

Rethinking Child Support

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INTRODUCTION

Most court-ordered child support awards are in arrears — many fully or substantially. This situation exists even though the amounts ordered have historically been unrealistically low. Indeed, statistics consistently report that the standard of living of the noncustodial payor (usually the father) increases following dissolution while that of the custodial parent (usually the mother) decreases. Thus, commentators frequently draw a relationship between low and defaulted child support and the so-called “feminization of poverty.”¹

In the last decade substantial efforts focused on the enforcement of child support awards. The traditional threats of incarceration for civil contempt or of criminal prosecution were rarely used because of their logical inconsistency with the acquisition of income. Instead, creative mechanisms have been developed to locate defaulters, discover tax re-

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¹ This feminization of poverty is common knowledge today and frequently the subject of newspaper, magazine, and TV coverage. For example, on August 21, 1987, the Sacramento Bee reported:

Only a quarter of the mothers of children whose fathers aren't living at home are getting full child-support payments, the Census Bureau reported Thursday.

Of 8.8 million U.S. women with children under 21 whose fathers were absent, only 2.1 million received full payments from the fathers, the bureau said. . . .

Payments for those women receiving child support averaged \$2,220 annually — down from \$2,530 in 1983 after adjustments for inflation.

The report is certain to reinforce the growing consensus among policy-makers that non-support by absent fathers is an important cause of poverty, requiring strong new laws. . . .

Sacramento Bee, Aug. 21, 1987, at A18, col. 1. For more scholarly documentation and discussion, see *Child Support — the National Disgrace*, in L. WEITZMAN, *THE DIVORCE REVOLUTION* 263, 263-322 (1985); see also *infra* notes 64-78 and accompanying text.

turns, intercept tax refunds and other payments, garnish and redirect wages, and attach property.² More recently efforts have been directed at increasing the court awards which these mechanisms can be used to enforce.³

Despite these reforms, default remains high.⁴ Arguably, perhaps not enough time has elapsed to evaluate the full impact of these reforms. On the other hand, perhaps situational factors other than simple self-interest and callousness motivate many payors to default. If so, the fear or even the actual enforcement of these sanctions may largely be irrelevant to these payors. In other words, as frequently depicted, are all these noncustodial fathers who could pay but do not simply greedy insensitive cads who, if they can get away with it, care more about having a new car than about buying new shoes for their kids? Or, are there reasons for nonpayment other than — or in addition to — inability or greed, which are better addressed by reconsidering features of the family court process other than enforcement mechanisms?

The possible answers to this very important question confront child support and family law with a double-edged sword. The most obvious edge, the fine-honed one, could result in changes producing greater initial and continuing compliance with court orders within the traditional context of state-mandated parental child support.⁵ The other, and less obvious, edge of this question(able) sword would cut a much broader swath by severely limiting the duration of state involvement in noncustodial parent/child relationships. This solution would drastically alter the legally-mandated child support obligation by emphasizing arguably more important personal, social, and economic goals.

The most important overall purpose of this Article is to alter the current rote acceptance of the traditional approach to child support and its enforcement. This Article will provide support for the suggestion already made that specific reasons other than greed motivate those who can pay but choose not to do so. Specifically, this Article asks whether

² See, e.g., The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified as amended at 42 U.S.C. §§ 651-667 (Supp. IV 1986)).

³ See, e.g., The Agnos Child Support Standards Act of 1984, 1984 Cal. Stat. 5664 (1984) (codified at CAL. CIV. CODE §§ 4720-4732 (West Supp. 1988)).

⁴ See *supra* note 1.

⁵ California legislation has extended child support to age 19 if an unmarried child is still attending high school full-time and resides with a parent. CAL. CIV. CODE § 196.5 (West 1985). Bills which would require child support well beyond the age of majority if the young adult were to attend college or vocational school have received substantial support in recent years. See, e.g., S.B. 1129, 1986 Cal. Legis.

the family court process itself contributes to the failure to pay. For example, could unilateral divorce be a cause, *i.e.*, when one spouse gets a divorce over the other spouse's objection and the objecting spouse must nonetheless pay child support? Could the inability to have one's "day in court" before a public official in an august setting to ventilate both grievances and efforts prior to dissolution be a causative factor in subsequent nonpayment of child support, particularly by one who perceives oneself as the most injured party? On a different front, are sole custody and weekend visitation orders counterproductive to child support payment by noncustodial fathers? Confronting the issue more directly, is it possible that the "presumption" of future nonpayment prior to any default, implicit in many of the new enforcement measures, antagonizes some would-be payors into default?

