lion's share. The no-fault law brought a clear increase in the percentage of cases in which the property was divided equally. By 1977, equal division was the norm.

TABLE 7

DIVISION OF COMMUNITY PROPERTY, 1968-1977
(Based on random samples of courts dockets, San Francisco and Los Angeles Counties)

	SAN FRANCISCO		LOS ANGELES		
	1968	1972	1968	1972	1977
	(57)	(59)	(34)	(43)	(221)
majority to husband*	2%	7%	6%	21%	10%
approximately equal division**	12	59	26	44	64
majority to wife*	86	34	58	35	26
mean percentage to wife	91%	62%	78%	54%	—***

* majority = over 60%

** approximately equal = between 40 and 60%

*** 1977 information not specified in detail sufficient to permit precise percentages

Table 7 shows that the wife was typically awarded more than half of the property under the old law.[66] In 1968, the property was divided equally in only 12% of the cases in San Francisco and 26% of the cases in Los Angeles.

Under the new law, the percentage of equal divisions increased dramatically: to 59% of the cases in San Francisco and 44% in Los Angeles by 1972.[67] By 1977, nearly two-thirds of the Los Angeles cases had an equal division.[68]

It is important to keep in mind the average value of the community property when thinking about the practical implications of these percentages. Since the median net value of community

66. Many of these unequal awards involved the family home and furnishings, which were typically awarded to the wife. *See* TABLE 10 *infra*. San Francisco wives were significantly more likely to get all the property under the old law than were Los Angeles wives.

67. I am indebted to Professor Herma Kay for noting that the remaining unequal divisions must have been by private agreement, since the court is bound to divide the property equally.

68. Thus, the new law brought a sharp drop in the percentage of wives who were awarded most of the community property. As TABLE 7 shows, in San Francisco the percentage dropped from 86% in 1968, to only 34% in 1972. In Los Angeles, it declined from 58% in 1968, to 35% in 1972, to 26% in 1977.

property in the period under survey was about $11,000, in most cases under the new law each spouse would receive about $5,500. Recalling the distribution of the community's net worth for 1978 as presented in Table 1, it is evident that since 58% of the couples had property worth less than $20,000 net, 58% of the divorced spouses could expect to be awarded less than $10,000 worth of property--assuming the property was divided equally. Or, to put it another way, only two out of five divorced spouses could expect a property award worth $10,000 or more.

While the shift in the overall pattern shown in Table 7 is clearly dramatic, three qualifications are necessary. First, although the docket samples are representative of the total population of divorcing couples, those couples who have only a few assets are, as we have noted, less likely than most to list their assets on court dockets.[69] Thus, in our calculation, the shift in the division of property could be ascertained only for those couples who listed their property on the court records.[70]

Second, in looking at the overall division of property in Table 7, we have not specified the items of property involved. Not all items of property are equally amenable to an equal division. Money can easily be distributed equally, but it is not always so easy to divide a house or a business. Some situations call for a "property division in which particular assets and obligations are wholly allocated to one party, or divided other than equally, in such a way that each party receives the same total net value."[71] This means that the spouse receiving a house, for example, may be required to make installment payments to the other spouse for his or her share of the assets. It is sometimes difficult to tell from the court records whether a series of monthly payments are tied to the property settlement or whether they are truly "spousal support." Thus, the figures on property division from the court records must be viewed with some caution, because they tell only part of the story.

Third, a small proportion of the cases contained a specific reference to a nonmodifiable integrated settlement of property and support; that is, the property award was explicitly linked to

69. *See* text accompanying note 28 *supra*. In addition, even when property is listed, the court records do not always show precisely how it is divided. The property may not be mentioned on the interlocutory decree, or there may be an order for the parties to keep what is "currently in their possession."

70. In contrast to the complete information we obtained in the interviews, only a minority of the court records provide enough information to specify the value of the total community assets and the dollar value of the portion going to each spouse or, even if the total value was not known, to learn whether the property went "all to the wife," "all to the husband," or whether it was equally divided. Equal division was specifically referred to in only 1% of the 1968 cases and 10% of the 1972 cases.

71. ATTORNEY'S GUIDE TO FAMILY LAW ACT, *supra* note 57, at 254.

spousal support, indicating that the wife or husband received more of one in exchange for less of the other (7% of the files in the 1968 sample, 9% in 1972, and 19% in 1977). Because property settlements are in any case nonmodifiable, we believe that in these cases the attorneys advised their female clients to settle for an advantageous property settlement, knowing it to be "a sure thing," in lieu of high spousal support payments, which would normally be vulnerable to later modification and to enforcement difficulties. Indeed, it is possible that a significant percentage of the unequal property awards under the new law, especially those in which the wife has received more than 60% of the property, may actually represent trade-offs for a low support order. The low percentage of spousal support orders, which we shall discuss in greater detail below,[72] makes this interpretation appear all the more likely.

One of the justifications for the equal division rule was the assertion that substantially disproportionate property awards were in fact highly unusual under the old law, especially in the years immediately preceding the change in the law,[73] because 51% to 49% splits could be, and commonly were, considered to be in technical compliance with the rule of "more than one half" of the property being awarded to the injured party.[74] It was argued that the new Act only recognized prevailing practice in eliminating questions of fault from property decisions.

Our data strongly contradict this assertion. They indicate that property was not being divided equally under the old law, and certainly not in 51% to 49% ratios. Rather, three-quarters of the cases involved a substantially unequal division. This finding therefore challenges the widespread belief that the no-fault divorce law merely codified existing practice. It indicates instead that the new law has had a powerful independent effect on the division of property.[75]

72. *See* Part III(A) (*Spousal Support Awards*) *infra.*

73. *Cf.* ATTORNEY'S GUIDE TO FAMILY LAW ACT, *supra* note 57, at 251.

74. *Id.*

75. It is interesting to note that although fault did affect the division of property under the old law, it has little effect today. The identity of the petitioner, which we can use as an indicator of "innocence," made a difference in the property distribution under the old law. In the 1968 cases in which the wife was the plaintiff, wives received an average of 89% of the community property. When the husband was the plaintiff, wives received only 60% of the property. Corresponding awards to wives were 60% and 56% under the new law (in 1972), suggesting that the petitioner's identity and fault have become less relevant.

Debts were similarly affected by innocence and guilt under the old law: wives were ordered to pay a lower proportion of the community liabilities if they, rather than their husbands, were the petitioners.

C. *Division of Specific Types of Property*

This section examines the division of the most common items of property: homes, household furnishings, money, cars, pensions, businesses and debts between 1968 and 1977. Three clear patterns emerge from these data. First, the new law has brought a significant increase in the percentage of cases in which each of these community assets is divided equally. Second, the period in question has seen an increase in the percentage of cases in which the husband is awarded all or most of the house, furnishings, and money in both San Francisco and Los Angeles; and the percentage of wives receiving all or most of each of these items of property has correspondingly dropped.

Third, there is clear evidence of consistent sex typing of various items of property over the ten year period. Despite the decreased differential between husbands and wives, wives remain more likely to be awarded the family home and household furnishings, while husbands are usually granted the other real estate, the business, and the family car.

1. The Family Home

The family home, an item owned by about half of all divorcing couples, has, as we have noted, typically been the middle-income family's major asset.[76] The legal tradition was to award the family house to the wife upon divorce, both because it was assumed to be hers—in the sense that she organized, decorated and maintained it—and because she was usually adjudged to be the innocent plaintiff and thus deserving of more than half of the community property. In addition, if the wife had child custody she needed the home to maintain a stable environment for the children.

With the absence of fault and the trend toward equal division, it is not suprising to find an increase in the number of homes being divided equally. Table 8 shows this increase from approximately one-quarter of the homes in 1968 to one-third in 1977. The table also shows a decline in the percentage of cases in which the greater part of the home equity was awarded to the wife, from 61% in 1968, under the old law, to 46% in 1977, under the new law, with awards to husbands fluctuating but remaining at a lower level.

"Equal division" of a house can mean either that the two parties maintain joint ownership after the divorce, or that the house is sold and the proceeds divided equally. The number of cases in

76. *See* TABLE 4 and text following notes 45-48 *supra.*

which there was an explicit order to sell the home rose from about one in ten in 1968, to about one in three in 1977 (not shown). By 1977, in most of the cases in which the home was divided it was sold

TABLE 8

DISPOSITION OF FAMILY HOME, 1968-1977
(Based on random samples of court dockets, Los Angeles County)

How House (or Equity) Divided	Year of Final Decree		
	1968	1972	1977
	(118)	(111)	(121)
majority to husband*	16%	24	19%
approximately equal division**	23	25	35
majority to wife	61	51	46

* majority = over 60%

** approximately equal = between 40 and 59%

We have already noted the concern about a forced sale of the family home, especially when there are minor children in the family.[77] Surprisingly, the presence of minor children does not increase the likelihood that the wife will be awarded the family home.[78] Thus, concern about the effects of a forced sale of the home on the children appears to be well-founded since our data reveal that 66% of the couples who were forced to sell their homes had minor children.

It is important to note that the California legislature clearly did not intend that the family home be sold in order to meet the equal division requirement.[79] Indeed, a 1970 Assembly Committee Report specifically states that a temporary award of the home to the spouse who has custody of minor children should be seen as a valid exception to the strict equal division rule:

> Where an interest in a residence which serves as the home of the family is the major community asset, an order for the im-

[77] *See* notes 62-64 & accompanying text *supra*. In the weighted interview sample, we found that couples with minor children were more likely to own homes than were childless couples, and this holds true even when we control for marital duration and family income. Overall, our data show that 65% of the couples with minor children own homes, compared to 33% of the couples with no minor children.

[78] In the random sample of 1977 court dockets, women with custody and childless women were equally likely to be awarded the home. In the weighted interview sample, custodial mothers were slightly more likely than childless mothers to be awarded the home, but couples with minor children were also more likely than childless couples to be ordered to sell the home and divide the proceeds.

[79] *In re* Marriage of Boseman, 31 Cal. App. 3d 372, 375, 107 Cal. Rptr. 232, 234 (1973).

> mediate sale of the residence in order to comply with the equal division mandate of the law would, certainly, be unnecessarily destructive of the economic and social circumstances of the parties and their children.[80]

The California courts first addressed this problem in 1973 in *In re Marriage of Boseman*.[81] In that case, the only asset which the parties had accumulated was their home. When the wife was awarded custody of the three minor children, ages thirteen, eleven, and three, the trial court ordered the house to remain in the wife's possession "for use and benefit of said minors"[82] until the youngest reached majority. Thereupon, the house was to be sold.[83]

The rationale for maintaining the home for the children is clearly articulated in *In re Marriage of Duke*.[84] There, the trial court's refusal to defer the sale of the home was reversed on appeal. The appellate court said:

> Where adverse economic, emotional and social impacts on minor children and the custodial parent which would result from an immediate loss of a long established family home are not outweighed by economic detriment to the noncustodial party, the court shall, upon request, reserve jurisdiction and defer sale on appropriate conditions.
>
> The value of a family home to its occupants cannot be measured solely by its value in the marketplace. The longer the

80. CAL. ASSEMBLY COMM. ON THE JUDICIARY, REPORT ON ASSEMBLY BILL NO. 530 AND SENATE BILL NO. 252 (THE FAMILY ACT), 1 ASSEMBLY J. 785, 787 (Reg. Sess. 1970).

81. 31 Cal. App. 3d 372, 107 Cal. Rptr. 232 (1973).

82. *Id.* at 374, 107 Cal. Rptr. at 234.

83. The appellate court remanded the case for clarification of the disposition of the proceeds of the house sale but upheld the temporary award of the residence to the wife. *Id.* at 378, 107 Cal. Rptr. at 237.

In re Marriage of Herrmann, 84 Cal. App. 3d 361, 148 Cal. Rptr. 550 (1978), dealt with a substantially similar fact situation. The trial court awarded Mrs. Herrmann the house and, to satisfy the equal division rule, ordered her to deliver to Mr. Herrmann a promissory note for half of the value of the house at the date of the dissolution, bearing 7% interest per year and payable upon the sale of the residence. The house was ordered sold either when the child reached 15, the child or the mother died, the mother remarried or began living with a man, or the mother and child moved away for more than 60 days, or upon the agreement of the parties. The court of appeals approved of the goal of maintaining the home for the children but disapproved of the promissory note. Instead, it recommended the *Boseman* formula of awarding each party a half interest in the house as tenants in common. 84 Cal. App. 3d at 366-67, 148 Cal. Rptr. at 553-54. Other courts have maintained the family home for minor children by awarding the residence to the custodial spouse, while achieving an equal division by granting the full retirement pension to the husband. *See, e.g., In re* Marriage of Emmett, 109 Cal. App. 3d 753, 760-61, 169 Cal. Rptr. 473, 477-78 (1980); *In re* Marriage of Marx, 97 Cal. App. 3d 552, 560, 159 Cal. Rptr. 215, 220 (1979).

84. 101 Cal. App. 3d 152, 161 Cal. Rptr. 444, *modified*, 102 Cal. App. 3d 619d (1980).

> occupancy, the more important these noneconomic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social milieu of their neighborhood.[85]

But despite the legislative and judicial authority for exempting the home from the immediate equal division of community property, the experts we interviewed in both 1974-75 and 1981 attested to the prevailing pattern of ordering the home sold with the proceeds being divided upon divorce. While some judges were willing to leave the home in joint tenancy for "a few years," very few were willing to let it remain unsold until small children attained majority.

2 Disposition of Other Assets

Table 9 shows the disposition of other community assets and debts over the decade of this research.

While the trend towards equal division is clear in each of the assets listed in Table 9, wives in 1977 were still more likely to be awarded more of the household furnishings than were husbands, and husbands were still more likely to be awarded the single family car. In families with two or more cars (not shown), equal division of the cars was more likely; indeed, in each year, in nine-tenths of the cases where two or more cars were owned, each spouse kept at least one. When cars were not divided equally, husbands were more likely than wives (11% to 3%) to receive all or most of the cars.

3 Business

It has traditionally been assumed that a business belongs to the husband, even in cases where it is legally part of the community property of the married couple. In the past, the easy property settlement in this regard was one in which the divorcing parties owned both a home and a business: the wife could be awarded the home, the husband could be awarded the business, and the two assets were assumed to balance each other out. Since an equal division was not required under the old law, the exact value of the two assets was unimportant. Table 9 reveals that, under the old law, husbands were almost always (in 91% of all cases) awarded the business, and that this pattern remained strong under the new law in 1972 and 1977, with businesses in both years awarded to the husband about 80% of the time.

85 *Id.* at 155-56, 161 Cal. Rptr. at 446 (italics omitted).

TABLE 9

DISPOSITION OF COMMUNITY ASSETS AND DEBTS, 1968-1977
(Based on random samples of court dockets, Los Angeles County)

DIVISION OF PROPERTY	1968	1972	1977
Household furnishings			
majority to husband*	6%	8%	7%
approximately equal division**	3	5	42
majority to wife	91	87	51
Single family car			
majority to husband*	62%	59%	54%
approximately equal division**	—	—	—
majority to wife	39	42	44
Money, stocks and bonds			
majority to husband*	27%	38%	24%
approximately equal division**	29	27	50
majority to wife	44	35	26
Family business			
majority to husband*	91%	78%	81%
approximately equal division**	0	13	14
majority to wife	10	9	6
Community debts			
majority to husband*	88%	85%	58%
approximately equal division**	6	7	29
majority to wife	7	8	13

* majority = over 60%
** approximately equal = between 40 and 59%

4. Pensions

Pensions (not shown) are typically awarded to the worker with an offsetting monetary award to the other spouse. Male and female workers are equally likely to be awarded their own pensions in a divorce settlement.[86] However, since men are more likely than women to hold jobs that allow them to acquire pensions, they are also more likely to be awarded those pensions at divorce. Furthermore, the wives of men with substantial pensions are more likely than other wives to be awarded the family home in a home-pension trade-off.

5. Division of Debts

In line with the widespread indebtedness of the American population, the court record samples indicate a rising percentage of divorcing couples with debts, from 15% in 1968 to 26% in 1977.[87]

Under the old law, the husband was typically ordered to pay the community debts inasmuch as he was assumed to be the spouse with the income to pay them.[88] The Family Law Act specifies that community property be divided equally.[89] In the early years of the new law, there were doubts as to whether this meant that debts as well as assets had to be divided equally,[90] but it was generally assumed that, since an overall equal division was required, if debts were awarded to one spouse, that party would also receive a compensatorily larger share of the assets. In recent years, the courts have allowed an unequal division of debts if the community has a negative net balance.[91] Of course, couples can always arrive at their own settlements in which the husband, for example, agrees to pay all of the debts because he is earning income and his wife is not.

Once again, the court data reveal a trend toward equalization, although the husband continues to be "awarded" the community debts in a large majority of known cases—58% in 1977,

86. *But see* McCarty v. McCarty, 101 S.Ct. 2728 (1981) *and* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), holding that federal pensions for military and railroad employees may not be divided as community property upon divorce.

87. *See* TABLE 5 *supra*.

88. Eighty percent of the Los Angeles judges we interviewed said they typically ordered the husband to pay the community debts under the old law. Only 8% said they typically split the debts, while another 8% said they tried to award the debts to the spouse who kept the property.

89. CAL. CIV. CODE § 4800 (West Supp. 1981).

90. By 1975, most (58%) of the Los Angeles judges we interviewed reported that they were dividing the debts equally (or using community funds to pay them before the property was divided). Nevertheless, 31% of the judges said that they still typically awarded most of the debts to the husband.

91. *In re* Marriage of Eastis, 47 Cal. App. 3d 459, 120 Cal. Rptr 861 (1975).

compared to 85% in 1972 and 88% in 1968. The share of debts to be paid by wives has increased under the new law. Yet even in 1977 only 29% of the debts were divided equally.

D. *Career Assets, Human Capital, and the New Property*

From the foregoing discussion, it would seem logical to conclude that community property is typically divided equally in California today. Before we draw this conclusion, however, it is important to note that the present legal definition of community property in California does not include all community assets. For example, if that definition were expanded to include the value of the husband's career, or the value of a professional education, assets which I refer to as "career assets," we would probably be forced to conclude that husbands are receiving a disproportionately large share of the community property.

I would argue that we are on the brink of a critical expansion of the traditional definition of community property, and that California courts will soon recognize career assets as part of the community property to be divided upon divorce. Let us briefly consider the rationale and legal trends leading in that direction.

1. The Rationale for Treating Career Assets as Community Property

The definition of community property in California, and of marital property in other states, has traditionally been limited to tangible assets.[92] Most married couples, however, have career assets of considerable value, and these assets are typically acquired and developed in the course of a marriage in much the same manner as tangible property is acquired.

To illustrate this point, consider first the family in which the husband is the sole wage earner. Such a family typically devotes a great deal of time, energy, and money to building the husband's career. The wife may abandon or postpone her own education "to put him through school" or help him get established; she may quit her job to move with him, or even use her own highly marketable job skills, without expectation of remuneration, to aid and advance his career.[93] This couple has invested in the "human capital" of the breadwinning spouse.

92. It is only recently that the courts have begun to recognize intangible assets, such as the right to receive future pension benefits. *See* text accompanying notes 101-05 *infra*.

93. Hannah Papaneck has suggested that in most single-income families, the single career might well be conceptualized as a "two-person career," the product of a cooperative effort by the partners. Papaneck, *Men, Women, and Work: Reflections on the Two-Person Career*, 78 AM. J. SOC. 852 (1973).

As a result of these concerted efforts, the husband acquires valuable education or training, and may obtain a license to practice a trade or profession, or perhaps membership in a trade union or professional association that assures work and salary and an array of other benefits.[94] While some of the assets which are by-products of this couple's concerted efforts (such as the goodwill built up in a business or profession) are currently recognized as community property in California, similar assets, such as an education and professional license, are not. The distinction between the two sets of assets is arbitrary. In the case at hand, for example, all of these career assets have been acquired with community resources in the course of the marriage,[95] and all of them have a clear monetary value. In fact, for the many couples who have little physical property to divide at divorce, it is likely that the monetary value of career assets will considerably exceed the value of their physical property.