A literature survey, summarized in the following section, provides some insight into the reasons for default. However, few articles directly focus much attention on this issue. Accordingly, the next section of this Article chronicles our very modest attempt to gather such data through family court records, phone interviews with payors, mail questionnaires from defaulters, and phone interviews with domestic relations attorneys.

Because of the extremely small study sample, nothing conclusive can be derived from our study. However, certainly both the literature and our empirical data taken together add support to the central proposition of this Article, namely that the reasons for nonpayment are often complex and may be ameliorated by changes in the family court process rather than changes to child support and its enforcement. For example, the relationship between joint physical custody or a marital agreement and the payment of child support clearly warrant further study. Hopefully this small effort will motivate others to follow.

Finally, this Article raises again the very important question eloquently advocated several years ago by Professor David Chambers.⁶ Despite the innocence and needs of the child, the developmental importance of two-parent contact with the child, our compulsive concern for the child's best interest (whatever that is), the feminization of poverty, and the obligation of responsible parenting — should the state try to force up to eighteen or more years of economic (and therefore psychological if not physical) contact and interdependence upon separate living units through the mechanisms of child support orders and state enforcement?

⁶ See Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982).

I. LITERATURE REVIEW OF REASONS FOR NONPAYMENT OF CHILD SUPPORT ORDERS

Research on factors affecting the payment of child support can be divided into six categories. It is important to note that these categories are not discrete. Several categories may intersect and work together to affect child support payment. The categories are:

- (1) The payor's financial resources and his ability to pay.
- (2) Enforcement of the child support obligation.
- (3) Socio-economic factors.
- (4) Psychological and emotional factors.
- (5) Access arrangements (custody and visitation).
- (6) Marital agreements.

A. *Payor's Financial Resources and His Ability to Pay*

Research has been conducted to determine whether the financial resources of the payor affect his ability to pay child support. Lenore Weitzman addressed this question in her ten-year study of the economics of divorce in Northern and Southern California families.⁷ Weitzman used two standards to determine whether payors had the ability to pay. First, she examined the child support order as a percentage of the payor's income. She found that courts rarely award more than 25% of a payor's income as child support. However, men with low incomes (under \$10,000) averaged 37% of their income as child support.⁸

Second, Weitzman examined the impact of the child support order on the payor's standard of living. Using the U.S. Department of Labor Standards for Basic Budgets, she found that three-fourths of the California fathers she studied had the ability to pay the amount ordered by the court without a substantial reduction in their standard of living.⁹ She also found that men in her study with high incomes were just as likely not to pay child support as the low income men in her study.¹⁰ Therefore, Weitzman rejected financial difficulties as the primary reason for failure to pay child support.

Likewise, David Chambers' study provides little support for the proposition that financial difficulties cause nonpayment. Chambers' re-

⁷ See L. WEITZMAN, *supra* note 1. For some important criticism of this oft-cited work, see McIsaac, *The Divorce Revolution: A Critique*, 10 CAL. FAM. L. REP. 3069 (1986). Mr. McIsaac is the Director, Family Court Services, Los Angeles County Super. Court.

⁸ L. WEITZMAN, *supra* note 1, at 273.

⁹ *Id.* at 274.

¹⁰ *Id.* at 296.

search drew on files for divorce cases in twenty-eight Michigan counties.¹¹ In general, his findings did not show financial resources as a predictor of nonpayment. In one county, men earning the lowest wages under high support orders did not pay at lower rates than the average for the entire sample. However, this group was also in a militant enforcement county.¹²

Canadian researchers conducted a comprehensive study involving court records, door-to-door surveys, interviews of men and women involved in maintenance orders, and a study of defaulters.¹³ The study found that financial difficulties could be associated with irregular payment, but not nonpayment.¹⁴ Men who owned their own homes appeared to be better payors than those who did not own homes.¹⁵ The study found that these payors' inability to pay their support orders was the second most common reason given for not paying child support. But when these payors' disposable income was measured against the amount of support ordered, a lack of disposable income was related to irregular payment, but not nonpayment. The study concluded that the payor's ability to pay actually reflects the priority the payor gives to the maintenance payments relative to their other obligations.¹⁶

Two other Canadian studies looked at the financial resources of the payor. Finnbogason and Townson reported that economic resources have little value in accounting for default rates. Instead, the researchers believe that psychological or interpersonal factors may be more important.¹⁷

The third Canadian study was conducted by Karen Bridge for the Commission on the Status of Women. The study found that default rates cannot be explained by unreasonable support levels. Instead, the research found that debtors neglected their family obligations in favor of their business obligations.¹⁸

Finally, there has been little research on the effect of the payees financial resources on payment performance. A payee with better finan-

¹¹ See D. CHAMBERS, *MAKING FATHERS PAY* (1979).

¹² *Id.* at 161.

¹³ See 1 CANADIAN INST. FOR RESEARCH, *MATRIMONIAL SUPPORT FAILURES* (1981).

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 22.

¹⁶ *Id.*

¹⁷ E. FINNBOGASON & M. TOWNSON, *THE BENEFITS AND COST-EFFECTIVENESS OF CENTRAL REGISTRY* 27 (1985).

¹⁸ K. BRIDGE, *AN INTERNATIONAL SURVEY OF PRIVATE AND PUBLIC LAW MAINTENANCE OF SINGLE-PARENT FAMILIES* 4 (1985).

cial resources may be able to use her attorney more often to enforce the support obligation. Higher income payees may use different tactics in persuading the payor to make his payments. They may be more assertive or more conciliatory. Our own study found that a payee's income level may affect payment. Low income payees were more likely not to receive their child support payments than were high income payees.

In summary, research does not support financial inability as the primary reason for nonpayment of child support. Most payors receive support orders that should allow them to meet their support obligations. However, this conclusion should not rule out the fact that some men run into financial difficulties. The research cited above bases its conclusions on an idealized view of human behavior. Most payors receive manageable support orders. However, not all payors have good money management skills. Financial mismanagement and financial difficulties were cited as reasons for nonpayment in our attorney survey.

Our study also suggests that a difference in income levels among payors may affect payment. Payors with lower incomes were more likely to be in default. As in Weitzman's study, our low income payors paid a higher percentage of their income as child support than did higher income payors. Thus, low income payors are left with a smaller pool of disposable income. In these circumstances, good money management will be even more essential.

But a payor giving other financial obligations a higher priority than his support obligations may indicate something other than simple ineptitude or irresponsibility with money. The payor's motivation comes into question. A lack of attachment for the child, anger at the ex-spouse, and other psychological factors may combine with socioeconomic factors to affect child support payments. Thus, unless the whole concept of child support is rethought with this reality in mind, collection mechanisms are essential.

B. Enforcement of the Child Support Obligation

Chambers' study examined payment patterns in twenty-eight Michigan counties. The research showed a disparity in payment rates among the counties. At the lowest range, only 45% of men from two counties paid their support obligation. In two other counties, 85% of payors paid their ordered amount. The average rate of payment among the counties was 70% of amounts due.¹⁹

Chambers noted that reasons for high payment rates could never ab-

¹⁹ D. CHAMBERS, *supra* note 11, at 82-83.

solutely be explained. However, his research indicates that strong enforcement may be the key to child support payment. Three factors were present in Michigan counties with successful enforcement schemes.