The issue is often no less pressing in two-earner families. Even though both spouses may have worked during the marriage, it is likely that, as a marital unit, they have chosen to give priority to one spouse's career in the expectation that both will share in the benefits of that decision.[96]

From these examples, it should be clear that a career that is developed in the course of a marriage is just as much a product of community efforts and resources as is the income earned by one spouse in the course of a marriage, or the real property accumulated during marriage. Recent years have brought an increased social recognition of this reality and there is now a discernible trend in both community and common law property states toward increased legal recognition as well.[97] California has already taken

94. These career assets typically include a number of items of value, such as the value of an education or training, job experience, seniority at a particular company or in an industry, the ability to earn a specific salary, insurance coverage for accidents, illness, hospitalization, disability and unemployment, the goodwill value of a professional practice or business, and the right to pensions, retirement benefits, and Social Security.

95. Elsewhere I have argued that an equitable system of community property would have to recognize that literally every uninherited asset acquired during a marriage is community property. *See* L. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW 89-97 (1981); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974).

96. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 6-11 (1977). If, on the other hand, the assets of the two spouses' careers are roughly equal, each would be likely to retain his or her own career assets. It is only when the career assets of one spouse exceed those of the second spouse that the need for reapportionment arises.

97. While career assets have been traditionally viewed as a spouse's separate property, that principle should hold only if a spouse enters a marriage with an already established career. If the career is partially or wholly developed in the course of a marriage, the newly acquired career assets should be viewed as a product of the mari-

two major steps in this direction by recognizing the community's interest in the goodwill value of a business or profession[98] and in non-vested pensions and retirement programs.[99] Other states have begun to recognize and divide a professional education and a license.[100]

2. Developments in Parallel Areas of the Law

One objection to the recognition of career assets as community property lies in the future-oriented nature of their value. A second objection lies in the difficulty of calculating their value. Practical answers to each of these objections may be found in the courts' recognition and valuation of similar assets, such as non-vested pensions and goodwill. Other promising analogies for the task of defining and apportioning career assets are suggested by the courts' treatment of a professional educaton and earning capacity. Here we shall briefly examine some of the developments in each of these areas.

a. *Non-vested pensions.* Let us first consider the developments which led the California Supreme Court to recognize non-vested pensions as community assets to be divided upon divorce. The traditional rule, articulated in *French v. French,*[101] was that only vested pension rights were considered community property, because non-vested pensions were "mere expectancies" and not "truly property."[102] But the court decided, in *In re Marriage of Brown,*[103] that the right to future benefits, even though those rights are not guaranteed, is a property right nevertheless. If these assets have been acquired with community funds (and community efforts), they are part of the community property.

It is clear that one of the justifications for the *Brown* decision was the clear inequity that resulted from allowing the working

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tal partnership. In the case of partially developed career assets, courts could apportion separate and community property interests here, just as they do with real property. See Professor Joan Krauskopf's formula for calculating the community's interest in a professional education, discussed in notes 129-33 & accompanying text *infra.*

98. *See* Part II(D)(2)(b) (*Goodwill of a business or profession*) *infra.*

99. *See* Part II(D)(2)(a) (*Nonvested pensions*) *infra.*

100. *See* Part II(D)(2)(c) (*Professional education and license*) *infra. See generally* Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital,* 28 KAN. L. REV. 379 (1980).

101. 17 Cal. 2d 775, 112 P.2d 235 (1941), *overruled, In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

102. As the court subsequently summarized this justification, "[N]onvested pension rights may be community, but . . . they are not property; classified as mere expectancies, such rights are not assets subject to division on dissolution of the marriage." *In re* Marriage of Brown, 15 Cal. 3d 838, 844, 544 P.2d 561, 564, 126 Cal. Rptr. 633, 636 (1976).

103. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

spouse, who was typically the husband, to retain all of the pension and retirement benefits. As the court noted, the *French* rule compelled "an inequitable division of rights acquired through community effort,"[104] and that such a rule did not accomplish "that equal division of property contemplated by the Civil Code."[105]

The courts have approached the practical issue of how to value and divide a future retirement benefit in two ways. The first method, which we call the "buy-out" method, calculates the current cash value of the pension at the time of divorce (by using basic actuarial principles)[106] and includes this amount in the total community property to be divided at divorce. Since a major aim of this approach is to achieve a "clean break" at the point of the divorce, the pension is invariably awarded to the worker while the spouse is given an offsetting asset (such as house or stocks and bonds) of equal value.[107]

The second approach, which we call the "future-share" method, ignores the current value of the pension and focuses instead on the *percentage* that the community owns. Each spouse is awarded a percentage of the future pension when (and if) it is paid.[108]

To appraise the community's percentage of the pension, the courts have typically used a simple "time rule." For example, if a couple has been married for ten years and the pension represents twenty years of employment, half of the pension is treated as community property.[109] Half of that, or one-fourth of the total pension, is the non-employee spouse's share.

Some courts adopting the future-share approach have actually side-stepped the valuation problem, by retaining jurisdiction until the pension vests. The *Brown* court followed this approach, candidly stating, "This method of dividing the community interest in the pension renders it unnecessary for the court to compute the

104. *Id.* at 841-42, 544 P.2d at 562, 126 Cal. Rptr. at 634.

105. *Id.* at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638 (referring to § 4800).

106. *See generally* Projector, *Putting a Value on a Pension Plan*, FAM. ADVOC., Summer, 1979, at 37, 41.

107. It is important to note that the courts have explicitly rejected using spousal support to offset a pension award. As the *Brown* court asserted, the "spouse should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right." 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639 (quoting *In re* Marriage of Peterson, 41 Cal. App. 3d 642, 651, 115 Cal. Rptr. 184, 191 (1974).

108. The Foreign Service Act of 1980 now entitles the divorced wives of Foreign Service officers to a share of their ex-husband's retirement and survivor benefits. The wife's share is pro-rated according to the number of years of the marriage. 22 U.S.C.A. § 4046(b) (West Supp. 1981).

109. A second method for calculating the community's share involves calculating the percentage of the funds contributed to the pension fund during marriage.

present value of the pension rights . . . ."[110]

b. *Goodwill of a business or profession.* California courts have long recognized that the goodwill value[111] of a business or profession is, despite its intangible nature, a valuable community asset to be included in the divisible community property upon divorce.[112] California appellate courts have found goodwill to be community property in a dental laboratory business,[113] a medical practice,[114] a law practice,[115] a private investigation service,[116] and a horse slaughter and horse auction business.[117] The Los Angeles judges we interviewed had found goodwill in the professional practices of an accountant, architect, banker, consultant, dentist, doctor, engineer, insurance agent, lawyer, pharmacist, professor, sales representative, social worker, and in a wide range of small and large businesses including a barber shop, hardware store, restuarant, indoor sign business and beauty salon chain.[118] Recently, two common law states, New Jersey and Oregon, also concluded that professional goodwill must be considered marital property in a dissolution action.[119]

Unfortunately, current definitions of goodwill have a strong

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110. 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.

111. The value of the goodwill in a business or profession is the "expected future income or opportunity for income that results from the owner's past efforts." C. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 52 (Cal. L. Revision Comm'n Study 1981). *See also* Miller, *Valuing the Goodwill of a Professional Practice*, 50 CAL. ST. B.J. 107 (1975). Professor Carol Bruch explains goodwill as follows:

> The buyer of a going concern expects the enterprise's income after acquisition to be greater than it would have been if the business had been first organized on the purchase date. Because of this advantage (which is the product of the clientele and reputation that were built up by the former owner), the buyer will pay more than the inventory and accounts receivable would justify. This important extra is "goodwill"—an intangible yet valuable asset of most businesses and professions that entail skill and reputation.

C. Bruch, *supra*, at 57 (footnote omitted).

112. *See generally In re* Marriage of Barnert, 85 Cal. App. 3d 413, 149 Cal. Rptr. 616 (1978); *In re* Marriage of Foster, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974); *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974).

113. Mueller v. Mueller, 144 Cal. App. 2d 245, 301 P.2d 90 (1956).

114. *In re* Marriage of Slater, 100 Cal. App. 3d 241, 160 Cal. Rptr. 686 (1979); *In re* Marriage of Barnert, 85 Cal. App. 3d 413, 149 Cal. Rptr. 616 (1978); *In re* Marriage of Foster, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974); *In re* Marriage of Fortier, 34 Cal. App. 3d 384, 109 Cal. Rptr. 915 (1973); Golden v. Golden, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969).

115. *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

116. *In re* Marriage of Webb, 94 Cal. App. 3d 335, 156 Cal. Rptr. 334 (1979).

117. *In re* Marriage of Winn, 98 Cal. App. 3d 363, 159 Cal. Rptr. 554 (1979).

118. The value of the goodwill ranged from $100 to $720,000.

119. *See generally* Kennedy & Thomas, *Putting a Value on Education and Professional Goodwill*, FAM. ADVOC., Summer, 1979, at 3.

social class bias. While the good reputation of a professional or business owner is recognized as an asset that can produce future income, no court has yet recognized that a career asset like goodwill exists for salaried employees. Some approximations of its value have been acknowledged by courts in personal injury and workers' compensation litigation where the value of seniority, union membership, or a steady job have been taken into account to predict future income.[120] Thus the principles for recognizing the goodwill that salaried employees acquire have already been established.

While there are no rigid rules for determining the value of goodwill, and "there appear to be as many formulas as there are accountants,"[121] the four most commonly mentioned methods among the Los Angeles judges we interviewed were estimates of market value,[122] multiple or excess earnings, a percentage of one year's income and, quite candidly, reliance on the expert testimony presented in court. Several courts have explicitly refused to rely on a formula and have instead enumerated a number of factors to be considered in valuing goodwill.[123] Still others have frankly admitted that the goodwill value is often set to equal the

120. *See* cases discussed in notes 134-39 & accompanying text *infra*.

121. C. Bruch, *supra* note 111, at 59. Professor Bruch summarizes five methods that are typically used for businesses that are frequently bought or sold. The first, the gross income approach, values goodwill at some percentage of one year's gross income. Second, a net income method involves multiplying one year's net income by some number from two to ten. The third approach, capitalization, determines the amount of principal which, if invested at a reasonable interest rate, would yield a total of interest and principal equal to the difference between the professional's earnings and those of similar professionals for the remainder of his career. The excess earnings method reverses this procedure, and first takes the difference in earnings for one year, then capitalizes it. Finally, the residual approach uses some fixed value, such as market value, to establish the value of the business as a whole, and from that subtracts the value of other assets, such as capital assets, accounts receivable, etc. The remaining value is that of the goodwill.

122. In *Fortier*, the value of the goodwill was held to be the market value at which the goodwill could be sold at the time of the dissolution of the marriage. 34 Cal. App. 3d at 388, 109 Cal. Rptr. at 918.

123. The *Lopez* court listed the

> practitioner's age, health, past demonstrated earning power, professional reputation in the community as to his judgment, skill, knowledge, his comparative professional success, and the nature and duration of his business as a sole practitioner or as a member of a partnership or professional corporation to which his professional efforts have made a propriety contribution,

and further noted that "consideration should be given to the *value* of the 'fixed' and 'other assets' of the professional business with which the 'goodwill' is to continue its relationship." 38 Cal. App. 3d at 109-10, 113 Cal. Rptr. at 68. To these considerations the *Foster* court added "the situation of the business premises, the amount of patronage, the personality of the parties engaged in the business, the length of time the business has been established, and the habit of its customers in continuing to patronize the business." 42 Cal. App. 3d at 583, 117 Cal. Rptr. at 53. Both courts

equity in the family home.[124]

c. *Professional education and license.* A third promising analogy is provided by the recent recognition of a professional education as a community asset.[125] Although California courts have not yet held that either a professional education or a professional license is a community asset, courts in common law states have recognized the marital partnership's interest in these assets, and the logic of their position is persuasive.[126]

The issue typically arises when one spouse, usually the wife, has supported the other through school "hopeful of improving fu-

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emphasized that while the market value of the goodwill might be persuasive evidence of the value, it alone was not conclusive.

124. As one judge said "I am personally in favor of goodwill because it allows you to give the wife the home . . . . You feel that you've been fair and the parties do too." Other judges echoed these sentiments with comments such as: "[Goodwill allows] the wife to get some compensation after a long marriage," and "[Goodwill allows] you to give the wife the community property she deserves."

125. One in six husbands in the weighted interview sample had acquired some education during marriage.

126. Kentucky was the first state to provide recompense for a wife who supported her husband's education. *See* Inman v. Inman, 578 S.W. 2d 266 (Ky. Ct. App. 1979). There the wife had paid her husband's way through dental school, but at the time of the divorce the couple had no traditional assets. Despite some reservations, the court ordered the husband to reimburse his wife for the cost of the education, allowing for interest and inflation, stating "that there are certain instances in which treating a professional license as marital property is the only way in which a court can achieve an equitable result." *Id.* at 268. The holding was limited, however, in two ways: first, by the court's willingness to treat a license as property only when there were few or no traditional assets; second, by restricting the award to the cost of the education.

New Jersey expanded on this holding in Lynn v. Lynn, 49 U.S.L.W. 2402 (N.J. Super. Ct. December 23, 1980). There, the husband and wife met while both were pre-med students. The wife went to work as a biologist to finance her husband's medical education, with the understanding that after his degree was completed she would return to finish hers. However, the couple separated after his first year of residency. At the time, the wife's earnings were approximately twice those of her husband. The court held that the medical school degree and license to practice medicine, obtained by the plaintiff during marriage, are each property and are includable as assets subject to equitable distribution. *Id.* To establish the value of the husband's medical education, the court accepted the assessment provided by a financial analyst who testified that the capitalized, discounted value of the differential in earning capacity between a man with a four-year college degree and a specialist in internal medicine was $306,000. The wife was awarded the value of 20% of this amount over a five-year period, in addition to alimony.

Other states have stopped just short of accepting this view by holding that a wife who puts her husband through school has an interest in his future earnings. *In re* Marriage of Horstmann, 263 N.W. 2d 885 (Iowa 1978). *In re* Marriage of Cropp, [1979] 5 FAM. L. REP. (BNA) 2957 (Minn. Dist. Ct. Sept. 6, 1979). In *Horstmann*, the Iowa court decreed this interest was the value of her contribution to the costs of the education. Still other states have said that although a degree is property, it is not subject to division. *See, e.g.*, Wisner v. Wisner, 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981); Graham v. Graham, 194 Colo. 429, 574 P.2d 75 (1978); Moss v. Moss, 80 Mich. App. 693, 264 N.W. 2d 97 (1978); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979).

ture community earnings" which both expect to share.[127] One of the most compelling fact situations involves the family that divorces soon after the husand or wife completes school. In many such cases, the couple have few, if any, tangible assets because most of their capital has been used to finance the student's education.

Consider, for example, the following hypothetical case which was presented to all the attorneys and judges we interviewed: Sheila Rosen, a twenty-nine year old registered nurse, supported the family for ten of the eleven years of the marriage while her husband Barry, aged thirty, completed college, medical school, and his residency. Their divorce occurs after Barry's first year of practice. His current net income of $24,000 a year is expected to rise steadily.[128]

Most of the experts predicted that the doctor-husband would be awarded the car, the medical equipment, and the debt. The nurse-wife would receive her personal belongings and some furniture—not very much to show for ten years of investment in her husband's education. While most of the experts (70%) predicted that the nurse would also be awarded some support, the estimated awards averaged only $338 a month and would be terminated in an average of three years. This award (a total of $12,168 over the three-year period) pales in comparison to what the wife would be entitled to as a co-owner of the husband's professional degree—no matter what method might be used to calculate the value of the latter. The eight years of the husband's tuition with simple interest would, in and of itself, be valued at several times as much as this meager spousal support award.

Sheila Rosen's fate would be quite different if the courts accepted Professor Joan Krauskopf's rationale for treating Barry's

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127. Schaefer, *Wife Works So Husband Can Go to Law School: Should She Be Taken in as a "Partner" When "Esq." Is Followed by Divorce?*, 2 COMMUNITY PROP. J. 85, 85 (1975).

128. The case reads as follows:

> Sheila Rosen, a 29-year old registered nurse, has supported the family for 10 of the 11 years of this marriage while her husband, Barry, finished college, medical school, an internship and two years of residency. Last year she earned $14,440 net (or $1,200 net per month).
>
> Barry Rosen is a 30-year old doctor. He is self employed and began his practice one year before the divorce, earning $24,000 net ($2,000 net per month). His income is expected to rise steadily.
>
> The Rosens do not have any children.
>
> Their community property consists of: household furniture and personal items worth $1,000; a car worth $2,000; a medical practice valued at $10,000, exclusive of goodwill. (This includes $6,000 worth of medical equipment.)
>
> The community debts are approximately $10,000, all of which were incurred for Barry's medical equipment.

education as community property.[129] Krauskopf argues that a community property marriage is based on equal partnership principles comparable to those in a business partnership. To achieve maximum utility of resources in a business, it is sometimes necessary to make sacrifices for the good of the whole. In the case of the wife's supporting her husband's education, the wife is making an investment in his "human capital"—his skills and knowledge acquired through schooling. She expects her investment to improve the status of the partnership as a whole, and expects to share those improvements as any business partner would.[130]

Three approaches to evaluating a professional education have been suggested. One approach involves ascertaining the cost value of the education (which is calculated by adding its purchase price plus its indirect costs).[131] A second approach involves ascertaining the capacity of the professional education to produce a future stream of income; once such a value is established, the total sum can be divided, or a percentage awarded to each spouse over time. According to Krauskopf, this can be determined by first calculating the present value of the post-education earning capacity, and by then subtracting the present value of the pre-education earning capacity and the present value of the costs of the education. The difference is the return on the investment, in which the wife has an equal share.

A third approach to effecting a fair resolution of the problem would be to award the lesser-educated spouse an equivalent educational opportunity. Though, in practical terms, this remedy may be limited largely to younger and relatively highly motivated spouses, it would provide equity through reimbursement in kind.

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129. *See* Krauskopf, note 100 *supra.*

130. *See id.*; G. BECKER, A TREATISE ON THE FAMILY (1981); G. BECKER, HUMAN CAPITAL (2d. ed 1975); INVESTMENT IN HUMAN CAPITAL xi (B. Kiker ed. 1971). Consider, for example, the costs that the Rosen marriage has paid for Barry's education (and his enhanced human capital). If we follow Krauskopf's analysis, we first note that the Rosens have lived without the wages Barry would have earned if he had been employed instead of studying. Thus one "opportunity" cost of Barry's education has been the lower standard of living Barry and Sheila have had for 10 of the 11 years of their marriage. A second set of costs involve the drain on community funds and labor to finance Barry's education: the money that Sheila earned was spent on Barry's tuition, books, meals and other living expenses.

A third set of costs are the "opportunity" costs of the additional education or training that Sheila had foregone while she was supporting Barry. Sheila might have taken specialized courses to improve her own earning capacity—or decided to get a medical degree herself. Since Sheila (and Barry) assumed that her investments in Barry's human capital were investments in partnership assets that they would share, they together bore the costs of foregoing alternative investments in Sheila's human capital.

131. *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978).

For example, in a 1975 New York case, *Morgan v. Morgan,*[132] a wife who put her husband through college and law school sued for reimbursement in kind so that she could attend medical school. She had dropped out of school to work as an executive secretary in order to support the family and pay for her husband's education. Her husband, a Wall Street attorney at the time of the divorce, was now in a position to gratify her request. The lower court found in her favor, but the decision was reversed on appeal.[133] Nevertheless, the lower court's opinion sparked considerable interest and undoubtedly will inspire other similar suits.

d. *Future earning capacity.* Precedents for calculating a major asset, future earning capacity, are already established in California in litigation involving worker's compensation,[134] personal injury,[135] and wrongful death.[136] California courts have consistently held that earning capacity, or what an employee could have earned had he or she not been injured, should guide juries and administrative bodies in determining the size of awards in these cases.

One issue that these courts have successfully dealt with is that of predicting future income for a person who has low current earnings because he or she has not yet completed an education or training program. For example, in *Rodriguez v. McDonnell Douglas Corp.,*[137] a twenty-two year old apprentice sprinkler fitter was severely injured at a construction site when a large piece of metal pipe fell and hit him on the head. A three-month jury trial resulted in an award of $4,235,996 to the injured worker. The appellate court upheld the award, noting that even though the injured worker was an apprentice at the time of the accident, "without an economic track record of any consequence,"[138] a union contract showed the annual increase in wages that would be earned by sprinkler fitters from 1970 onward. The court also approved of testimony by an expert witness who included expected fringe benefits in calculating the plaintiff's lifetime earning capacity at $1,440,114. The court stated the California rule for deter-

132. 81 Misc. 2d 616, 366 N.Y.S.2d 977 (Sup. Ct. 1975), *modified,* 52 A.D.2d 804, 383 N.Y.S.2d 343 (1976).

133. *Id.*

134. *See, e.g.,* Argonaut Ins. Co. v. Industrial Accident Comm., 57 Cal. 2d 589, 371 P.2d 281, 21 Cal. Rptr. 545 (1962); Thrifty Drug Stores, Inc. v. Workers Comp. Appeals Bd., 95 Cal. App. 3d 937, 157 Cal. Rptr. 459 (1979).

135. *See, e.g.,* Kircher v. Atchison, T., & S.F. Ry., 32 Cal. 2d 176, 195 P.2d 427 (1948); Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (1978); Groat v. Walkup Drayage and Warehouse Co., 14 Cal. App. 2d 350, 58 P.2d 200 (1936).

136. *See, e.g.,* Gall v. Union Ice Co., 108 Cal. App. 2d 303, 239 P.2d 48 (1951).

137. 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (1978).

138. *Id.* at 656, 151 Cal. Rptr. at 415.

mining damages in this sort of case as " 'not what the plaintiff would have earned, but what he could have earned.' "[139]

This decision is useful in that it demonstrates the value of the career assets that salaried employees accrue. The *Rodriguez* court explicitly acknowledged the value of the plaintiff's career assets—his apprenticeship, union membership, and fringe benefits –and relied on them in determining his future earning capacity. Since California courts have long recognized the ability of juries and administrative bodies to consider career assets, such as an education, union membership, and entitlement to fringe benefits in determining the size of awards in personal injury cases, it is logical for them to consider the value of such assets in determining the value of a divorcing couple's community property.

Family court judges could draw on the body of expertise developed in these areas to calculate the value of such career assets as a professional education or on-the-job training; the value of having a secure job (especially in a high-unemployment economy), work experience, and seniority rights; a professional license, union membership, or certification in a trade; job-related benefits such as health, accident and life insurance; goodwill in a company job, as well as in a business or profession; and Social Security, disability, and other retirement coverage.

A more extended discussion of career assets as community property would be inappropriate to the intended scope of this Article. From what we have presented here, however, it should be clear that the findings of this Article must be greatly affected by whether or not we choose to accept such assets as community property. If, for example, we assume that community property is limited to the assets that are currently defined as community assets, we must inevitably conclude that the community property of most divorcing couples is relatively modest, and that such assets tend to be divided equally. On the other hand, if our definition of community property is expanded to include more intangible assets of the marriage, such as the career assets suggested above, we

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139. *Id.* at 656, 151 Cal. Rptr. at 416, *quoting* J. STEIN, DAMAGES AND RECOVERY—PERSONAL INJURY AND DEATH ACTIONS § 58, at 94 (1972). Similarly, the earning capacity of a UCLA student who was working toward a teaching credential was calculated at the rate of a full-time teacher, not the rate of the part-time recreational job she held at the time she was injured. Jeffares v. Workmen's Comp. Appeals Bd., 6 Cal. App. 3d 548, 86 Cal. Rptr. 288 (1970). The court noted that

> The fact that the injured employee is a student working part-time because of the necessity to complete his educational goal in order to obtain a full-time position in the future is a special circumstance which should be considered in predicting earning potential. . . . The petitioner's earning "potential" during the term of her temporary disability included the salary paid to a teacher as of September 1967.

Id. at 552-53, 86 Cal. Rptr. at 290-91 (citation omitted).

must surmise that most divorcing couples have accumulated community assets of considerable value, and that the husband typically leaves the marriage with most of them. We shall return to the policy implications of this choice in the final section of the Article.

III. Spousal Support[140]

A. *Spousal Support Awards*

The single most important datum on alimony, which is now called "spousal support" in California, is the fact that it is not awarded to most divorcing women. In 1977, for example, only 17% of the women who were divorced in California were awarded spousal support.[141]

What is perhaps more surprising is that this figure does not reflect a new or localized trend, but rather a well-established pattern nationwide: available data indicate that alimony has always been awarded in a minority of all divorces. Data collected by the U.S. Bureau of the Census between 1887 and 1922 show similarly small proportions of alimony awards to divorced women, ranging from about 9% to 15%.[142]

The data clearly do not support the widely held assumption that no-fault divorce laws (and the women's liberation movement) have been responsible for a drastic reduction in alimony awards. In California, for example, in 1968 (two years before no-fault divorce), 19% of the divorced women in Los Angeles and San Francisco Counties were awarded alimony. A decade later, in 1977, the percentage was 17%. This small decline reflects a decline in awards to women after short marriages: our data indicate that only 5% of the women married between one and five years were awarded alimony in 1977, compared to 14% in 1968.

As these figures suggest, the no-fault divorce law did establish a new norm of self-sufficiency for younger women who were capable of supporting themselves after divorce. In theory, however, the law also assures support (and protection) for those women

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140. The data discussed in this section are summarized from Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 Fam. L.Q. 141 (1980). Although spousal support may be awarded to either spouse, it is more commonly awarded to women as they are most likely to be the financially dependent. The data in this section are confined to awards to women.

141. All of the statistics in this section are, unless specifically noted, from our analysis of the random samples of court dockets described in note 18 *supra*.

142. From 1887 to 1906, 9.3% of divorces included provisions for permanent alimony. In 1916, the percentage was 15.4; and in 1922, alimony was awarded in 14.7% of the nationwide sample of decrees. P. Jacobson, American Marriage and Divorce 126 (1959). It seems, then, that the promise of alimony has always been a myth.

who cannot support themselves.[143] In particular, three groups of women who are assumed to have compelling financial needs are singled out for support: those with full-time responsibility for young children,[144] those who require transitional support to become self-supporting,[145] and those who are incapable of becoming self-supporting by reason of age or "earning disabilities" after a long marriage.[146] This third category recognizes that a long-married housewife's earning capacity is typically impaired during the period in which she devotes herself to her home and children, and that she is therefore entitled to continued support.

Contrary to these explicit goals, California data indicate that the system in practice has failed to provide support for these women. In fact, the first group, mothers of young children, have experienced the sharpest decline in spousal support awards of any group of women under the new law.[147] Although most of these women were awarded *child support* in every year of our survey, child support awards were rarely sufficient to cover half of the costs of the children.[148]

Longer-married women were significantly more likely to be awarded support. However, in 1977, 54% of those married fifteen years or more were not awarded support.[149] Even if we look only at longer-married women who were full-time housewives, we find that one in three women was not awarded support. Thus, despite the law's rhetoric, one-third of the "displaced homemakers" were never awarded alimony.

The relatively low proportion of support awards suggests two conclusions which are discussed further below: first, an expectation of self sufficiency for most divorced women—and for virtually all of those married for less than fifteen years—and second, a significant gap between the reality of support awards and the law's

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143. CAL. CIV. CODE (West Supp. 1981) directs the judges to consider the "circumstances of the respective parties" (§ 4801(a)), including the "duration of the marriage" (§ 4801(a)(4)), and *the "ability of the supported spouse to engage in gainful employment* without interfering with the interests of dependent children in the custody of the spouse" (§ 4801(a)(5)) (emphasis added).

CAL. CIV. CODE § 4801 (West Supp. 1981) specifically instructs judges to consider the impaired earning capacity that may result to a spouse who has been a homemaker in a long marriage. *Id.* § 4801(a)(1).

144. *Id.* § 4801(a)(5). For further discussion of these standards and their operation in practice, see Weitzman & Dixon *supra* note 140, at 144, 164-79.

145. CAL. CIV. CODE § 4801(a)(6) (West Supp. 1981).

146. *Id.* § 4801(a)(7), (a)(1).

147. Only 13% of the mothers of preschool children were awarded any spousal support in 1977, compared to 20% who received alimony in 1968.

148. This is discussed in more detail in Part IV(B) (*The Adequacy of Child Support Awards*) *infra*.

149. The much larger proportion of divorces that occur after short marriages explains their relatively greater weight in the overall 17% statistic.

stated intent to provide transitional support and support for women with impaired earning capacities.

The actual distribution of spousal support awards is generally determined by four major factors: marital duration, family income, employability of the wife, and the presence of minor children. Since these patterns have been described elsewhere,[150] only the major relationships are summarized here.

First let us look at marital duration. As might be expected, under both the old law and the new, a woman's chances of being awarded support increases directly with the length of her marriage. Our 1977 data show that the percentage of California women awarded alimony increased from 5% of those married less than five years, to 15% of those married between five and nine years, to 28% of those married between ten and fourteen years, to 46% of those married more than fifteen years.[151]

Let us next consider the influence of family income on spousal support. While awards are influenced by the income of both spouses, the husband's income explains more of the variance. As Table 10 shows, only 15% of the wives of men who earned under $20,000 a year were awarded support, compared to 62% of the wives of men who earned over $30,000 a year. Thus, wives of men with yearly incomes of over $30,000 a year were four times as likely to be awarded alimony as those married to men who earned less than $20,000.

Lest the reader get the impression that the population of divorced persons is equally distributed among these income groups, it is important to underscore the fact that most divorced families fall into the first group—where men earn less than $20,000.[152] Similarly, the population of divorced families is heavily weighted toward the low end of the marital duration categories. The median length of a marriage that ends in divorce is about six years in California.[153]

When one takes into account the short marriages and relatively low incomes of most divorcing couples, it becomes apparent why only one in five divorced women is awarded alimony: most divorcing couples are fairly young with limited incomes. Never-

150. *See generally* Weitzman & Dixon, note 140 *supra*.

151. These percentages are based on the random sample of court dockets. The interview sample, with long marriages over represented, allowed us to subdivide the last group. After controlling for income we found that 26% of women married 15 to 19 years were awarded alimony as were 34% of those married 20-24 years and 55% of those married 25 years or more.

152. The median husband's income in the weighted couples' sample was $13,000 per year. The median family income was $20,000 per year.

153. Health & Welf. Agency, Cal. Dep't of Health Services, Vital Statistics of California 38 (1977).

theless, this does not explain why support is not awarded to young mothers and displaced homemakers, who are supposedly protected by the law.

TABLE 10

PERCENTAGE OF WIVES AWARDED ALIMONY BY YEARLY PREDIVORCE INCOME OF HUSBAND AND WIFE
(Based on interviews with divorced men and women, Los Angeles County, 1978)

	PERCENTAGE OF WIVES AWARDED ALIMONY		
HUSBAND'S INCOME	WIFE'S INCOME		All Wives
	Under $10,000 per Year	Over $10,000 per Year	
Under $20,000	14%	16%	15%
(n)**	(77)	(24)	(101)
$20-29,000	49%	9%	33%
(n)	(35)	(22)	(57)
$30,000 and over	67%	36%	62%
(n)	(49)	(22)	(60)

* Because this table does not control for marital duration, these data are influenced by the overrepresentation of long marriages in the interview sample.

** n refers to the number of cases on which the percentages are based.

The third factor that affects spousal support awards is the wife's employability. Table 10 shows that the wife's income is negatively related to support awards only among families in which the husband earns over $20,000 a year. For example, among husbands earning over $30,000 a year, 67% of the wives who earned less than $10,000 a year were awarded support, in contrast to 36% of the wives who earned over $10,000 a year. Along the same lines, housewives are more likely to be awarded support than are working wives, and this is most evident in longer marriages. For example, among women married more than ten years, 65% of the housewives were awarded alimony compared to 29% of the working wives.

Of course in reality, all of these factors—length of marriage, husband's income, and wife's employability—interact. They are

discussed separately here to highlight the independent effect that each one has on support awards.

A fourth factor that influences support is the presence of children under eighteen. Mothers with minor children are more likely to be awarded spousal support (in addition to child support) than are women who do not have minor children. In 1977, 22% of the mothers with minor children were awarded spousal support, in contrast to 11% of the women with no children under eighteen. The difference between these two groups is small because the new norm of self-sufficiency is being applied to young women whether they have minor children or not.

In summary, these data suggest that spousal support is awarded to a small minority of divorced women. Women who have been housewives during lengthy marriages are more likely to be awarded support—but only if they have been married to men with incomes over $20,000. Further, since tax regulations encourage a man to label his "child support" as "alimony,"[154] the true number of alimony awards may be even less than the above statistics suggest.

Two other data are necessary to complete this summary of the pattern of current support awards: the amount of the awards and their duration. With respect to the amount of the award, the typical spousal support award is quite modest—a median of $210 per month in 1977 (excluding awards of $1 a year).[155] The median monthly award is correlated with the length of marriage: from an average of $150 a month for women married between five and nine years, to $200 a month for those married between ten and fourteen years, to $300 a month for those married fifteen years or more. These data suggest that the average alimony award is too meager to be considered a bona fide means of support. An award of $210 per month may help defray welfare costs, but it can hardly provide any economic protection for a dependent spouse.[156]

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154. I.R.C. § 71(a), (alimony included in wife's gross income); I.R.C. § 71(b) (child support not included in wife's gross income); I.R.C. § 215 (alimony paid by husband deductible to him if included in wife's gross income). In Commissioner v. Lester 366 U.S. 299 (1961), the Court held that the husband is entitled to deduct the full amount of "family support" payments as alimony unless a specific amount is designated for child support in the divorce decree. *See* Booth, *Taking Advantage of Lester: How a Couple Can Split the Tax Burden After Splitting Up,* FAM. ADVOC., Winter, 1981, at 24.

155. Awards of $1 a year allow courts to retain jurisdiction over future spousal support awards. Hester v. Hester, 2 Cal. App. 3d 1091, 82 Cal. Rptr. 811 (1969). In 1977, 26% of the divorced women were awarded $1 a year in addition to the 17% who were awarded monthly support.

156. Of course, the amount of alimony is influenced by both the duration of the marriage and the husband's income, and longer-married wives of higher income hus-

With respect to the duration of the awards, we found a sharp change in the pattern of California awards after the no-fault divorce was instituted. Before 1970, most alimony awards that were issued were relatively open ended—that is, they were labeled "permanent" or "until remarriage or death" or "until further order of the court."[157] Under the new law, however, there has been a strong tendency to limit the duration of monthly monetary awards, typically with a reduction to a symbolic award of $1 a year which allows the court to retain jurisdiction over spousal support.[158] For example, in 1968, only a third of all spousal support awards had a specified duration, but by 1977, two-thirds had a specified time limit (with $1 a year thereafter).

The median duration of these awards in 1977 was twenty-five months—or just over two years. Since one of the aims of the new alimony was to provide transitional support for the woman who needed education and retraining, one cannot help but question how this could be accomplished in the relatively short period of two years. No doubt these awards provide a strong incentive for the supported spouse to find a job, but they also seem to reflect an implicit assumption about the relative ease with which a divorced woman who has been a housewife can find an adequate job and become self-sufficient.

Are these assumptions appropriate? Is it easy for a divorced woman to find an adequate job? Can she typically earn enough to support herself and her family? To judge the reasonableness of the assumptions behind short-term support awards, we need to examine the data on women's labor force participation and earnings. In addition, we need to ask how support awards can themselves affect women's employability and earnings.

B. *Two Families*[159]

The interviews with attorneys and judges focused on a series of hypothetical divorce cases. In response to one of these cases,

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bands do receive more monthly alimony. However, even the wives of fairly well-to-do men are relatively deprived when the wife's postdivorce standard of living is compared with that of her former husband. This data is discussed in greater detail in Part IV(A)(2) (Long-Married Couples and Displaced Homemakers) *infra*.

157. Weitzman & Dixon, note 140 *supra*.

158. *See* note 155 *supra*.

159. Earlier reports of judges' and attorneys' responses to this series of hypothetical cases may be found in Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. REV. 471, 510-14 (1972) [hereinafter cited as *Child Custody Awards*], and Weitzman & Dixon, *supra* note 140, at 153-59. A modified version of the "Byrd" case is discussed in Weitzman (in consultation with Carol Bruch and Norma Wikler), *Support Awards and Enforcement*, in JUDICIAL DISCRETION: DOES

virtually all of the judges and lawyers we interviewed predicted a short term transitional spousal support award. In response to the second, virtually all predicted a longer or open-ended award. These cases therefore provide a useful vehicle for discussing the assumptions that underlie post-divorce support.

The first case involves a five-year marriage between two college graduates. At the time of the divorce Ted Byrd is an accountant with a net income of $1,000 a month. Pat Byrd has been a full-time housewife and mother throughout the marriage, caring for their two preschool children.[160]

In response to these facts, the Los Angeles judges awarded Pat Byrd an average (median) of $200 a month in spousal support for an average duration of slightly less than two years.[161] They also awarded her an average (median) of $250 in child support.[162] Follow up questions reveal that these awards are based on the assumption that Pat Byrd will be either self-sufficient or remarried within two years.

The second case involves a twenty-seven year marriage between an IBM executive and a traditional housewife. At the time of the divorce, Victor Thompson, age fifty-five, earns a net (after tax) income of $72,000 a year, or $6000 net a month. His wife, Ann, has been a housewife and mother throughout their twenty-seven year marriage, raising three children who are now in college.[163] The average Los Angeles judge awarded Mrs. Thompson

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SEX MAKE A DIFFERENCE? 49 (Nat'l Jud. Educ. Program, N.O.W. Legal Def. & Educ. Fund 1981) [hereinafter cited as *Support Awards and Enforcement*].

160. The facts in this case varied somewhat among our four samples, although the husband's income and occupation remained constant. The ages of the children ranged from one and three, to four and six, and the ages of the parents from 23 and 27, to 31 and 32. None of these variations seem to have affected the responses, which were amazingly consistent across all samples. Here we rely on the Los Angeles judges' responses to the following facts:

> Pat is 23, Ted is 27. They have two sons aged three and four. Ted Byrd, an accountant, earns $14,000 a year gross, $1,000 a month net. Pat has been a housewife and mother throughout the marriage and does not want to take a job because it would interfere with her time for her preschool children.

161. The Los Angeles attorneys predicted that Pat Byrd would get even less: a median award of $150 a month for an average duration of slightly less than two years (1 year, 8 months).

162. This is discussed further in Part IV(A) (*The Amount of Child Support*) *infra*.

163. The case reads as follows:

> Victor Thompson, age 55, is a senior executive at IBM with a net income of $72,000 per year, (or $6,000 net per month).
>
> His wife, Ann, has been a housewife and mother throughout their 27-year marriage, raising three children who are now in college. She has never been employed outside of the home.
>
> This was the first marriage for both the husband and the wife. At the time of the divorce Ann is 53; Victor is 55.
>
> The property consists of: a car worth $5,000; a second car worth

$2,000 a month in spousal support. Since her children are over 18 and living away from home, she is not entitled to any child support. Follow-up questioning revealed that the judges felt that Mrs. Thompson both needs and deserves support: they pointed to the length of her marriage, her lack of employable skills, and her husband's ability to provide her with an adequate standard of living. Nevertheless, several judges talked about the desirability of retraining traditional housewives, such as Mrs. Thompson, for self-supporting employment.[164].