First, counties with the best levels of payment involved payments made directly to the court, backed up with a serious threat of jail in cases of nonpayment.²⁰

Second, counties jailing men for nonpayment were successful in their collections only if they utilized a "self-starting" system. This system aggressively tracks each payors' record. Payors missing a few payments or in arrears for a small sum were sent warning notices. Action is taken without a complaint from the payee and involves nonwelfare cases.²¹

Third, Chambers found that the larger the county, the lower the amount of the collections. This third factor was not as strong a predictor of nonpayment as the threat of jail or use of the "self-starting" system.²²

Weitzman's study faults the legal system for inadequate enforcement. She believes that without adequate enforcement fathers have little incentive to meet their support obligations.²³ Her research found that the courts were reluctant to impose strict measures, such as wage assignment, out of concern for the payor.²⁴

In contrast, the Alberta study reported less enthusiastic results about the level of enforcement as a predictor of payment. One city, Edmonton, had the greatest level of enforcement, yet a majority of all cases were still in arrears.²⁵ Moreover, when men were interviewed to determine their attitudes to stricter enforcement measures, a majority reported that they would not pay. Therefore, the researchers concluded that tighter enforcement would mean more resistance.²⁶ Of course this conclusion presumes that the payors would actually carry through with their threats to resist. Chambers' work, however, indicates that the right type of enforcement can be effective and may result in less resistance.

Another factor in enforcement is the action of the payee. A payee may conduct her own brand of private enforcement, either personally or through her attorney. Our investigation noted differences among the

²⁰ *Id.* at 90.

²¹ *Id.*

²² *Id.* at 91.

²³ L. WEITZMAN, *supra* note 1, at 294.

²⁴ *Id.* at 302-03.

²⁵ 1 CANADIAN INST. FOR RESEARCH, *supra* note 13, at 17.

²⁶ *Id.* at 18.

payees interviewed on this subject. Several payees said they would simply not tolerate late payments by their ex-spouse. These payees are women who are aware of their legal rights and would not hesitate to ask the District Attorney to enforce the support order. They are also women who communicate their feelings on this issue to the payor. Other payees showed more passivity on this issue. They felt that they were lucky to get any payment at all from the payor. Therefore, they were reluctant to press for more or better payment performance.

C. Socioeconomic Factors

Researchers have examined a variety of socioeconomic factors and their relationship to payment performance. While agreement exists about some factors, there is conflict regarding other factors.

1. Remarriage and New Children in a Remarriage

Wallerstein and Huntington,²⁷ and Chambers²⁸ found that remarriage of the payor or payee did not affect payment performance. In contrast, the Alberta study found that remarriage by the husband or his involvement in a common-law relationship produced better payment.²⁹

But when the presence of children in the new marriage was examined, both Wallerstein³⁰ and Pearson and Thoennes³¹ found that it reduced payment to the payee. This reduction in payment may reflect several factors. First, it may indicate financial difficulties for the payor. Chambers found that fathers with new children in a remarriage generally end up with a lower standard of living than their remarried ex-spouse. These fathers must provide support for two families, a situation that may prove difficult for some men.³² Second, the remarriage may exacerbate any alienation the payor may be experiencing with his children from the former marriage. The presence of new children may increase the payor's isolation from his former family and result in poorer payment performance.

²⁷ Wallerstein & Huntington, *Bread and Roses: Nonfinancial Issues Related to Fathers' Economic Support of Their Children Following Divorce*, in *THE PARENTAL CHILD SUPPORT OBLIGATION: RESEARCH, PRACTICE, AND SOCIAL POLICY* 141 (J. Cassetty ed. 1983) [hereafter *THE PARENTAL CHILD SUPPORT OBLIGATION*].

²⁸ D. CHAMBERS, *supra* note 11, at 162.

²⁹ 1 CANADIAN INST. FOR RESEARCH, *supra* note 13, at 19.

³⁰ Wallerstein & Huntington, *supra* note 27, at 142.

³¹ Pearson & Thoennes, *Child Custody, Child Support Arrangements, and Child Support Payment Patterns*, 36 JUV. & FAM. CT. J. 3, 54 (1985).

³² D. CHAMBERS, *supra* note 11, at 63-64.