How reasonable is it to assume that either Pat Byrd or Ann Thompson will be able to become self-sufficient? How likely is it that either of them will remarry or apply for welfare? Let us now examine the options that most divorced women have as an alternative to alimony: remarriage, welfare, and employment.

C. *Alternatives: Remarriage, Welfare, and Employment*

1. Welfare and Remarriage

The Los Angeles judges often referred to welfare and remarriage as alternative options for the woman who could not support herself, and as preferable solutions, in some cases, to "saddling" their former husbands with the responsibility for their support.[165] From a public policy perspective, neither of these alternatives should—or can be—counted on to support a significant group of divorced women. Only 6% of the women we interviewed were supported by welfare in the first year after the divorce.[166] Another 6% had remarried. When one considers the divorced woman's income as a single mother and the financial pressures on her and her children, it is not surprising to find that many of the divorced women we interviewed perceived an economic incentive to remarry—just to make ends meet. But forcing divorced women into remarriage—or onto welfare—is not an aim of the Family Law Act and would not be sound public policy. Furthermore, it is erroneous for judges to assume that all, or even most, divorced women will remarry. The likelihood of remarriage is largely a

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$2,000; a home and furnishings with an equity value of $90,000; stocks and bonds with a current value of $10,000.

164. In England, in contrast, it is assumed that Mrs. Thompson has "earned" an entitlement to share her husband's standard of living through life-long maintenance. *See* L. Weitzman, Equity and Equality in Legal Divorce: Case Studies of Property and Maintenance Awards in the United States and England (Paper presented at the International Conference on Divorce and Remarriage, Leuven, Belgium, Aug. 1981).

165. For a more extensive analysis of the impact of divorce on the growth in female-headed families, see H. Ross & I. Sawhill, Time of Transition: The Growth of Families Headed By Women 35-64 (1975).

166. An excellent analysis of the incentives for welfare vs. paid employment for female-headed families is provided by H. Ross and I. Sawhill, *supra* note 165, at 98-99.

function of the women's age at the time of divorce.[167] If a woman is under thirty, she has a 75% chance of remarrying. But her chances are significantly less if she is older: between thirty and forty it is closer to 50%, and if she is forty or more she has only a 28% chance of remarriage. Thus, instead of assuming that all divorced women remarry, it makes sense to think of divorced women as single heads of households, and to consider what is best for persons in that status. In addition, once a divorced woman remarries, concern about her spousal support award becomes irrelevant, since spousal support terminates upon remarriage.

2. Women's Employment and Opportunities

Our interviews indicate that most judges view employment as the major alternative to postdivorce support. Thus, we now turn to an examination of the employment prospects for divorced women. Some divorced women, like our hypothetical nurse Sheila Rosen, discussed above,[168] have been employed throughout their marriage,[169] while other divorced women returned to work shortly before the divorce.[170] Although many of these women could benefit from education or retraining, they are not of concern to us here. Our focus is rather on women like Pat Byrd and Ann Thompson who have not been employed during marriage and who are faced with strong and immediate pressures to find a job at the point of the divorce.[171]

Both Pat Byrd and Ann Thompson will be affected by the persistent second class status of women with respect to both occupational level and income. Most working women are clustered in a limited number of low-status, low-paying jobs.[172] Thus, the first

167. *See generally* Nat'l Center for Health Statistics, U.S. Department of Health, Monthly Vital Statistics Report (Supp. Sept. 12, 1980).

168. *See* Part II(D)(2)(c) (*Professional education and license*) *supra.*

169. Only 32% of the divorced women in the weighted interview sample were employed full time throughout the marriage. Another 3% were employed part time throughout the marriage.

170. Nine percent of the divorced women in the weighted interview sample returned to work in the two years before the divorce.

171. Almost half (49.5%) of the divorced women in the weighted interview sample had worked at some point during the marriage but had not worked steadily at either a part time or a full time job. This group of women includes a tremendous array of sporadic employment histories—ranging from women who worked for a few months during their first year of marriage and had never worked in the 16 years since then, to those who regularly took part time jobs during the Christmas season. Only 16% of the women were full time housewives throughout the marriage and had never held a paid job. (As noted above, the remaining 35% of the women were employed full or part time throughout the marriage.)

172. Smith, *The Movement of Women into the Labor Force*, in THE SUBTLE REVOLUTION 10 (R. Smith ed. 1979). As Smith notes,

> One-third work in clerical occupations. Another quarter work in the fields of health care (not including physicians), education (not including

and biggest problem facing women in the labor market today "is the occupational and industrial concentration of female workers in a few women's jobs."[173] The second problem, which is a consequence of the sex segregation of occupations, is that women's wages are low: "the median annual earnings of women working full time, year round, are only 60% those of men."[174] In addition, if a woman has minor children at home, she is more likely to work only part time, and this further diminishes her potential wage income.[175]

The literature on women's changing labor force participation is vast and for the most part beyond the scope of this Article. Yet it is important to note how, in the face of the general problems besetting women who seek entry into the job market, a court award at the time of divorce can significantly affect an individual woman's employment prospects. Although it may seem that her earning capacity at that time is more or less established—that is, she either has employment skills or she has not—the nature of her spousal support award can in fact critically affect her future earning capacity. When she is awarded a minimal amount of spousal support for a short period of time, she is likely to "sell herself short" in the job market. That is, she is likely to forgo retraining and take a job that is not well paid and that offers few opportunities for advancement, simply to assure herself of a steady paycheck.

One of the clearest themes in our interviews with recently divorced women was their lack of self confidence and their panic about finances. Even well-educated, attractive, and articulate women confessed the sense of anxiety they experienced at the prospect of having to support themselves on a drastically reduced income, of receiving only two years of alimony, and of not having enough money to make ends meet. As a result of this pressure, they felt that they should take any job just to ensure their survival.

This is not to suggest that only women experience insecurity,

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higher education), domestic service, and food service. The extreme form of occupational segregation in which women remained at home may have ended years ago, but the majority are still doing "women's work."

Id.

173. *Id.*

174. *Id.* According to Smith, "The predominantly female occupations have below-average pay and offer limited opportunities for advancement. In addition, women often earn less than men within the same occupation. *Id.*

175. Barrett, *Women in the Job Market: Unemployment and Work Schedules,* in THE SUBTLE REVOLUTION, *supra* note 172, at 81. Although married women with children are more likely to work part time rather than full time, divorced women with children are more likely to work full time because they cannot survive on the income of a part time job.

pressure, and loss of self confidence at divorce. No matter how civilized the divorce, it is likely to be emotionally trying for both husband and wife. But even though many men have severe difficulties in other areas in beginning a new life, they almost always have some degree of security about their work. They are typically established in their jobs and can rely on the security of their paychecks.

Women, like our hypothetical Ann Thompson, who have been housewives throughout lengthy marriages, and those, like our Pat Byrd, who are custodial mothers of young children, typically not only lack salable skills, but also have no realistic idea of how to get career counseling or job training. Even women who have worked part time during marriage, or who have worked before their children were born, typically feel forced to sell themselves short when faced with the prospect of a drastically reduced budget and the possibility of real impoverishment. Many in our sample took the first job for which they applied, no matter how low the salary they were offered.

D. *Implications for Spousal Support Awards*

How might a different type of support award better serve Pat Byrd's and Ann Thompson's needs? If a woman feels great financial pressure, she is likely to take a low-paying job in clerical, sales, or service work because she does not know what other types of jobs she might obtain. If, however, she knew she had the time and monetary resources to investigate other options, she could seek vocational counseling to help her assess her talents and interests and discover the necessary steps she must take to get a better job. For example, as the wife of an accountant, Pat Byrd may have acquired a reservoir of financial knowledge and interests. If so, a counselor could guide her to commercial courses or urge her to invest two years in an accounting or business administration degree. Similarly, as the wife of a corporate executive, Ann Thompson may have transferable skills for a career in finance or public relations.

These possibilities suggest three important elements that judges could consider in setting spousal support awards: first, evaluating the divorced woman's salable skills and interests; second, allowing her to receive the training she needs to develop those skills or to retrain her for a new career; and third, convincing her (and her attorney, her husband, her husband's attorney, and the judge) that it is worth the time and money to invest in her future career now, instead of urging her to find employment right away. Skills assessment and retraining should pay off in real dollars not only for the divorced woman and her children, but even-

tually for her former husband as well, as it will ultimately lighten his burden of financial support for the children.

In fact, research from Ohio State University shows that women who enrolled in a training program rather than taking a job in the first year after divorce, were more successful in terms of both job level and annual earnings in the long run.[176] Professor Frank Mott followed a group of married women over five years from 1968 to 1973. A subsample of this group were divorced during the study period, and Professor Mott compared the postdivorce experiences of women who began working immediately after the divorce with those who obtained job counseling, enrolled in a training program, and did not enter the labor force for a year or more.[177] He found that both young and mature women who enrolled in a training program were more successful than their counterparts (who received no training) in "finding a job after the transition and in obtaining higher annual earnings during that year."[178] Mott concluded:

> It is suggested that, while the new transition family obviously needs income support to carry it through the often-difficult marital disruption period, it probably needs as much job-related assistance. While many mature women who become household heads ultimately acquire new or relearned job skills, as well as an understanding of how to seek and find jobs, the process is often inefficient and costly. Many social and economic traumas could be avoided by timely assistance at this crucial point in the life cycle.[179]

The policy implications of this research are worthy of note. I believe that they provide a persuasive argument for the advantages of generous support awards in the first few years after divorce. Early "balloon payments" would allow the newly divorced woman to take advantage of educational and training opportunities that will maximize her long-term earning potential and thus maximize the long-run payoffs for both herself and her former husband.

176. F. Mott, The Socioeconomic Status of Households Headed by Women: Results from the National Longitudinal Surveys (Employment & Training Admin., U.S. Dep't of Labor, R. & D. Monograph No. 72 1979)).

177. *Id.* at 30.

178. *Id.*

179. *Id.* at 33.

IV. Child Support[180]

A. *The Amount of Child Support*

In response to the hypothetical Byrd case,[181] the Los Angeles judges proposed a median child support award of $250 for the two children (a four-year-old daughter and a six-year-old son). The attorneys' predictions were similar,[182] averaging $271 in total child support.

These predictions accorded well with actuality, although the hypothetical Ted Byrd's income is slightly above the average of a random sample of divorced fathers in 1977. Data from the 1977 Los Angeles court dockets reveal that the mean child support order that year was $126 per child. Total child support averaged $195 per family.

Another way of looking at the typical child support award is as a percentage of husband's income. In Ted Byrd's case, $250 out of a net monthly income of $1,000 is 25% of Ted's net income for child support. That was about the average percentage in Los Angeles in 1977, but was slightly below the average in San Francisco where child support averaged about a third of the husband's net income.

The percentage of a husband's income awarded in child support varies by the husband's income level, with lower income men typically being required to pay a greater proportion of their incomes in child support. (However there is a large amount of variation in data based on different samples.) In the random sample of court dockets, men who earned less than $10,000 a year were ordered to pay 20% of their gross incomes in child support. The percentage dropped to 10% of gross income among men earning $30,000 or more. Professor Judith Cassetty also found evidence of regressive child support awards in Michigan data collected in 1975, where men with gross incomes of over $15,000 contributed only 11% of their incomes to child support.[183]

The same inverse relationship is evident among the husbands in our 1978 interview sample. Table 11, which uses net income (i.e., take home pay), shows an even larger disparity between low- and high-income men in the percentage of income ordered for child support. Men with net incomes under $10,000 were ordered

180. The data in this section are summarized from Weitzman & Dixon, *Child Custody Awards*, *supra* note 159, at 488-99.

181. The facts of this case are detailed in note 160 *supra*.

182. The attorneys' awards were not consistently higher than the judges'. For example, the median spousal support award in this case was $200 a month among judges and $150 a month among attorneys.

183. J. Cassetty, Child Support and Public Policy 64, 65 (Table 4-1) (1978).

to pay 37% of their net income in child support, while those with net incomes above $50,000 were ordered to pay only 5%.

One reason for this difference is that higher income men are more likely to pay spousal suppport as well as child support, so that child support figures do not necessarily reflect the full extent of the man's support contribution. Thus if we look at the last column of Table 11 showing the total amount of support (child support plus spousal support—or one or the other), there is less difference between high- and low-income husbands.

TABLE 11

CHILD AND SPOUSAL SUPPORT AWARDED AS A PERCENTAGE OF HUSBAND'S POSTDIVORCE NET INCOME
(Based on weighted sample of interviews with divorced persons, Los Angeles County, 1978)

	PERCENTAGE OF HUSBAND'S NET INCOME AWARDED FOR SUPPORT		
HUSBAND'S NET INCOME	Child support ordered	Spousal support ordered	Total order (either or both)
$10,000	37%	—	37%
$10-$19,999	25	13%	25
$20-29,000	25	30	32
$30-$49,000	10	24	30
$50,000+	5	20	19

Table 11 suggests that a man is rarely ordered to part with more than a third of his net income, no matter what his income level. Since both the judges and the attorneys we interviewed often referred to an informal limit of never ordering a man to pay more than one-half of his net income in support,[184] we were surprised to find this lower one-third "ceiling" operating in practice.

These data were also surprising in that the amounts of support awarded were lower than the amounts suggested in the sched-

184. While most of the Los Angeles judges said they were aware of this informal rule, only one third said they themselves ascribed to it. The other two-thirds said they would award *more* than half of the husband's net income to spousal and child support where appropriate.

ule that judges use to set temporary orders.[185] While the schedule of suggested support awards is intended as a rough guideline for temporary orders, close to 60% of the Los Angeles judges said they consistently relied on them. Perhaps these schedules are being interpreted as having set an upper limit or a ceiling on award levels.

B. *The Adequacy of Child Support Awards*

I would suggest three standards for evaluating the adequacy of child support awards. One is to compare them with the actual costs of raising children. A second is to assess their reasonableness in terms of the husband's financial resources. Each of these standards is embodied in California law, which specifies that support be set in accordance with the parties' needs and ability to pay.[186] A third way to evaluate them is to compare the husband's financial contribution to child support with the financial contribution of his former wife.

1. The Cost of Raising Children[187]

Economist Thomas Espenshade has calculated that it would cost $85,163 to raise a child to age eighteen in a moderate income family in 1980. In a low income family in the United States it would cost $58,238.[188] His calculations include only the direct maintenance costs: out-of-pocket expenditures on the child's birth, food, clothing, housing, transportation, medical care, education, and other expenses. A final component is the cost of a four-year college education at a tax-supported institution. *Parents* magazine used a similar procedure, but included an adjustment for yearly inflation, and estimated that the cost of raising a child would run to over $175,000.[189]

If we use Espenshade's conservative estimates,[190] and eliminate the cost of college (since college costs may not be included in child support), we find that it averages $4,200 a year to raise one child at a moderate income level. Because of economies of scale,

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185. Los Angeles Sup. Ct., Dep't 2, Guidelines for Temporary Support Orders (1978).

186. CAL. CIV. CODE § 4700 (West 1970).

187. Portions of this discussion were first presented in Weitzman & Dixon, *Child Custody Awards*, *supra* note 159, at 497-99. *See also Support Awards and Enforcement*, *supra* note 159, at 64-69, 83.

188. Espenshade, *Raising a Child Can Now Cost $85,000*, INTERCOM, Sept. 1980, at 10, 11.

189. Tilling, *Your $250,000 Baby*, PARENTS, Nov. 1980, at 83.

190. The conservative nature of Espenshade's figures is evident in his estimate of $10,000 for four years of college. Espenshade, *supra* note 188, at 10-11. This amounts to only $2,500 a year or $278 a month (for a nine-month academic year). It is difficult to find even a public university at which tuition, books, room and board cost only $278 a month.

a second child increases the costs roughly half as much as the first child so that the total childrearing cost for two minor children would be over $6,000 a year. Similarly, if we calculate the cost for a low income standard of living, we find the cost close to $3,000 a year for one child and over $4,500 for two children.

Since these costs vary between urban and rural areas, and from one region to another, regional consumer price indexes for food, clothing, and housing link estimates to the current prices in each area.[191] The regionally specific rates for an urban area in the western United States show that it costs more than $4,000 a year to raise one child at a moderate standard of living in 1980, and close to $3,000 at a low-cost standard of living. If we assume that our hypothetical Pat Byrd would raise her children at the moderate standard, we find that her court-ordered child support award would give her $2,700 less than what she needs. Even at the poverty standard, her court-ordered child support would leave her $1,200 short.

The inadequacy of court-ordered child support is underscored by another relevant comparison.[192] Pat Byrd's total support award of $450 per month for child and spousal support is lower than she would get from the Aid to Families with Dependent Children (AFDC) program. The AFDC level of support for a household with two children is $463 per month plus $73 in food stamps, or a total of $536 per month.[193] The Federal Government has determined this sum to be necessary for families at the lowest economic levels; hence we see that Pat Byrd, our average divorced woman, obviously will not be able to rear her children, even at the poverty level, on the court-ordered support.

One problem with Espenshade's calculations is that they omit a major child care expense that Pat Byrd will have to bear. Since Espenshade's calculations are based on two-parent families, he assumes that one parent, typically the mother, is available full time to care for the child.[194] But if the mother in a single-parent family has to work,[195] she typically has to pay someone else to take care of her children. These child care costs have to be added to Espen-

191. Espenshade, *supra* note 188, at 9.

192. I am indebted to Professor Carol Bruch for suggesting this comparison to me.

193. *See* CAL. WELF. & INST. CODE §§ 11450, 11453.1 (West 1980 & Supp. 1981).

194. As Karen Seal points out, "These figures presume that while one parent works the other will be available to care for the child. In one-parent families, where the mother is forced to work, the cost of child care alone may exceed the child support award." Seal, *A Decade of No-Fault Divorce*, FAM. ADVOC., Spring, 1979, at 10, 14.

195. While 42% of all married women with children under six years of age were in the labor force in 1978, 60% of the divorced women with preschool children were working. Smith, *supra* note 172, at 9.

shade's estimates in order to determine adequate child support for such single-parent families.

A 1980 report of the California Advisory Commission on Child Care reveals the average cost of child care in various California communities.[196] In Los Angeles County, the average monthly cost of family day care for a pre-school child averages $205 in family day care and $195 in a day care center—or about $2,400 a year.[197] If Pat Byrd's daughter was under two years of age, instead of four years old, it would cost another $600 a year. If Pat Byrd works a full day, she will also have to pay for after-school care for her six-year old son. That will cost her about $160 a month in family day care, or $116 a month in an after-school center, for an average of another $1,600 a year.

If we assume that Pat Byrd will work full time, then her child care costs would be about $200 a month for her daughter and $138 a month for her son. That adds up to over $333 a month—more than her entire child support award. Of course, if she is lucky enough to get the children into a public day care center with a sliding fee scale, her costs will be much less, but that typically entails a long waiting list and places her under pressure to go to work immediately.[198]

2. The Husband's Ability to Pay

A second way to evaluate the adequacy of child support awards is in terms of the husband's financial resources. In a classic study of child support enforcement, Professor David Chambers established a procedure for evaluating the reasonableness of the court awards in terms of the husband's resources.[199] Chambers first looked at the father's postdivorce standard of living *without* any deductions.[200] Following his procedures with our California data,[201] we find, as Chambers did, that most fathers would be rela-

196. *See Support Awards and Enforcement*, *supra* note 159, at 67, citing figures compiled by Joan P. Emerson Bay Area Child Care Project and reported by the Children's Council of San Francisco. The figures for full-time care are generally based on a 10-hour day, but the hours of care range from 8 to 12 hours per day for a five-day week.

197. *Id.* These figures are the average of the costs listed in Pasadena and Santa Monica.

198. *Id.*

199. D. CHAMBERS, MAKING FATHERS PAY (1979).

200. *Id.* at 47 (Figure 4.2).

201. The starting point for these computations is the Department of Labor specification of the Higher, Intermediate, and Lower level budgets for an urban family of four for autumn 1977. For example, the Lower level budget for a family of four was $10,481. The basic budgets were devised for a typical family of two adults and two children. A separate procedure adjusts this budget to other types and sizes of families (depending on family size, age of oldest child, and age of household head). BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1570-2, at 5 (1968). A fam-

tively well off. In Michigan, over 90% of the divorced fathers would be living at a level above the higher standard budget if they did not pay any support. In California, close to two-thirds of the fathers would be living at this level if no support were paid. When a father moves out, "separating himself from his family and hoarding all income to himself, the father improves his standard of living dramatically."[202]

Next, Chambers asked what would happen to the father's standard of living if he paid the full amount of child support ordered. At the same time he asked how ex-wives and dependent children would fare on the amount of support ordered by the court. Obviously, if the family income stays constant, both units cannot maintain their former standard when living apart. In Michigan, Chambers found that "under the levels of child support that are ordered by the court . . . it is only the women and children whose standards of living decline even when the father is making payments."[203] Chambers concluded that 80% of the fathers could maintain a comfortable standard of living (at or above the intermediate standard budget) after paying court-ordered support.[204]

In California, we found that close to three-quarters of the fathers had the "ability to pay" the amount the court ordered with-

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ily of only two persons, for example, with a 35-year old head of the household, would need only 60% of the money a family of four would need at a Lower level budget.

Using this procedure, a Higher, Intermediate, and Lower Budget was computed for *each* postdivorce family in our interview sample. For each predivorce family, there were two postdivorce families (the husband's and wife's). Postdivorce families were defined as a divorced person, a new spouse or cohabitee (where applicable), and any children whose custody was assigned to that spouse. The actual income of each postdivorce family was then compared with the three standard budgets and ranked according to the level of need.

We found, for example, that if divorced husbands pay no support 64% of them have postdivorce incomes above the Higher Standard Budget for their family, while 68% have incomes above the Intermediate Budget, and 73% above the Lower Standard Budget. Similar computations were made assuming divorced husbands' incomes are reduced by their paying all ordered support. For divorced wives, calculations assumed that the only income women had was from support payments, and again this level of income was compared with the three budget levels for wives' postdivorce families. *See* Table 12 *infra*.

202. D. CHAMBERS, *supra* note 199, at 48.

203. *Id.*

204. Chambers calculates that

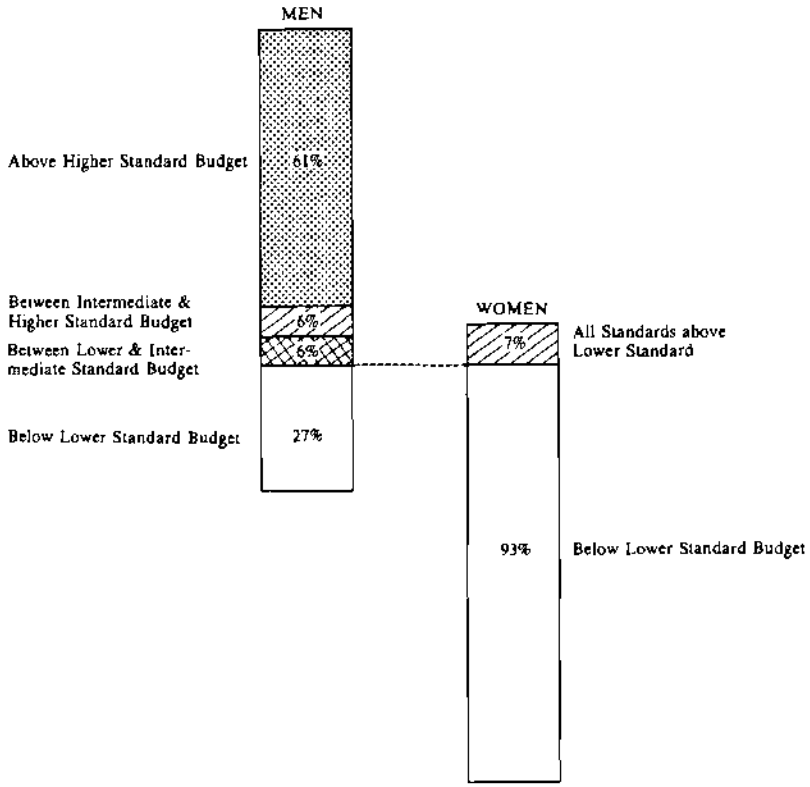
> a mother with two children needs between 75 and 80 percent of the family's former total income to continue to live at the prior standard. The father will have been ordered by the court to pay around 33 percent of his income. There remains a painful gap. On the other hand, the father who pays child support and retains two-thirds of his income still remains better off financially than he was before divorce. Four in five fathers can live at or above the Intermediate Standard Budget.

Id.

out a substantial reduction in their standard of living.[205] As Table 12 indicates, 61% of the California fathers would be able to comply fully with the court order and still live above the high standard budget. An additional 12% would be living above the lower standard budget. Thus 73% of the men could live at a level above the lower standard budget. In contrast only 7% of the women would

TABLE 12

STANDARD OF LIVING IF HUSBAND PAYS SUPPORT
(Income standards of men and women if men pay all support ordered and women live on support)



(Based on weighted sample of interviews with divorced persons, Los Angeles County, 1978)

205. Using similar procedures to construct an index of ability to pay, Canadian researchers also found that 80% of the fathers could afford to pay. 1 CANADIAN INST. FOR RESEARCH, INST. OF L. RESEARCH & REFORM, MATRIMONIAL SUPPORT FAILURES: REASONS, PROFILES, AND PERCEPTIONS OF INDIVIDUALS INVOLVED 22 (1981) [hereinafter cited as MATRIMONIAL SUPPORT FAILURES].

be living at this level. Almost all the women and children—fully 93%—would be living below the poverty level.

Since it is clear that the women and children cannot live on these awards—even if they are paid in full—in a later section we will consider how their financial situation will be affected by other financial resources, such as employment and welfare.[206]

3. Equitable Contributions from Husband and Wife

One standard for an equitable distribution of the financial responsibility for child support would be to ask each of the parents to contribute half of the child's financial support. A second standard for equity would be to ask each parent to contribute according to his or her ability to pay. The latter standard, which is codified in California law, aims at placing a lesser burden on the spouse with the lower earning capacity, and that is typically the wife.

One way to measure the extent to which California patterns comply with the first standard of a 50-50 division is to compare each parent's contribution to the total cost of raising children. In a previous section, we compared the amount of child support the father is ordered to pay with Espenshade's estimates of the actual cost of raising children.[207] We found that the average child support award did not cover half of the cost of actually raising children, and concluded that the major burden of support falls on the custodial mother. Thus California child support awards do not meet the first standard of equity, because the noncustodial father is not required to pay an equal share of the costs of raising his children. This conclusion is further supported by the data on noncompliance,[208] which indicate that men in fact tend to pay far less than the court has ordered, thus further increasing the disproportionate share that the mother is forced to assume.

The California data also fall short of the second standard of equity, whereby each parent is expected to contribute according to his or her ability to pay. The data reviewed above show that child support is typically set in accordance with the husband's ability to pay while still allowing him to maintain an adequate standard of living. The wife, however, who usually has far less earning capacity, and thus less ability to pay, typically ends up shouldering a disproportionately large share of the cost of child support. This inevitably results in a drastically reduced standard of living for the wife. Thus, rather than finding that child support has been

206. *See* Part V(A) (*Postdivorce Incomes of Husbands and Wives*) *infra.*
207. *See* Part IV(B)(1) (The Cost of Raising Children) *supra.*
208. *See* Part V(C)(1) (The Problem of Noncompliance) *infra.*

apportioned in accord with the second norm of equity—according to the ability of each parent to pay—we find it has been apportioned in direct contradiction to that norm, with the heaviest burden falling upon the parent who can *least* afford to pay, the custodial mother.

In summary, the data reviewed in this section point to three conclusions. First, the amount of child support ordered is typically quite modest in terms of the husband's ability to pay. Second, the amount of child support ordered is typically not enough to cover even half the cost of actually raising the children. Third, it follows that the major burden of child support is typically placed on the wife even though normally she has fewer resources and an inferior "ability to pay."

V. Social and Economic Consequences for the Family

A. *Postdivorce Incomes of Husbands and Wives*

The awards made in our two hypothetical cases illustrate how support awards structure large disparities in the postdivorce incomes of men and women. For example, if Victor Thompson is ordered to pay $2,000 a month spousal support, he retains $4,000 a month or twice as much income for himself.[209] And if Ted Byrd is ordered to pay $450 a month for spousal and child support, he retains $550 for himself or 55% of the family's income. That leaves 45%—less than half—to be shared by the three other members of his family.[210] Judges are reluctant to consider taking more than half of a man's net income for support,[211] but when there are children in the family, the consequences can be grossly inequitable: a wife and two children are expected to live on less than the husband has for himself.

Thus one result of the support awards discussed above is that husbands are much better off after divorce than are their former wives and children. The conclusion has been documented in several studies,[212] and is clearly reflected in our California data.

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209. The after tax consequences of these awards would result in greater disparities between the two spouses. Ann would have to pay tax on her $2,000 income while Victor's alimony payments are "tax advantages" for him.

210. When faced with the same case, a sample of English judges and solicitors consistently predicted that the wife and children would be awarded a much higher percentage of the husband's income. L. Weitzman, note 164 *supra*.

211. *See* note 184 & accompanying text *supra*.

212. *See, e.g.*, J. Cassetty, note 183 *supra*; D. Chambers, note 199 *supra*; Hoffman & Holmes, *Husbands, Wives, and Divorce*, in IV Five Thousand American Families—Patterns of Economic Progress 23 (1976); Seal, note 194, *supra*.

TABLE 13. POSTDIVORCE INCOMES OF COUPLES MARRIED LESS THAN 10 YEARS.
(Based on interviews with divorced men and women, Los Angeles County, 1978)

PREDIVORCE YEARLY FAMILY INCOME	MEAN YEARLY SUPPORT AWARDED TO WIFE*	MEDIAN POSTDIVORCE INCOME		MEDIAN POSTDIVORCE INCOME PERCENTAGE OF PREDIVORCE FAMILY INCOM	
		Wife's (Adjusted)**	Husband's (Adjusted)***	Wife (Adjusted)	Husband (Adjusted)
under $20,000 (n = 41)†	$ 570	$ 9,067	$11,440	71%	74%
$20-29,000 (n = 24)	$1,355	$13,000	$18,050	56%	78%
$30-39,000 (n = 19)	$1,747	$15,000	$27,000	39%	78%
$40,000+ (n = 21)	$7,733	$18,000	$45,718	29%	75%

* Alimony and child support, including zero and one dollar awards.
** Wife's adjusted income calculated by adding wife's earnings plus alimony and child support awarded plus income from any other source (such as wages or welfare).
*** Husband's adjusted income calculated by subtracting alimony and child support ordered paid from husband's total income.
† n refers to the number of cases on which the percentages are based.

1. Young Couples with Children

a. *Comparing household incomes.* Let us first examine the postdivorce incomes of California husbands and wives after marriages of less than ten years, that is, couples closely comparable to our hypothetical Byrd family. In order to provide a standard of comparison, we have used the family's predivorce income as the "base" against which to compare each spouse's financial resources after divorce.

Table 13 shows the "adjusted" postdivorce incomes for former husbands and wives. The wife's adjusted postdivorce income includes the amount of alimony and child support she was awarded plus her income from other sources, such as wages or welfare payments. Similarly, the husband's adjusted income has been calculated by deducting the amount he was ordered to pay in alimony and child support from his total postdivorce income. This estimate of the husband's postdivorce income is conservative in that it assumes that he is fully complying with the court order. Since the relative difference in postdivorce income between husband and wife was found to be strongly influenced by the husband's income level, we have also controlled for husbands' income in the following analysis. These data are presented in Table 13, which shows the disparity between the postdivorce standards of living of former husbands and wives.

The "relative deprivation" of wives increases with income level; that is, while both husbands and wives in families with predivorce incomes under $20,000 each have a postdivorce income close to three-fourths of the family's former income, the gap between the two widens at higher income levels. Among families with predivorce incomes of $20,000 to $29,000 a year, the wife's adjusted postdivorce income declines to about half (56%) of the family's former standard, while her husband maintains three-fourths (78%) of the former standard.[213] Similarly, among families with predivorce incomes of $30,000 to $39,000 a year, the wife is reduced to less than 40% of the former family standard while her husband maintains 78%.

The contrast between the postdivorce incomes of former husbands and wives is most marked among families with incomes of $40,000 or more. Relative to other divorced women in the sample, these wives appear to be moderately well off with a mean support award of $7,733 and a yearly income of $18,000. But relative to

213. Since these interviews took place about a year after the legal divorce, the combined income of the two spouses was often greater than it was at the time of the divorce. Sources of this additional income included new jobs, increased working hours, supplementary income or aid from the government, and (among some women and a large number of men) raises and cost of living increases.

their own former husbands they are clearly deprived: they must live on a mere 29% of their former family income while their former husbands retain three-quarters of that standard, or more than twice as much dollar income ($18,000 vs. $45,718) per year.

b. *Comparing per capita income.* The foregoing discussion treats the postdivorce households of men and women as if each contained just one person. However, women are more likely than men to have dependent children in their households, and are therefore more likely to share their postdivorce income with others.

One way of building this factor into the analysis is to calculate the per capita income in the two households, by dividing the adjusted income of each spouse by the number of persons in their household. Table 14 shows the per capita figures for the same group of families examined in Table 13.

Once again, it is important to stress that the method we have used tends to minimize or underestimate the income differences in our data. Specifically, we have assumed that all alimony and child support orders are fully complied with; thus we have included the full amount of support ordered in the wife's income and subtracted the full amount from the husband's income. Obviously, where alimony or child support is not paid at all or is only partially paid, as is often the case, the husband's income will be greater than we have assumed, the wife's less, and the difference between the two even greater.

Clearly the presence of children in the wife's postdivorce household makes a major difference in the amount of money available to each member. The wife and each member of her household are allowed far less income than the husband and each member of his household.

Table 14 indicates that divorced men who were married less than ten years have a much higher per capita income—that is, they have much more money to spend on themselves—than their former wives at every level of predivorce family income. Where the discrepancy is smallest, in lower income families, the husband and every member of his postdivorce family has almost twice as much money as his former wife and every member of her postdivorce family (who are typically *his* children). In higher income families, the discrepancy is enormous: among families with predivorce incomes of $40,000 or more a year, the wife and children are expected to live at 48% of their former per capita level, while the husband is allowed 200% of his former level. In other words, the wife experiences rapid downward mobility while the husband experiences very rapid upward mobility. Indeed, our interviews show that it is the discrepancy between the postdivorce

TABLE 14. MEDIAN POSTDIVORCE PER CAPITA INCOMES OF COUPLES MARRIED LESS THAN 10 YEARS. (Based on interviews with divorced men and women, Los Angeles County, 1978.)

PREDIVORCE YEARLY FAMILY INCOME	PREDIVORCE PER CAPITA FAMILY INCOME	POSTDIVORCE PER CAPITA INCOME		POSTDIVORCE PER CAPITA INCOME AS % OF OLD FAMILY PER CAPITA INCOME	
		WIFE (Adjusted)*†	HUSBAND (Adjusted)**†	WIFE (Adjusted)	HUSBAND (Adjusted)
under $20,000 (n = 41)††	$ 6,056	$ 7,025	$11,440	129%	176%
$20-29,000 (n = 24)	$11,028	$ 8,917	$18,050	87%	165%
$30-39,000 (n = 19)	$17,500	$13,050	$27,000	77%	176%
40,000+ (n = 21)	$23,500	$12,000	$45,718	48%	201%

* Wife's postdivorce adjusted per capita family income was calculated by taking the wife's total income (from all sources including alimony and child support) and dividing by the number of people in her post divorce family (including children in her custody).

** Husband's postdivorce adjusted per capita income was calculated by taking the husband's total income, subtracting any alimony and child support awarded to his ex-wife, and dividing the remaining amount by the number of people in his postdivorce family (including new spouses, permanent cohabitantees and children in his custody).

† These figures *do not* include any additional income provided by the new spouse for the 19% of the divorced men and the 4% of the divorced women who had remarried by the time of the interview (approximately one year after the legal divorce).

†† n refers to the number of case on which the percentages are based.

standards of living, especially among middle-class and upper-middle-class couples, that fosters much of the feeling of injustice expressed by so many women after divorce.

2. Long-Married Couples and Displaced Homemakers

Before we discuss the consequences of these discrepancies, let us consider the experiences of longer-married couples. When we focus on our hypothetical Byrd family, we assume that Pat Byrd, at age twenty-seven, has a good employment potential and is young enough to build a new life for herself after divorce. But what about the woman who is forty-two at the point of divorce, or the woman who is fifty-two? The problems of job placement, retraining, and self-esteem are much more severe for these women.

We have assumed that a divorced woman needs an appropriate amount of time and financial support to become self-sufficient. In fact, we have argued that she should be given a fairly generous support award after divorce so that she can take advantage of training and educational opportunities that will maximize the long-run payoff for herself and for her former husband.[214]

But when we talk about support for an older woman, we have to think about the possibility of support for a longer, indeed perhaps an indefinite, period. In this case, the task of balancing the needs of the two postdivorce households becomes acute because what happens at divorce may establish a situation that will persist for many years. The hardest case is that of the long-married woman who has devoted her life to raising children, and whose children are now grown. The hypothetical Thompson case used in our interviews affords a representative view of such a woman's position.

The average Los Angeles judge awarded Mrs. Thompson $2,000 a month in spousal support. Since her children are over eighteen and living away from home, she would not usually be entitled to any child support.[215] This leaves Mrs. Thompson with $2,000 a month, or $24,000 a year, in contrast to her former husband's net yearly income of $48,000. The latter will allow him to maintain a very comfortable standard of living. But Ann Thompson, with her house sold, no employment prospects, and the loss of

214. *See* Part III(D) (*Implications for Spousal Support Awards*) *supra.*

215. While the court cannot ordinarily order a parent to support a child who is over 18 unless that child is "incapable of self support," Levy v. Levy, 245 Cal. App. 2d 341, 363, 53 Cal. Rptr. 790, 803 (1966), it can incorporate a voluntary agreement for child support into the court order. Only 6% of the parents we interviewed with children over 18 had signed such voluntary agreements.

TABLE 15. MEDIAN POSTDIVORCE PER CAPITA INCOMES OF COUPLES MARRIED 18 YEARS OR MORE
(Based on interviews with divorced men and women, Los Angeles County, 1978)

PREDIVORCE YEARLY FAMILY INCOME	PER CAPITA FAMILY INCOME	POSTDIVORCE PER CAPITA INCOME		POSTDIVORCE PER CAPITA INCOME AS % OF OLD FAMILY PER CAPITA INCOME	
		WIFE (Adjusted)*	HUSBAND (Adjusted)†‡	WIFE (Adjusted)	HUSBAND (Adjusted)
Under $20,000 (n = 12)**	$ 5,750	$6,500	$11,950	102%	160%
$20-29,000 (n = 13)	$11,500	$6,100	$11,500	48%	97%
$30-39,000 (n = 16)	$12,306	$9,100	$18,000	60%	158%
$40,000 or more (n = 22)	$20,162	$8,500	$28,640	42%	175%

* Wife's postdivorce adjusted per capita family income was calculated by taking the wife's total income (from all sources including alimony and child support) and dividing by the number of people in her post-divorce family (including children in her custody).

† Husband's postdivorce adjusted per capita income was calculated by taking the husband's total income, subtracting any alimony and child support awarded to his ex-wife, and dividing the remaining amount by the number of people in his postdivorce family (including new spouses, permanent cohabitants and children in his custody).

‡ These figures *do not* include any additional income provided by the new spouse for the 36 percent of the divorced men and the 6 percent of the divorced women who had remarried by the time of the interview (approximately one year after the legal divorce).