2. Occupation of the Payor

Some researchers have examined the payment performance of men in white-collar and blue-collar jobs. Pearson and Thoennes³³ reported that occupation may affect payment. However, Reece found that occupation was not particularly important compared to the stability of employment of the payor. Her sample covered a wide socioeconomic range and found that occupation was not a predictive factor in nonpayment.³⁴

One of the most comprehensive examinations of this factor was conducted by Chambers. His study found that the father's occupation was a significant factor in payment performance. White-collar and skilled blue-collar workers and men who remained with the same employer paid the best.³⁵ However, Chambers found that steadiness of employment was more important than occupation in predicting payment.³⁶

Occupation may reflect a variety of sub-factors in the payor's life. Jobs paying lower wages may produce more financial difficulties for the payor, particularly if he has another family to support. Job instability may indicate a payor who suffers from psychological problems or illness. Wallerstein noted that fathers with depressive disorders or problems with alcohol abuse experienced habitual unemployment. These fathers produced very low levels of payment.³⁷

3. Length of Marriage

Both Chambers³⁸ and the Alberta study³⁹ found that the duration of the marriage affected payment. Both studies reported that the longer the marriage, the better the payment. However, some of the following data seems to contradict this conclusion when other variables are added.

4. Father's Age at Divorce

Chambers' study found that men over the age of forty at the time of the divorce produced poorer payment patterns than did men under forty.⁴⁰

³³ Pearson & Thoennes, *supra* note 31, at 54.

³⁴ Reece, *Joint Custody: A Cautious View*, 16 U.C. DAVIS L. REV. 775, 778 (1983).

³⁵ D. CHAMBERS, *supra* note 11, at 161.

³⁶ *Id.* at 112 table 7.1.

³⁷ Wallerstein & Huntington, *supra* note 27, at 143.

³⁸ D. CHAMBERS, *supra* note 11, at 112.

³⁹ 1 CANADIAN INST. FOR RESEARCH, *supra* note 13, at 19.

⁴⁰ D. CHAMBERS, *supra* note 11, at 112.

5. Number and Age of Children

Chambers' research showed that men with four or more children paid very poorly.⁴¹ The Alberta study found that there were better payments if the child was less than seven years of age at the time of the divorce.⁴²

6. Mother's Age at the Birth of the First Child

Chambers reported that payors married to women who were over thirty at the birth of the first child paid better than men whose wives were age twenty-three to thirty. The worst payment pattern was by men whose wives were eighteen years or younger at the birth of the first child.⁴³

Applying the research on socioeconomic factors to our study is difficult. The court files on which we drew much of our information did not provide sufficient information on the socioeconomic factors that have been studied. Of all the factors cited above, occupation and the presence of children in a remarriage seem the most promising factors for our research. More information on these two factors may explain the differences we observed between low income and high income payors.

D. Psychological and Emotional Factors

Reece conducted research on families undergoing counseling because of problems with custody, visitation, and nonpayment of child support. The people in her sample had a history of problems with contractual relationships (marriage, employment, and attorneys) and with management of money. She concluded that given their personality, these payors' problems in paying child support and in maintaining good relationships with their ex-spouse were predictable.⁴⁴

Finnbogason reported that the defaulting payor's personality accounts for the failure to pay. These payors were characterized as poorly socialized, hostile, unable to cope with problems, and angry at their ex-spouse.⁴⁵

Chambers noted that the payor's attitude about the award may be one of the most important factors in payment. In Michigan, both hus-

⁴¹ *Id.*

⁴² 1 CANADIAN INST. FOR RESEARCH, *supra* note 13, at 19.

⁴³ D. CHAMBERS, *supra* note 11, at 112.

⁴⁴ Reece, *supra* note 34, at 779.

⁴⁵ E. FINNBOGASON & M. TOWNSON, *supra* note 17, at 27.

band and wife are asked to attend a Friends of the Court meeting before the divorce process begins. Men not attending the meeting paid fewer of their support orders than men who attended the sessions. This was one of the strongest factors in nonpayment that Chambers analyzed. He suggests that it may indicate the payor's lack of attachment to his children or anger at the wife. It may also affect the payor's attitude about the award in general. Fathers not attending the meeting missed an opportunity to understand how and why the child support order is fashioned by the court.⁴⁶

The Alberta study listed a variety of reasons for the payor's default: punishment of the ex-spouse, bitterness over the marital dissolution, and a lack of understanding and acceptance about the court's method in ordering a child support award.⁴⁷