** n refers to the number of cases on which the percentages were based.

her major status, is likely to experience extreme downward mobility.[216]

Mrs. Thompson's downward mobility is typical of the experiences of long-married divorced women in California. Table 15 shows the adjusted postdivorce per capita incomes for long-married men and women. While the pattern is similar to that observed for women in shorter marriages, it is clear that these long-married women are worse off than their younger counterparts, because they remain far more dependent on their former husbands.

Consider, for example, the contrast in families in the average predivorce income range, those with incomes of $20,000 to $29,000 a year. Wives in this group have a postdivorce per capita income that is less than half of what they had during the marriage. Their husbands, in contrast, are living at 97% of their former standard. The pattern is similar for wives from families with predivorce incomes of $30,000 to $39,000. They and all members of their household—which often includes their children—are living on 60% of their former income while the husbands are living on 158%.

Finally, even those wives who appear relatively well off—those who were sharing a median family income of over $40,000 a year before divorce, and were awarded an average of $13,700 a year in alimony and child support—are relatively deprived when compared to their former husbands. These women are expected to live at less than a half (42%) of their former standard, while their former husbands appear to be flourishing on 175% of that household standard.

Although considerable concern has been expressed about the plight of the wife after a lengthy marriage,[217] and the courts have explicitly ruled that the parties' incomes should not be sharply disparate after long marriages,[218] it is nevertheless clear that the pattern of support and property awards tends to impoverish the long-married woman while providing the long-married man with a continuously comfortable standard of living.

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216. As Wallerstein and Kelly observe,

> The decline in the standard of living was made more troublesome for some women by the way it brought them into a lower socioeconomic class. Women who had been in the highest and most prosperous socioeconomic group, in particular, faced an entirely changed life. For these women, all of them left by their husbands, the moorings of their identification with a certain social class, and with it the core of their self-esteem—formerly exclusively determined by the husband's education, occupation, and income—were shaken loose.

J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 23 (1980).

217. *In re* Marriage of Morrison, 20 Cal. 3d 437, 143 Cal. Rptr. 139, 573 P.2d 41 (1978).

218. *In re* Marriage of Andreen, 76 Cal. App. 3d 667, 143 Cal. Rptr. 94 (1978).

Not surprisingly, the feelings of injustice expressed by many women after divorce surfaces particularly among long-married women. Our interviews indicate that 100% of the respondents in long marriages, both men and women, said they believed that their marriage would be a lifelong partnership in which they would share all of the property and income they acquired, and that the wives' efforts to build their husbands' careers (and earning power) were investments in a future both would share.[219] But as these data indicate, when the marriage dissolves, the husband's income is effectively treated as "his" rather than "theirs," and he alone reaps the lion's share of benefits from the partnership that she helped to build.

B. *The Impoverishment of Women and Children*[220]

Thus far, we have seen that men have much more disposable income after divorce, both absolutely and relatively, than their former wives and children. This conclusion is confirmed by Michigan researchers who found that the economic status of divorced men improves, while that of divorced women declines. The study was conducted by The Institute for Survey Research of the University of Michigan, which followed a sample of 5,000 American families (weighted to be representative of the U.S. population) for seven years, from 1968 through 1974.[221] Economists Saul Hoffman and John Holmes compared the incomes of men and women who stayed in intact families with the incomes of divorced men and divorced women over this seven-year period. Detailed information from the interviews provided the researchers with precise income data, including income from employment, intra-family transfers, welfare, and other government programs. Alimony and/or child support paid by the husband was subtracted from his income and added to the wife's postdivorce income. Finally, to facilitate direct comparisons, all income was calculated in constant 1968 dollars so that changes in real income could be examined without the compounding effect of inflation.

A comparison of the married and divorced couples yielded two major findings. First, as might be expected, the real income of both divorced men and divorced women declined, while the income of married couples rose. Divorced men lost 19% in real

219. One hundred percent of the wives and 99% of the husbands agreed with the following statement: "I assumed that we would share all of the property and income we would acquire." Along the same lines, 90% of the women and 100% of the men married more than 18 years said that they agreed that "I assumed that once we got married I would have an obligation to support my wife for the rest of her life."

220. This literature is also reviewed in *Support Awards and Enforcement*, note 159 *supra*.

221. Hoffman & Holmes, *supra*, note 212, at 24.

income while divorced women lost 29%.[222] In contrast, married men and women experienced a 22% rise in real income.[223] These data confirm our common sense belief that both parties suffer after a divorce. They also confirm that women experience a greater loss than do their former husbands.

The second finding of the Michigan research is surprising. To see what the income loss meant in terms of family purchasing power, Hoffman and Holmes constructed an index of family income in relation to family needs.[224] Since this income/need comparison is adjusted for family size, as well as for the members' age and sex, it provides an individually tailored measure of a family's economic well-being in the context of marital status changes.

The Michigan researchers found that the experiences of men and women were strikingly different when they used this measure of income relative to needs. Over the seven-year period, the economic position of divorced men, when assessed in terms of need, actually improved by 17%.[225] In contrast, over the same period divorced women experienced a 29% decline in terms of what their income could provide in relation to their needs.[226]

In order to compare the Michigan findings to our California data, we used a similar procedure for calculating the basic needs of each of the families in our interview sample.[227] These data,

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222. *Id.* at 27 (Table 2.1), 31 (Table 2.2). Hoffman and Holmes are frequently cited as showing that divorced men have only a 10% decline in real money income. While this figure is shown in Table 2.1, it is based on the husband's total postdivorce income before alimony and/or child support is paid. Once these support payments are deducted from the husband's income, husbands experience a 19% decline in real income.

223. *Id.* at 27 (Table 2.1).

224. This index, which is based on the Department of Agriculture's "Low-Cost Food Budget," adjusted for the size, age, and sex composition of the family, is similar to the index described in notes 201 *supra* and 227 *infra*.

225. Hoffman & Holmes, *supra* note 212, at 27 (Table 2.1). This is close to the rate of improvement of married couples who improved their standard of living by 21%. *Id.*

226. *Id.* at 31 (Table 2.2).

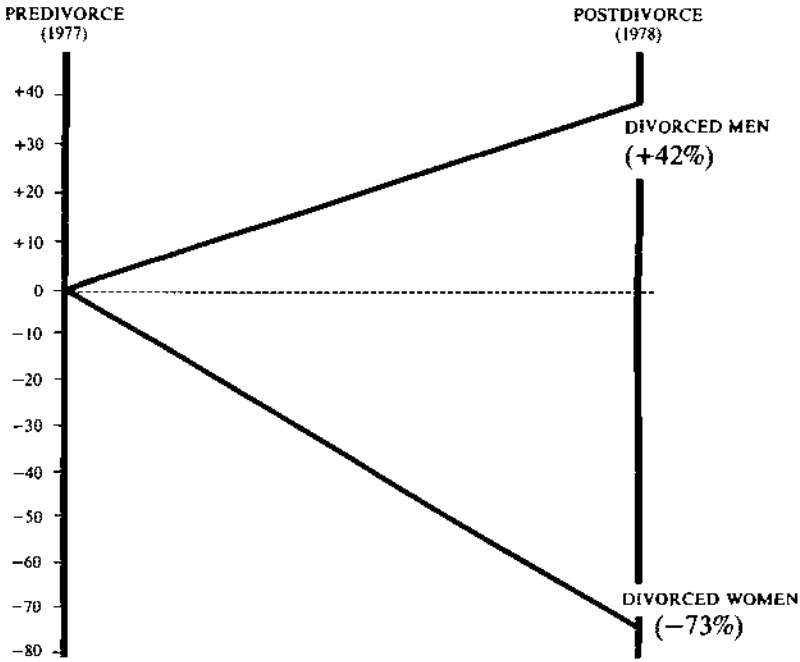
227. We assumed that the basic needs level for each family was the Lower Standard Budget devised by the BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THREE STANDARDS OF LIVING FOR AN URBAN FAMILY OF FOUR PERSONS (1967). This budget is computed for a four-person urban family (husband and wife and two children) and kept current by frequent adjustments. *See, e.g.*, McCraw, *Medical Care Costs Lead Rise in 1976-77 Family Budgets*, MONTHLY LAB. REV., Nov. 1978, at 33. A Labor Department report devised a method for adjusting this standard budget to other types of families, depending on family size, age of oldest child, and age of head of household. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REVISED EQUIVALENCE SCALE FOR ESTIMATING EQUIVALENT INCOMES OR BUDGET COSTS BY FAMILY TYPE, BULLETIN NO. 1570-2 (1968). For example, the needs of a family of two persons (husband and wife) with the head of the household of age 35 was calculated at 60% of the base figure for a Lower Standard Budget.

A Lower Standard Budget was calculated for each family in our interview sam-

reported in Table 16, show a radical change in the two families' standard of living just one year after legal divorce. Men experienced a 42% improvement in their postdivorce standard of living, while women experienced a 73% loss.

TABLE 16

PERCENT CHANGE IN STANDARD OF LIVING* OF DIVORCED MEN AND WOMEN IN CALIFORNIA
(One year after divorce)



(Based on weighted sample of interviews with divorced persons approximately one year after legal divorce, Los Angeles County, 1978)

* Income in relation to needs with needs based on U.S. Department of Agriculture's low standard budget.

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ple three different ways: once for the predivorce family, once for the wife's postdivorce family, and once for the husband's postdivorce family. The income over needs for each family was then computed. Membership in postdivorce families of husbands and wives included a new spouse or cohabitor (where applicable), and any children whose custody was assigned to that spouse. I am indebted to my research assistant, David Lineweber, for programming this analysis.

Table 16 suggests that divorce is a financial catastrophe for most women: in just one year they experience a dramatic decline in income and a calamitous drop in their standard of living. It is difficult to imagine how they survive the severe economic deprivation: every single expenditure that one takes for granted—clothing, food, housing, heat—must be cut to one-half or one-third of what one is accustomed to. No wonder that more divorced women report that they are in a constant financial crisis after divorce[228] and that they are perpetually worried about not being able to pay their bills.[229] This financial crisis cannot help but affect their socio-emotional lives, and it is not surprising that divorced women report more stress[230] and less satisfaction with their lives than any other group of Americans.[231]

How does this striking contrast in economic experiences of former husbands and wives come about? One explanation is that the wife typically assumes most of the costs of raising the couple's children. Thus, her need for help and services increases as a direct

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228. In our interview sample, more women than men reported that they were "more concerned about money now than when they were married," were "more careful about budgeting," and were "spending their money on necessities, not extras." More men than women reported that they were satisfied with their current standard of living, and that they spent more money on themselves than when they were married.

229. Fully 70% of divorced women in a national sample say they often worry about making ends meet. While 58% of the divorced men in a nationwide study of the quality of American life said that they never worried about meeting their bills, only 30% of the divorced women were in the same position. A. CAMPBELL, P. CONVERSE & W. RODGERS, THE QUALITY OF AMERICAN LIFE 420 (1976).

230. Divorced women are more likely to report that they feel "frightened," that "life is hard," that they "always feel rushed," "worry about a nervous breakdown," and "worry . . . about bills" than *any* other group of American men and women. *Id.* at 404 (Table 12-5).

231. *Id.* at 398 (Table 12-2). The authors note that "Divorced women are generally more negative than women in general in a number of domains but they are particularly dissatisfied with their standard of living and their savings." *Id.* at 420.

> Our data demonstrate . . . that divorce has a different meaning to women than to men. We have pointed out the great dissatisfaction divorced women feel with the economic circumstances of their lives, a feeling not shared by divorced men. [There are numerous] other evidences that the life of a divorced woman is more stressful than that of a divorced man . . . . Divorced women report far more stress in answer to these questions than any of the other groups of women. Divorced men, on the contrary, are somewhat less likely to report stress than the other groups of men. Particularly striking is the high proportion of divorced women who fear they may have a nervous breakdown (25%) compared to the much smaller proportion (8%) of divorced men.
>
> Taken together our survey gives us a picture of divorced men who . . . do not find their lives strained or disturbing. The picture of divorced women is unrelievedly negative. . . . [T]hey find their lives less satisfying than other women do and marked by much psychological stress.

Id. at 421 (footnote omitted).

result of her becoming a single parent, while at the same time her income declines.

A second explanation lies in the inadequacy of the child support (and in rarer cases, the alimony) which the wife is awarded. All too often this support does not come close to compensating her for her actual costs. Thus, she must somehow make up the deficit alone, even though she earns much less than her former husband.

A third reason for the discrepancy is the reduced gap between the husband's income and his needs after divorce. Although the husband has fewer dollars than before divorce, he is not constrained to share those dollars with his former wife and his children. Thus, the demands on his income have diminished. As a result, the husband is left with more surplus income than he enjoyed during marriage.

Fourth, many divorced men have received salary increases over the year, while their obligations for alimony and child support have remained fixed or diminished: some support obligations have ended, others have been reduced (for example, a child may have reached majority), and a good many men have simply decided to reduce or stop their support payments despite the existence of a court order. The result, once again, is that divorced men are able to enjoy the surplus income themselves.

C. *Further Erosion of Support Orders: Noncompliance and Inflation*

In order to focus on the adequacy of support orders made by the courts, we have thus far paid little attention to the critical importance of noncompliance and inflation. We now turn to an examination of these two factors and their effects on postdivorce support. We find that the disparity in financial status between men and women reported above is even greater when one considers how inadequate support orders are further diminished by noncompliance and inflation.

1. The Problem of Noncompliance

The widespread lack of compliance with court-ordered child and spousal support has been well documented by previous research in the United States and Canada.[232] For example, a 1978 survey conducted by the U.S. Bureau of the Census revealed that only half of the women who were awarded child support received it as ordered; about a quarter of the women received less than the full amount, while another quarter never received a single pay-

232. For a more complete review of this literature, see L. WEITZMAN, *supra* note 95, at 126-34.

ment.[233] Similarly, a 1980 survey of maintenance orders in Alberta, Canada, revealed that only a third of the women received the full amount of the court-ordered support.[234] Another third received less than the full amount, while the final third never received a penny of the support ordered.[235]

Our California data probably underestimate the overall extent of noncompliance because they are limited to events within the first year after divorce. In 1977, 15% of the Los Angeles wives went back to court to complain of noncompliance within twelve months of their final decree of divorce.[236] Interview data, however, suggest that this figure greatly underestimates nonpayment and does not reflect the extent of underpayment and irregular payment. Many wives who were interviewed reported that they did not file a formal complaint about their husband's noncompliance because they lacked the time, knowledge, and/or monetary resources to do so. In fact, *only one-third* of our female interviewees reported that they regularly received the full amount of court-ordered child support in the first year of the court order. A hefty 43% of the women reported receiving little or no child support during that first year. The remaining 22% reported having problems in obtaining either the full amount of the order or obtaining it on time.

Compliance with spousal support orders appeared to be somewhat better among the interview sample, but one must recall the relative rarity of these awards to begin with. Nevertheless, we found that within just six months of the divorce decree, one out of six men was already in arrears on spousal support payments, owing an average of more than $1,000 each.

All of the research on compliance with child support orders points to three consistent findings.[237] First, not one study has found a state or county in which more than half of the fathers fully comply with court orders.[238] Second, the research suggests

233. CHILD SUPPORT AND ALIMONY, note 34 *supra*.

Along the same lines, a 1975 nationwide poll showed that only 44% of the divorced mothers were awarded child support and, of those, only 47% were able to collect it regularly. B. BRYANT, AMERICAN WOMEN TODAY AND TOMORROW 24 (1977). Another 29% collected it sometimes or "rarely," and the remaining 21% reported that they were never able to collect any of the child support ordered by the court. *Id.*

234. MATRIMONIAL SUPPORT FAILURES, *supra* note 205, at 3.

235. *Id.*

236. That is, they filed an order to show cause why their ex-spouse should not be found in contempt of court for failing to pay alimony or child support.

237. This is summarized from a more extensive review of the literature in L. WEITZMAN, note 95 *supra*.

238. The reported percentage for full compliance varies from a low of 22% of all fathers (in a 1973 study of AFDC fathers cited in C. Jones, N. Gordon & I. Sawhill, Child Support Payments in the U.S. 29 (Urban Institute Working Paper No. 992-03

that many of the fathers who are ordered to pay support pay it irregularly and are often in arrears. In several studies the arrearage is for half or three-quarters of the money owed, and in one study it reached 89%.[239] While some contribution is certainly preferable to total noncompliance, irregular and infrequent child support payments can create serious hardships for the dependent mother and children. Third, the research indicates that a very sizable minority of fathers—typically between a quarter and a third—never make a single court-ordered payment.[240]

One implication of this research is that child support makes the difference between poverty and nonpoverty for many families. Women who were near the poverty line and received child support would have fallen below the poverty level if those payments were eliminated. In fact, one U.S. Bureau of the Census study showed that about a third of the divorced and separated women who did not receive child support fell below the poverty line, compared to only 12% of the women who received support.[241]

A second implication is that whether or not a woman receives child support can become a major determinant of whether or not she applies for public assistance. In a 1978 census sample, 38% of women without child support from the father of their children received public assistance income, compared to only 13% of women with child support income.[242]

The lack of compliance not only causes enormous economic hardship, it also undermines people's confidence in the law and the force of court orders. Our California interviews were replete with complaints about the court's failure to enforce its support orders, its hostile or negative response to requests from nonsup-

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1976) to a high of 38% (in Eckhardt's data in the first year after the court order. Eckhardt, *Deviance, Visibility and Legal Action: The Duty to Support,* 15 SOC. PROB. 470, 473-74 (1968)).

239. *See* 2 H. FOSTER & D. FREED, LAW AND THE FAMILY—NEW YORK xv & n.1 (1966).

240. It is interesting to note that men and women have radically different perceptions of "the rate" of noncompliance. While two-thirds of the women report that they have difficulty collecting child support, only 11% of the men perceived any problem. Although part of this discrepancy may stem from the men's desire to appear honorable or impress an interviewer, it may also be explained in the different stake the two sexes have in the outcome. For the woman, a check that is a week or two weeks late may mean no money to pay the rent and a struggle to find money for food. In addition, the uncertainty of the payment is likely to create anxiety and disrupt her budgeting. Her husband, on the other hand, may perceive the same delay as inconsequential and assume that he has fully complied as long as he sends the check sometime during the month.

241. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT, CURRENT POPULATION REPORTS, SERIES P-23, NO. 84, at 3-4 (1979).

242. *Id.*

ported mothers, and the resulting frustration and disillusionment that women experience when they are forced to confront the apparent ease with which a violation of the law is tolerated.

2. Why Don't Fathers Pay?

How can we explain the high rate of noncompliance with support orders? One widespread belief is that fathers simply cannot afford to pay the child and spousal support ordered by the court. However, Chambers' data from Michigan[243] and our data from California[244] indicate that most divorced fathers can afford to comply with the court orders and are able to live quite well after doing so. Every study of men's ability to pay arrives at the same conclusion: the money is there. Indeed, there is normally enough to permit payment of significantly higher awards than are currently being made.

A second set of data similarly refutes the suggestion that men cannot afford to comply. If lack of ability to pay were the cause of noncompliance, we would expect the highest rates of noncompliance among men with lowest incomes. But as Table 17 shows, there is in fact little relationship between income and noncompliance.

TABLE 17

COMPLIANCE WITH CHILD SUPPORT ORDERS BY FATHER'S POSTDIVORCE GROSS INCOME
(Based on weighted sample of interviews with divorced persons, Los Angeles County, 1978)

FATHER'S YEARLY INCOME	PERCENT IRREGULAR OR NO PAYMENTS
Under $10,000	27%
$10-20,000	27
$20-30,000	22
$30-50,000	29
$50,000 or more	8

The Canadian study of support orders actually revealed that men who never paid child support had much higher monthly incomes than fair or poor payers.[245] In addition, when the Canadian researchers constructed an index of ability to pay, they found

243. See Part IV(B)(2) (The Husband's Ability to Pay) *supra*.

244. *Id.*

245. MATRIMONIAL SUPPORT FAILURES, *supra* note 205, at 20.

that 80% of the fathers could afford to pay.[246]

A better explanation for the lack of compliance lies in the absence of—and/or the failure to use—effective enforcement procedures. Recent years have brought a dramatic increase in the range of available machinery to enforce child support orders both within and across state lines. But even though California has a wide variety of enforcement options,[247] attorneys and judges are reluctant to utilize them. For example, in 1977 less than 5% of the random sample of cases from the court dockets included wage attachments to secure support.[248] Similarly, the Canadian researchers found that 40% of the cases in one city involved unserved summonses and 14% involved unserved warrants.[249]

In pioneering work on the collection of child support, Professor David Chambers has shown that strong enforcement procedures are essential to an effective system of collection.[250] In an examination of twenty-eight Michigan counties,[251] Chambers found that the counties with the highest rates of compliance shared two characteristics: a self-starting system of collecting child support, and a high incarceration rate.[252] In a self-starting system, child support payments are made directly to the court so that court personnel can keep a careful watch on compliance. As soon as a father is delinquent, action is initiated by the Friend of the Court, a publicly supported collection system which pursues nonsupporting fathers whether or not their ex-wives are on welfare.[253]

The second essential component of an effective deterrent system appears to be a high probability of jail for continuously delinquent fathers. When Chambers compared the rate of compliance among different Michigan counties, he found that those counties

246. *Id.*

247. For the variety of options available, including liens, wage assignments, garnishment of wages, and contempt, see *Support Awards and Enforcement*, *supra* note 159, at 90-91. Since January 1980, courts have also been authorized to award reasonable attorneys' fees incurred in the enforcement of existing child support orders.

248. Only 4.7% of the cases in which child support was awarded had a wage attachment within the first year after the divorce, as did 2.6% of the cases with a spousal support order. Since January 1981, wage assignments are supposed to be compulsory after two months' arrearage for spousal support and one month for child support.

249. MATRIMONIAL SUPPORT FAILURES, *supra* note 205, at 3

250. D. CHAMBERS, *supra* note 199, at 101.

251. Chambers research is based on 13,000 case files along with interviews with fathers, ex-wives, court personnel, judges and jail keepers. *Id.* at 304. *See generally id.* at 283 (Methodological Appendix).

252. *Id.* at 90-91.

253. *Id.* at 10-13. The Friend of the Court does not wait for a complaint from the mother to begin enforcement efforts. It initiates a series of reminders, prodding letters, and warnings, and, if these fail, follows through with mandatory wage assignments, judicial reprimands, probation, and, if necessary, jail.

which used jail most often had the highest rates of compliance.[254] Michigan, which ultimately jails one out of seven divorced fathers under court orders to pay child support, collects more child support per case than any other state in the country.[255] Chambers also showed, however, that jail alone does not increase compliance; it must be paired with self-starting enforcement machinery.[256] In summary, Professor Chambers concludes that no-nonsense enforcement brings compliance:

> The sad finding of our study has been that, in the absence of sanctions, so many fathers fail to pay . . . . [S]wift and certain punishment can reduce the incidence [of noncompliance] so long as potential offenders perceive a clear link between their own behavior and a system that leads to punishment.[257]

Chambers further concludes that the uniformity of the findings "suggests both that there are few identifiable groups so self-motivated toward payment that they pay as well as they are able without threat and, conversely, that there are few groups so unable to pay that the threat of jail does not produce substantial additional benefits."[258]

To reduce the need for incarceration at the end of the process, Chambers recommends the establishment of a system of direct child support deductions from wages when the order is first made.[259] This possibility already exists in California where a wage assignment can be instituted at the time of the initial order.[260]

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254. *Id.* at 90.

255. *Id.* at 8; *Making Fathers Pay Child Support,* MARRIAGE & DIVORCE TODAY, Jan. 1980, at 2.

256. D. CHAMBERS, *supra* note 199, at 90. In one analysis, Professor Chambers matched subgroups of fathers by factors that influence compliance rates (such as the father's occupation) and compared fathers in a high-jailing self-starting county (Genesee) with an identical subgroup in a low-jailing non-self-starting county (Washtenaw). Men in Genesee had uniformly higher (20-25 percentage points more) compliance rates across all subgroups. *Id.* at 117-20.

257. *The Solution to Non-Support: Jail the Parent,* MARRIAGE & DIVORCE TODAY, Dec. 1977, at 2.

258. D. CHAMBERS, *supra* note 199, at 118-19. Similar results are reported by The Honorable Rosemary Barkett of West Palm Beach, Florida, who found that the effective means of securing compliance was to sentence noncomplying fathers to jail, but to recall the commitment if they paid the arrearage. If Judge Barkett found a noncomplying father had the ability to comply but had refused to do so the respondent was found in contempt and sentenced to jail. But the man was able to purge the contempt by paying the arrearage and the current court order. In three months, all but two of the men managed to pay and avoid jail. Letter from The Honorable Rosemary Barkett to Dr. Norma Wikler, Director, Judicial Education Project, NOW Legal Defense and Education Fund (Nov. 10, 1980).

259. D. CHAMBERS, *supra* note 199, at 258-61.

260. CAL. CIV. CODE § 4701(a) (West Supp. 1981) allows the judge to order a wage assignment in any case; there is no need to wait for arrearages.

3. Inflation

Even if support awards are fully complied with, their value may be severely eroded by inflation. Surprisingly, less than 10% of the support awards made in 1977 included a cost of living escalator or other form of anti-inflationary adjustment. Without such periodic adjustments, the purchasing power of court-orderd support is drastically reduced by inflation. For example, a child or spousal support order for $500 per month which was awarded in 1978 would have bought only $465 worth of the same goods one year later.[261] The purchasing power of the same order entered ten years ago would be cut nearly in half.[262]

The potential influence of double-digit inflation is easily seen in the context of the hypothetical Byrd case. If we assume a constant 12% rate of inflation, Pat Byrd's $200 a month spousal support award would be worth only $159 in just two years. Similarly, her 1980 child support award of $250 a month would dwindle to only $142 a month five years later. Moreover, after sixteen years, by the time Pat Byrd's oldest child is nineteen, it will be worth only $72 a month.

Pat Byrd's total award of $450 a month in 1980 will yield a mere $142 in purchasing power in just five years. Even if she were awarded $500 today—a full one-half of her husband's present take-home pay—it would be worth only $284 five years hence.

This obviously leads us to the question of what it would take to maintain the value of the original award over time.[263] The spousal support award of $200 would have to be increased to $225 in two years, and to $315 in five years. Similarly, to maintain the children's level of support, we would have to increase the $250 child support award to $394 in five years, and to over $600 by the time the oldest child reaches eighteen.

Compounding the inflationary factor in diminishing the effectiveness of a child support order is the increasing cost of supporting a child as that child grows older. This provides another reason for suggesting that child support awards include built-in escalators; the needs and costs of children increase as children grow older. In fact, in an intact marriage, the amount spent in the seventeenth year of the child's life would be almost three and one-half times the amount spent at age one.[264]

Attorney Philip Eden aptly illustrates the diminished effec-

261. Eden, *How Inflation Flaunts the Court's Orders,* FAM. ADVOC., Spring, 1979, at 2, 2.

262. *Id.*

263. These calculations are based on the assumption that the rate of change between 1979 and 1980 will hold constant.

264. Eden, *supra* note 261, at 4.

tiveness of an unmodified support order of $500 awarded a decade ago for three children aged one, three, and five:

> The growth of the children in the last decade increased the amount needed to maintain the original living standard to $633. The purchasing power of the original amount has been eroded by inflation down to $275. The proportion of the non-custodial spouse's income used for support of the children has dropped from one-third down to one-sixth.
>
> While the original award represented a certain standard of living for these children, their growth and inflation have combined to reduce the buying power of that same $500. For each dollar now needed to purchase that original standard of living, they have only 43 cents.[265]

Obviously, in an era of double digit inflation, automatic cost of living escalators or other forms of adjustments should be built into support awards.

D. *The Impact of Economic Changes on Children*

One of the most persuasive indictments of the system that produces radically different economic circumstances for men and women after divorce is the detrimental effects that such economic changes have on children in general, and on the father-child relationship in particular. While there is a large and growing literature on the effects of divorce on children that is beyond the scope of this Article, my aim in this section is to suggest how the property and support awards discussed above directly affect the children of divorce.

A recent study by Drs. Judith Wallerstein and Joan Kelly provides impressive qualitative evidence on these effects.[266] Wallerstein and Kelly interviewed parents and children in sixty divorcing families in Marin County, California, at three points in time: six months, eighteen months, and five years after separation. The study examined the effects of divorce on "normal" children in a relatively affluent community in California. While no one would argue that this well-to-do community is typical, the authors' findings are all the more impressive because here one might expect the economic impact of divorce to be minimized.

Wallerstein and Kelly corroborate the central role that financial awards play in the lives of men, women, and children after divorce: "Virtually every parent in our study was preoccupied with the change in family economics created by the divorce. . . . [However,] the women in our study were affected by severe economic changes more substantially and more perma-

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265. *Id.*
266. J. WALLERSTEIN & J. KELLY, note 216 *supra*.

nently than were the men."[267]

Although a very high percentage of the men in the Wallerstein-Kelly sample paid child support on a more or less regular basis, three-quarters of the women experienced a notable decline in their standard of living.[268] For a third of the women, the economic change was abrupt and severe.[269] Few of them had made any preparation for the drastically diminished economic circumstances they were forced to confront.[270]

The sharp decline in the mother's standard of living led to a series of very dramatic changes for their children. First, the decline forced the mothers into hectic and exhausting schedules which diminished the time and emotional energy they had available for their children. The extreme pressure to earn money left these mothers with little time for work, retraining, child care, household chores, and a new social life.[271] Children were carried to babysitters early in the morning and picked up on the way home—before or after the rush to do the shopping, prepare dinner, and clean the house.[272] Several mothers, working full time for the first time in their lives, had to work past midnight regularly to complete numerous household chores.[273] Thus, the children in these one-parent families not only had less of their fathers, they clearly had less of their mothers as well.[274]

Second, these children rarely received compensatory care and

267. J. WALLERSTEIN & J. KELLY, *supra* note 216, at 23.

268. *Id.* at 23.

269. Seven percent of these women moved onto welfare rolls. *Id.*

270. These changes affect women at every economic level and the stress is no less acute for middle-class women. As Wallerstein and Kelly note,

> While our own sympathies and concern quite naturally tended to be directed more to those whose standard of living moved toward or plummeted below the poverty level, the sudden reduction in available monies was as deeply affecting to women of middle-class means. While such women perhaps worried less about feeding their youngsters adequately or having their car repossessed, the stress of adjusting themselves and their children to living on substantially less money was nonetheless real.

Id. at 22.

271. *Id.* at 24-25.

272. *Id.* at 24.

273. *Id.* at 25.

274. As Wallerstein and Kelley describe it:

> Within six months of separation, one-quarter of the mothers interviewed judged themselves to be substantially less available to their children due directly to expanded work schedules and/or new educational demands. One of the ironies of the woman's move toward independence, increased self-esteem, and personal growth was that the children did not always share in the benefits, at least not in the first year. Certainly one of the most pressing dilemmas for the single parent is the difficulty in balancing financial and psychological needs of parent and child in the wake of the separation.

Id.

attention from other family members. Unfortunately, few grandmothers or other extended family members or neighbors were available for assistance.[275] In addition, fathers typically refused to babysit, even if their schedules would have permitted them to do so.[276] Thus, child care responsibilities typically fell on the mother alone.

Third, the diminished income available for the wife and children often led to a residential move, and thus to unfamiliar neighborhoods, friends, and schools for the children. Within the first three years, "almost two-thirds of the youngsters had changed their place of residence, and a substantial number of these had moved three or more times."[277] Many of these moves were directly tied to economic factors—the need for cheaper housing, better jobs, or more adequate child care arrangements.[278]

These residential changes represented more than a change in life-style and standard of living for the children. They typically caused a disruption in the child's education, close friendships, and neighborhood life. Even when teachers or friends were not particularly helpful, the familiar and relatively stable environment of a school frequently became an important source of continuity and stability.

The effects of these disruptions in the child's home environment were heightened because they occurred simultaneously with the child's loss of one parent, and greatly reduced care from the other parent. Since many of the mothers had not been employed

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275. *Id.*

276. *Id.* at 24-25. As Wallerstein and Kelley note,

> Rather than welcoming the potential time with the child as an opportunity to continue or enrich their relationship, they viewed the mother's request as a manipulative exploitation. Some fathers refused, on principle, to be available for the mother's "convenience," even if, for example, she was taking weekly night classes to improve her career or vocational opportunities.

Id. at 25.

277. *Id.* at 183.

278. *Id.* As Professor Mavis Hetherington points out, it is important to note that divorce

> is experienced as a qualitatively different experience for children of varying ages: Younger children, less able to accurately appraise the parents' motives for divorce, are more likely to blame themselves and to have distorted views of the emotions of their parents. Adolescents, while experiencing considerable pain and anger, are more able to assess correctly responsibility for the divorce and to deal with more practical concerns, such as increased responsibilities and worsened economic circumstances. Older children often feel pressured to function in a mature, autonomous manner earlier. Also, it is important to the adjustment of preschoolers that the home remain organized and that authoritative control be maintained, while at the same time there exist nurturance and maturity demands.

Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOLOGIST 851 (1979).

before divorce, their children felt altogether abandoned when their mothers had to adopt new work schedules.[279] As a result, the children's basic sense of stability was significantly affected.

The researchers concluded that the quality of care that is given by the custodial parent declines precipitously for a period immediately following divorce.[280] This is a result of stress on both the mother and the children, and the inability of the mother to spend as much time with the children after divorce as she did before: the cumulative effect simply makes her physically and psychologically less accessible to her children.[281] Probably most children would be able to adjust satisfactorily to any one of these changes, but their rapid and simultaneous occurrence can be overwhelming to almost any child. Thus, the emotional impact of divorce clearly reflects its economic impact.

It is important to note the detrimental effects of these economic changes on the father-child relationship. Wallerstein and Kelly found that children often compared the economic situation in their mother's and father's households:

> [T]he ambiance of the divorced family is that the economic status of mother and children does not stand alone, but is frequently, and sometimes continually, compared with the standard of living which the family had enjoyed earlier, as well as with the present standard of living of the husband, or the husband's new family.[282]

When the wife and children experienced downward mobility, and the father earned very little money, the wife and children were most often compassionate toward the father and protected him. However, when the wife and children experienced downward mobility and the father did not, the discrepancy between the two households was a source of great bitterness. Children in this situation thus experienced a pervasive sense of deprivation and anger.[283]

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279. J. WALLERSTEIN & J. KELLY, *supra* note 216, at 25.

280. *Id.* at 42-43.

281. *Id.* at 42.

282. *Id.* at 231.

283. As Wallerstein and Kelly state:

> [T]he discrepancy between the father's standard of living and that of the mother and children . . . was often central to the life of the family and remained as a festering source of anger and bitter preoccupation. The continuation of this discrepancy over the years generated continuing bitterness between the parents. Mother and children were likely to share in their anger at the father and to experience a pervasive sense of deprivation, sometimes depression, accompanied by a feeling that life was unrewarding and unjust.

Id.

Conclusions and Policy Implications

The data presented in this Article provide a comprehensive and detailed portrait of property and support awards at divorce. This final section summarizes the major research findings and highlights some of their policy implications.

With regard to community property, we have seen that most divorcing couples have relatively few assets: less than half own or are purchasing a home at the time of divorce, and even fewer own a community property business or pension.

In 1977, the median net value of divorcing couple's community assets was only $11,000, which was less than one year's median family income. This comparison suggests that the spouses' earning capacity is typically of greater value than the tangible assets of the marriage. It also suggests that the primary financial issues at divorce, for many divorcing persons, and most particularly for women and children, are those of spousal and child support: an equitable division of family income offers the only possible cushion against the financial hardships that divorce brings for most middle- and lower-class families.

On the whole, community property, as it is presently defined, is being divided equally between the husband and wife since the passage of no-fault divorce laws. This finding reflects a dramatic change from the pattern under the old law, whereby the wife was typically awarded the larger share of the community property. The change is most noticeable in the disposition of the family home: whereas the home was usually awarded to the mother of minor children under the old law, it is more likely to be sold under the new law, with the proceeds divided between the two spouses. Even though the present law permits a delayed disposition to accommodate the continued residence of minor children, delayed disposition is not the norm and is often of relatively short duration when granted.

One of the issues raised in the section on marital property concerns certain intangible assets of the marriage, which are not currently defined as community property in California and most other states, and their effect on the *de facto* equality of property division. Two assertions are made: first, that through their concerted efforts, most couples acquire career assets (such as occupational or professional training, job seniority, and other forms of future earning capacity) in the course of their marriage, and these assets are typically the most valuable community assets at the time of divorce; second, that because many career assets are not currently recognized as community property, a major portion of the couple's assets are exempted from the equal division requirement. Since these assets are typically treated as the husband's separate

property, he is allowed to retain a greater share of the community assets after divorce.

Turning next to the issue of spousal support, we have seen that while minimal support is awarded to half of the women divorcing after marriages of long duration, and to two-thirds of the long-married housewives, younger women generally receive no spousal support, and those who do receive it for only a short period. In California in 1977, only 17% of all divorced women were awarded support, and the median amount awarded was $210 a month for a limited duration of two years. Responses to interviews disclosed that these minimal spousal support awards created severe pressures and hardships for newly divorced women, especially those who have been housewives and those who are currently mothers of minor children, impelling them into low-level jobs to meet short-term necessities at the sacrifice of long-term benefits for themselves, their children, and even their former husbands.

Turning next to the issue of child support, we find a similar pattern of minimal awards: the median child support ordered in California in 1977 was $126 per child. When child support awards are evaluated in terms of the actual costs of raising a child, they are found to be insufficient *ab initio*. When evaluated in terms of each parent's ability to pay, they are found typically to result in a disproportionate burden on the custodial mother even though she has fewer resources and less earning capacity than her former huband. In addition, the value of child support that is awarded is severely diminished in many cases by the father's noncompliance with the court order, and in almost all cases by the eroding purchasing power of the award in an inflationary economy.

The data on noncompliance with spousal and child support awards point to four conclusions. First, most fathers have the ability to comply with support orders while still maintaining a comfortable standard of living. Second, many fathers do not in fact comply. Third, husbands who do not comply are rarely sanctioned, and the burden of enforcing child and spousal support obligations thus typically falls on the intended recipient—who is in a weak position to enforce compliance. Fourth, as Chambers' research indicates, a vast increase in compliance can be achieved by the adoption of a self-starting, state-initiated system which includes wage assignments and both the threat and practice of incarceration for noncompliance.

The final section of this Article dealt with the consequences of support and property awards for the postdivorce standards of living of former husbands, former wives, and their children. Here

the data reveal a dramatic contrast between men and women at every income level and every level of marital duration. Divorced wives and their children experience rapid downward mobility (an average 73% decline in the standard of living for the women in our interview sample), while their husbands actually improve their standard of living after divorce (a rise of 42% in income relative to needs).

These economic changes have drastic psychosocial effects on children. The sharp decline in their mothers' standard of living forces residential moves, with resulting changes of schools, teachers, neighbors, and friends. Mothers pressured to earn money have less time and energy to devote to their children, just when the children need their mothers most. Moreover, when the discrepancy in standard of living between children and father is great, children are likely to feel angry and resentful and to share their mothers' feelings of deprivation and injustice.

These findings make it clear that, for all its aims at fairness, the current *laissez-faire* system of divorce is taking a high economic casualty toll among women and children. The time has come for us to recognize that divorced women and their children need greater economic protection—and to fashion the remedies to accomplish that goal.