Wallerstein found a high correlation between the "psychological intactness" of the father and good payment performance. These payors had better psychological profiles, were more adjusted to the divorce, and demonstrated positive relationships with their children. The study found a completely opposite profile for those not paying support.⁴⁸ Interestingly, the study found that a father's payment pattern was not associated with the relationship between payor and payee. Payors were just as likely or unlikely to produce payment if they were on good or bad terms with their ex-spouse.⁴⁹

However, Pearson and Thoennes noted that interpersonal factors, such as the payor's relationship to the ex-spouse, were relevant factors in payment performance. But the research did not delineate exactly how payment might be affected.⁵⁰

Although there is conflict among researchers over specific causes and effects within this category, the payor's psychological or emotional response to the divorce is clearly important. Our study certainly hints at this common-sense conclusion.

E. Child Custody and Support Awards

Increasing research has been conducted on the impact of access arrangements on payment patterns. The studies have tried to determine whether the type of custody or visitation granted will affect the payor's payment of the support order. Some researchers believe that more fre-

⁴⁶ D. CHAMBERS, *supra* note 11, at 113.

⁴⁷ K. BRIDGE, *supra* note 18, at 4-5.

⁴⁸ Wallerstein & Huntington, *supra* note 27, at 153-54.

⁴⁹ *Id.* at 152.

⁵⁰ Pearson & Thoennes, *supra* note 31, at 54.

quent contact between the payor and the child produces better payment. This conclusion raises the issue of whether or not the payor's payment is affected by any problems in carrying out the access arrangements.

Phear's research examined custody decisions and their effect on postdivorce litigation in 500 Massachusetts divorce cases. In studying later relitigation, the research found that sole custody cases returned most often to court over nonpayment of child support.⁵¹

Wallerstein's research showed that children who were visited most frequently were better supported by the payor.⁵² However, as discussed above, Wallerstein's results are tied more to the psychological profile of the payor, rather than to the award itself. She suggests that it is the payor, not the award, that determines contact and payment.

In contrast, Pearson and Thoennes reported that the best payment occurred with joint legal *and* physical custody fathers. Seventy-five percent of payees in this custody situation got full payment. When joint legal, maternal physical custody was awarded, 64% of payees received full payment. Only 46% of payees with sole legal and physical custody received full payment.⁵³ However, Polikoff has faulted the accuracy of Pearson and Thoennes' research. She found no relationship between custody and payment in Pearson and Thoennes' data.⁵⁴ She also rejects

⁵¹ Phear, Beck, Hauser, Clark & Whitney, *An Empirical Study of Custody Agreements Versus Joint Sole Legal Custody*, 11 J. PSYCHIATRY & L. 419, 432 (1983).

⁵² Wallerstein & Huntington, *supra* note 27, at 154.

⁵³ Pearson & Thoennes, *supra* note 31, at 52-53.

The definitions set out in CAL. CIV. CODE § 4600.5 satisfactorily define the following terms for the purposes of this Article as well:

- (1) "Joint custody" means joint physical custody and joint legal custody.
- (2) "Sole physical custody" means that a child shall reside with and under the supervision of one parent, subject to the power of the court to order visitation.
- (3) "Joint physical custody" means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents.
- (4) "Sole legal custody" means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.
- (5) "Joint legal custody" means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.

CAL. CIV. CODE § 4600.5 (Deering Supp. 1989).

⁵⁴ Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support*, 19 CLEARINGHOUSE REV. 274, 274 (1985).

the theory that support is best accomplished with enforcement of visitation or that support is not paid because of problems with visitation.⁵⁵

Likewise, Weitzman found no correlation between compliance with the support order and the payor's complaints about problems with visitation. She reports that men with no visitation problems were just as likely not to pay their support as they were likely to pay it. Further, men complying with support awards were just as likely to report visitation problems as those not complying with their support obligations.⁵⁶

However, Salkind notes that noncustody fathers face a severe emotional adjustment following divorce. They must cope with social pressure to continue as a parent, yet they lack equal parenting access after the marriage ends. He suggests that this may lead to postdivorce stress on the payor and create a lack of incentive to provide child support.⁵⁷