The first policy recommendation which follows from the data reviewed above is for an expanded definition of community property to include career assets, such as a professional education, job security, and enhanced earning capacity.[284]

Second, adequate protection for the children of divorced couples calls for a legislative presumption in favor of maintaining the family residence for minor children and their custodian.

Third, economic protection for the children of divorce also requires child support schedules that: (a) reflect the actual costs of raising children, (b) more equitably apportion the costs of raising children between the two parents, and (c) allow a child to maintain the same standard of living as his or her wealthier parent. In addition, the data point to the need for automatic cost-of-living

284. As an alternative to extending the definition of community property to include career assets, Professor Robert Mnookin suggests redistribution of family resources through alimony or lump sum alimony. While this is not the place to debate the advantages of remedies that rely on property vs. alimony, it is important to note that the latter does have tax advantages and it is not dischargeable in bankruptcy. A legislative proposal for lump sum alimony is currently being considered by the California Law Revision Commission. However, any alimony remedy will face a difficult 'normative' climate in a state where both judges and lawyers have come to assume that alimony is based on need not compensation and should be restricted to women who are incapable of self-support. Personal Interview with Robert Mnookin, at Stanford University (May 1981).

escalators that prevent inflation from eroding the court order, and more rigorous self-starting systems of enforcing child support awards. The latter should include, as a minimum, a system of automatic wage assignments that become effective at the inception of the original order, and more forceful sanctions, such as jail, when necessary.

Fourth, adequate economic protection for younger divorced women, especially for those who have been housewives during the marriage and/or those who have subordinated their own careers to their husbands and families, requires the adoption of support rules enabling such women to develop a satisfactory earning capacity. In view of the known benefits of counseling, education, and retraining, more generous and protracted spousal support awards are suggested for younger women. These awards should also contain provisions for cost-of-living adjustments and should begin with several years of balloon payments. The latter could subsidize training or retraining order to maximize the recipient's long-term employment potential.

Fifth, older divorced women, especially those whose earning capacities have been impaired in marriages of long duration, need support rules that equalize the net income available to both spouses after divorce. Old-fashioned norms of redistributive justice and simple fairness seem more appropriate than current norms of postdivorce self-sufficiency for such women. One of the greatest inequities in the current law is the almost punitive treatment of divorced wives after long-duration marriages. They, like widows, deserve some form of survivor benefits.

Finally, both social and economic supports are needed for the custodial parent (or parents), whether male or female. The possible nature and range of such supports are suggested by the following statement from a Norwegian social scientist who was herself recently divorced:

> Everyone [in Norway] knows that divorced parents need more money and more social support because of the additional pressures involved in raising children as a single parent. . . . So, as soon as I got divorced my income went up: both the local and national government increased my mother's allowance, my tax rate dropped drastically as I was now taxed at the lower rate of a single head of household, and my former husband contributed to child support. . . . It also helped to have the possibility of 24-hour day care and a husband who was willing to take some of the responsibility for parenting during the week.[285]

This brief quotation affords a wealth of insights into the advantages of a legal (and social) system that takes seriously its re-

285. Personal Interview, conducted by Lenore J. Weitzman, Oct. 1979, at the Center for Research on Women, Stanford University (on file at the author's office).

sponsibility to provide protection and support for parents and their children after divorce.

The data presented in this Article demonstrate an array of inadequacies and inequities that arise from the current legal system of divorce and point to the need to augment the property and income of divorced women and their children. I have suggested several promising paths to achieve greater equity in the postdivorce lives of men and women, while assuming that the policy debates and fine tuning will be conducted in another arena. But whatever routes are adopted, it is time for the policy debate to begin, for the legal system must find a better way to minimize the economic casualties that result from the present system of divorce.

PART 5

POLICY ISSUES AND SUMMARY OF GROUP DISCUSSIONS

A series of fundamental policy issues, based on the findings of the Institute's study of matrimonial support failures, was developed for use as an agenda for the Conference group discussions, and these policy issues were distributed to the participants when the Conference began.

The policy issues were divided into the following three broad categories:

A. Basic Duties and Obligations.

B. Maintenance Awards and Enforcement.

C. Changes and Alternate Models

There was a further division of the policy issues into six numerical subcategories, and the specific policy questions were numbered sequentially within each of the six subcategories, for example, questions 2.1 and 2.2.

The policy issues, and the summary of group discussions which is presented in the same organizational format used for the policy issues, is included in this Part 5, as follows:

POLICY ISSUES

A. BASIC DUTIES AND OBLIGATIONS

1. SPOUSES

1.1 Should a spouse have to support an ex-spouse even after marriage breakdown?

1.2 If yes, when should this liability terminate?

1.3 As between the first family and a second family, whose entitlement should take precedence?

2. CHILDREN

2.1 Should the entitlement of spouse and children be dealt with separately?

2.2 Is the issue of award/collection/enforcement severable from the issue of custody/access?

2.3 Should the child be empowered to institute proceedings in his or her own right?

2.4 Should the child have independent legal representation in parental disputes that impact on child support, including negotiated settlements, divorce proceedings and custody disputes?

2.5 Should statutory obligations to provide child support extend beyond the attainment of the child's majority and, if so, under what circumstances?

2.6 Should a child be entitled to claim support from the biological parent as well as any person standing "in loco-parentis"? If so, how are these "parental" obligations to be assessed?

3. STATE

3.1 What should be the responsibility of the state?

B. MAINTENANCE AWARDS AND ENFORCEMENT

4. MAKING OF AWARDS

4.1 Is the present system satisfactory?

4.2 On what basis are awards made?

4.3 Should the procedure for gathering and presenting financial information on the parties to the court be improved?

5. COLLECTION/ENFORCEMENT

5.1 Who should be responsible for collection/enforcement? Spouse? Custodial parent? Courts? Department of Social Services?

5.2 What machinery is necessary to enable the responsible party to collect/enforce the award?

C. CHANGES AND ALTERNATE MODELS

6. CHANGES

6.1 What changes should be made in the existing system?

6.2 Should there be a formula for child suppport, in terms of a percentage of father's/mother's income deductible from source or income tax?

6.3 Should there be a general fund from where spouse and children can draw money if they have a maintenance

order and the province collect from liable spouse/father? (like in Israel!)

6.4 Should there be a matrimonial support insurance plan?

6.5 Should maintenance be taken out of the court system and into arbitration or mediation?

SUMMARY OF GROUP DISCUSSIONS

A. BASIC DUTIES AND OBLIGATIONS

1. SPOUSES

1.1 Should a spouse have to support an ex-spouse even after marriage breakdown?

1.2 If yes, when should this liability terminate?

1.3 As between the first family and a second family, whose entitlement should take precedence?

Many groups spent considerable time establishing criteria and assumptions on which more specific policy issues could be decided. It proved impossible to consider the obligations of ex-partners without raising questions about the nature of marriage, the kinds of investments individuals made in marriage, and the unspoken "contracts" made between partners during their marriage. If, for example, marriage is conceived, at least at the time of breakdown, as an economic partnership, it is possible, though difficult, to quantify investments and to assign a value to the (usually) male partners continuing support of his ex-partner. If the non-financial investments are taken into consideration, then "fault" and other reasons for marriage breakdown may be taken into account in determining levels and duration of financial support.

Amongst the groups there was general recognition that changes in the economic and social position of women were altering people's expectations of investments in marriage. Women today are frequently more independent before marriage than they were in earlier generations, and one of the objects of support may be to help a partner to regain her independence and to "reinstate" her to some extent to the position she would have had in economic and career terms before she married. In most cases women may lose more than men through marriage, but this is also related to other economic factors, such as the position of women in the labour market.

For younger and childless wives, support may be inappropriate, but mothers who will have primary childcare as their main responsibility will need a transition period of financial support to help them to adjust and prepare for their changed status and circumstances. If we apply this principle, it

may provide a way of structuring an end of responsibility regarding first marriages. Older women who have devoted the greater part of their adult lives to caring for husbands and children may be entitled to continuing support. Groups differed in their judgements about whether an ex-partner should continue to be responsible for an ex-partner who had become seriously ill or handicapped during the marriage. Although it would be difficult, some groups felt there should be recognition of the variety of contracts individual couples may have made when they married.

The groups believed that remarriage or cohabitation of the supported partner altered the situation. There was also recognition that if the state created a legal framework which allowed divorce, it had an obligation to insulate the vulnerable parties, usually, but not always, women and children, from the most extreme consequences of divorce.

The question concerning the relative claims of the first and second families caused controvery. In their discussions, some groups distinguished between obligations to an ex-partner and obligations to children (one cannot really talk about ex-children). If we believe that divorce ends a marriage (as opposed to parenthood) and leaves one free for another marriage, it is difficult to argue that the ex-partner's needs should come first. Thus, if only on the pragmatic grounds of giving the second marriage some chance of succeeding, and because divorced people who remarried would naturally put their new partnership first, many argued that the second family must take precedence. It is, incidentally, easier for an ex-partner to free himself economically and emotionally for a new partnership if, in strictly financial terms, his obligations to his ex-partner are clear and limited in time. This would be so if he has to support his ex-wife only through a transitionary period.

2. CHILDREN

2.1 Should the entitlement of spouse and children be dealt with separately?

Many discussions focussed on the differences between "theory" and "practice" with respect to this question. While one might wish to see the obligations of marriage and parenthood as distinct, setting support levels involves pragmatic considerations. What do she and her children need to live on? How much can he afford? The remarriage of the supported ex-partner made the distinction important, as a father should then only be liable for child support.

2.2 Is the issue of award/collection/enforcement severable from the issue of custody/access?

Many non-custodial fathers connect the payment of support and the exercise of access rights, even if they are dealt with separately. Perhaps logically access rights should be enforced with the same vigour as maintenance. In this area greater use could be made of informed conciliation.

2.3 Should the child be empowered to institute proceedings in his or her own right?

Many groups mentioned that it is already possible for a child to institute proceedings in his/her own right, and this raises questions about the degree of maturity/independence we ascribe to "children" up to the age of majority. While some felt that this procedure should only be open to "older" children, others felt that it might enable third parties, including the state, to intervene and protect the separate and distinct interests of children caught in the cross-fire of continuing marital conflicts.

2.4 Should the child have independent legal representation in parental disputes that impact on child support, including negotiated settlements, divorce proceedings and custody disputes?

The recognition that this procedure exists led most groups to conclude that there were circumstances in which children would benefit from independent representation in divorce/custody proceedings. Such representation was not always necessary; some thought it should be left to the court's discretion. Some felt that legal representation was not always necessary as long as there was a qualified, impartial spokesman for the children. It is difficult to advise judges as to which children would benefit, especially if partners had made a or agreement. This may mask an unsatisfactory situation for the children.

.f children are young it would not necessarily be the job of the representative to "find out" what they wanted, but rather impartially to protect their interests. Some felt that if children were old enough, it should be possible for them to have access to an advisor to discuss their own needs and feelings.

2.5 Should statutory obligations to provide child support extend beyond the attainment of the child's majority and, if so, under what circumstances?

This question also raised the issue of the degree of autonomy and responsibility which our society attributes to 16 to 18 year olds. Participants were sharply divided on this issue. Should 16 year olds be treated in the same way as their peers from intact families, even though the Divorce Act imposed a duty on the non-custodial parent to support children beyond the age of majority? Children receiving higher education and handicapped children were felt to be different cases and distinguishable from 16 year olds who had left school to earn a living.

2.6 Should a child be entitled to claim support from the biological parent as well as any person standing "in loco-parentis"? If so, how are these "parental" obligations to be assessed?

Some groups found this question very difficult. Frequently a biological parent, as well as a "loco-parentis" parent, without custody, will nevertheless continue to provide both parental contact and financial support for children. Some participants

felt that the primary responsibility for support remained with the natural parents, and that obligation should take precedence over any "loco-parentis" obligation. Legal policy and practice on this issue remains confused.

3. STATE

3.1 What should be the responsibility of the state?

The responsibility of the state is relevant to many of the policy issues discussed. Groups frequently referred to the responsibility borne by the state in related areas, such as support for the handicapped, and, more basically, support through welfare guarantees of basic living standards for women with dependent children.

The divisive effect of a distinction between the private arrangements made by the more affluent, and reliance on public structures by the less affluent, was an important theme in many discussions. It was felt that the state should guarantee minimum living standards, provide a buffer between aggrieved parties, and protect the interests of the weak.

B. MAINTENANCE AWARDS AND ENFORCEMENT

4. MAKING OF AWARDS

4.1 Is the present system satisfactory?

There seemed to be unanimous agreement that there was considerable scope for improvement in the operation of the present system.

4.2 Is the present system satisfactory?

4.3 Should the procedure for gathering and presenting financial information on the parties to the court be improved?

Considerable scepticism was expressed as to whether support awards by judges conformed to any consistent pattern. Some groups wanted legislation to specify in greater detail the appropriate criteria for awards, while others (a clear majority) would be satified if the courts had access to budget counsellors and if there were mandatory filing of budget statements in a prescribed form. The desirability of judges involving themselves in self-assessment through judicial seminars was also commented on. It was also thought that it would be helpful if the judges had access to financial experts who could explain the income tax aspects of proposed orders.

Some groups expressed the view that orders were inadequate and badly enforced; others recognized that the liable spouse's resources often left the judges with little freedom of action.

There was considerable agreement that privately negotiated settlements were more likely to be complied with, and there was wide support for the Manitoba and British Columbia pilot projects on financial records.

5. COLLECTION/ENFORCEMENT

5.1 Who should be responsible for collection/enforcement? Spouse? Custodial parent? Courts? Department of Social Services?

5.2 What machinery is necessary to enable the responsible party to collect/enforce the award?

The Reciprocal Enforcement of Maintenance Orders Act provides a slow and cumbersome procedure, with cases sometimes taking years to enforce. Against this background, the proposed withdrawal of the Federal Government from jurisdiction over marriage and divorce is disturbing in contrast with Australia where the advent of the Federal Divorce Act of 1966 was recognized as a great step forward. This is not to suggest that some adjustment of constitutional power is not necessary in order to assure the powers of Provincial Family Court Judges to make custody orders and to vary divorce court orders, notwithstanding s. 11(2) of the Divorce Act. However, unless divorce orders and, more importantly, orders for corollary relief, such as custody and maintenance, are recognized throughout Canada, additional problems may ensue. The present Reciprocal Enforcement of Maintenance Orders Act, and custody orders legislation, are in need of overhaul if they are to provide a satisfactory alternative to the present Divorce Act.

Associated with the above is the need for more effective tracing procedures where the liable spouse/parent has to be traced to another province. Despite problems of privacy and confidentiality, a parent locater service has been created in the United States for all persons who need support, not merely those in receipt of public support. Perhaps surprisingly, the public has apparently accepted this, and has treated the father's right to privacy as secondary to the child's rights to support. Since the Federal Government has the most effective data-base (for example, in taxation and U.I.C. records), its cooperation would be essential. Some groups were also attracted to the Quebec procedures for requiring friends and relatives of a defaulting spouse to disclose his address.

There was considerable support for automatic enforcement, and paying of awards by the State, subject to initiation by the recipient spouse. Reservations were expressed about the efficiency of the Alberta and Ontario subrogation systems. There was also support for automatic enforcement, independent of the recipient spouse, using computer records, automatic reminders etc., either when the liable spouse had defaulted on one payment (including payments under voluntary agreements) or when he earned less than $20,000 per annum. There was less agreement as to whether this enforcement procedure should be under the courts

(there was a desire to preserve the court's neutrality) or administered by an independent agency. Hopefully, the agency would have a computer link to other provinces with similar systems. It was thought inappropriate for the Department of Social Services to act as a collection agency.

There was uniform support for garnishment and attachment as the preferred way of enforcing orders, and a plea was expressed for greater use of existing statutory powers.

Jail was recognized as a weapon of last resort; when necessary, the threat of suspended sentence or the use of short weekend sentences was preferred. Worry was expressed about jailing the poorest sections of the community: those who were social misfits or who could not afford to pay.

Some questions were raised as to the seriousness with which those charged with the enforcement of the law treated defaulting spouses or parents. The view was expressed that issuance of summonses should have higher priority.

Finally, it was suggested that mediation and conciliation, rather than court proceedings, were the preferred initial approach to the problem. This might allow easier resolution of the difficulties created by the interaction of maintenance and access problems (consider the work of Wallerstein and others) and would reserve the courts for the cases of liable spouses who were really determined not to pay and with whom other approaches proved to be ineffective.

C. CHANGES AND ALTERNATE MODELS

6. CHANGES

6.1 What changes should be made in the existing system?

(1) Support services such as day care should be improved to enable the parent caring for the child to work.

(2) Emphasis should be placed on improving services which assist women in reentering or entering the work force.

(3) The state should assume the responsibility of enforcing maintenance orders.

(4) The state should provide services geared at preventing marriage breakdown, including:

(a) education on family life in the schools, for example, a course in life style where people learn how to live;

(b) family life information and information as to services available for families through the welfare system;

(c) when marriage breakdown is first indicated to a public agency, an explanation of conciliation services available to the couple and encouragement to make use of them;

(d) a Family Institute where families can obtain information and services to assist them.

(5) Public policies related to families should be consistent.

(6) All the debtor-creditor remedies should be available for purposes of enforcement of maintenance.

(7) Conciliation services should be available to all, but should not be mandatory.

(8) There should be a family advocacy program similar to the program in British Columbia.

(9) There should be uniform legislation making the filing of financial information related to income mandatory.

(10) The state should provide a service for tracing the parent who cannot be located.

(11) The Judges should consider the indexing of maintenance orders.

(12) There should be legislation providing for a review of maintenance orders by a court referee every three years.

(13) Attachment of wages or continuous garnishment should be used more regularly.

(14) The following scheme was prepared by one of the groups:

When marriage breakdown occurs, if the supporting spouse's income is under $20,000 (this is an arbitrary figure), there should be an automatic deduction of 10 to 15% from that spouse's income for a three year period. The dependent spouse and children should then receive an allowance which would be above the social welfare allowance and related to the supporting spouse's income level. The benefits of the proposal are:

(a) it would provide certainty for the wage-earning spouse as he/she would know what the monthly payment would be;

(b) it would mean that judicial discretion would not be involved in making maintenance awards;

(c) an interest-earning fund would be established.

(15) Another group proposed the following scheme:

If separation occurs, the family allowance should be increased to $200 per child per month. Two-thirds of the money being paid to the custodial parent should be added to the non-custodial parent's income. If the custodial parent goes out to work, one-third of the $200 should be added to the custodial parent's income. The benefits of this proposal are:

(a) it would give the custodial spouse an immediate income;

(b) it would provide an incentive to work.

6.2 Should there be a formula for child support, in terms of a percentage of father's/mother's income deductible from source or income tax?

A majority of the groups rejected the use of a formula for child support. One group expressed interest in a formula being used in the United States. Ideas from the groups on the issue include:

(a) maintenance should be collected through the income tax;

(b) the state has a responsibility for setting guidelines as to how to establish maintenance awards but it is difficult to put these guidelines into a formula.

6.3 Should there be a general fund from where spouse and children can draw money if they have a maintenance order and the province collect from liable spouse/father? (like in Israel!)

The responses to this question were varied; only one group responded with a definite "no". Another group supported the idea, but felt that it was not viable.

One group supported the idea of a fund to be administrated through social services or a department of justice, but recommended that the fund not be called "welfare."

A guaranteed income separate from Social Assistance which has limits imposed on it depending on family size, similar to the scheme in Sweden, was also suggested.

6.4 Should there be a matrimonial support insurance plan?

The groups did not support the matrimonial support insurance plan. Although there was some interest expressed, it was felt the plan was not practical.

6.5 Should maintenance be taken out of the court system and into arbitration or mediation?

The responses to this issue varied. Generally, the groups seemed to believe that mediation should be used first, and that the matter should go before the court for a rubber-stamping of a mediation agreement or if mediation had not succeeded.

Arbitration was supported by one group; other groups did not address the matter or felt the court system preferable to arbitration.

PART 6

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