Chambers' work found that when fathers wished to visit, visitation problems were short-term and remediable. Men who filed complaints about visitation paid as well or better than average over the life of the decree as did men making no complaints. Chambers recognized that disputes over visitation may result in withholding of payment. However, men fighting over visitation are more involved with their children and will provide good life-time payments.⁵⁸

Custody and visitation issues appear closely tied to psychological and emotional factors. Some payors will cope better with the emotional chaos that is often produced by a divorce. Although unsatisfied with their access arrangements and any resulting problems, these payors will continue to meet their support obligations. Other payors will not fare so well. This issue of access arrangements points to the fact that individual differences among the parties involved in divorce make it difficult to determine whether the type of access granted can predict good payment patterns. Wallerstein suggests that the mix of economic and psychological factors are so intertwined that some percentage of payors will always fail in their support obligations.⁵⁹

Our own research found that payors granted joint physical custody produced the best payment. This result is limited by the small size of the sample. Our results did not show any clear difference in payments between joint legal (maternal or paternal physical) and sole custody.

⁵⁵ *Id.* at 275.

⁵⁶ L. WEITZMAN, *supra* note 1, at 297.

⁵⁷ Salkind, *The Father-Child Postdivorce Relationship and Child Support*, in *THE PARENTAL CHILD SUPPORT OBLIGATION*, *supra* note 27, at 177.

⁵⁸ D. CHAMBERS, *supra* note 11, at 129.

⁵⁹ Wallerstein & Huntington, *supra* note 27, at 155.

Further information is needed before we can determine the impact of access arrangements on our payors. The overwhelming majority of our payors were granted "reasonable" visitation. We have little information about the actual amount of time each payor spent with his children. Likewise, there was insufficient data in the court files about any problems the payors may have encountered in trying to carry out their visitation.

F. Marital Agreements

Consideration of the impact of marital agreements on child support payments is difficult. There has been no significant discussion of this issue in the literature. Therefore, any hypothesizing on this factor in child support payments is hampered by a lack of comprehensive research to substantiate propositions advanced. Nonetheless, we believe that a marital agreement may affect child support payment.

First, payors making marital agreements may produce good payment patterns because they have better financial resources than payors not making a marital agreement. Our study showed that payors making marital agreements did tend to fall within the higher income range. These same payors were much more likely to appear to be making their child support payments. In contrast, few of our defaulting payors, who tended to have lower incomes, had marital agreements. As a result, money seems to be a salient factor in marital agreements and child support payment.

This conclusion is limited in several ways. First, some of our defaulting payors had higher incomes and still failed to fulfill their support orders. Second, the doubtful validity of the payor's financial resources as an explanation of nonpayment has already been discussed. Third, we have no assurance that our payors making marital agreements were fully complying with the support order. The files merely show a lack of evidence indicating default.

Nonetheless, the actual process of making a marital agreement may influence the payor in making him more likely to abide by the support agreement. This result may reflect the payor's perception that he helped fashion the terms of the agreement. If a payor feels the agreement was made with his input, he may feel more obligation to fulfill its terms.

The process of making a marital agreement may also allow couples an opportunity to vent their emotions on issues connected with the divorce not otherwise available in the no-fault court process. These couples may find the lines of communication are improved. Any subse-

quent problems with child support may be resolved by the couples themselves, rather than resorting to the courts.

Although there appears to be little information on the impact of marital agreements, there is information on the related processes of negotiation and mediation. For example, many commentators note that negotiation and mediation help couples by allowing them a chance to express some of their feelings about the marriage and the divorce.⁶⁰ Wallerstein and Kelly's five-year study showed that many parents had been unable to resolve their conflicts at the time of the divorce.⁶¹ Donald Saponsnek has examined mediation as a method of resolving child custody disputes. He found that the process of mediation changed parent's attitudes about conflict resolution. They engaged in less adversarial thinking and more cooperation. Saponsnek also believes that the process of mediation lets parents retain control over decisions and leads the parents to work together for the children's benefit.⁶²

However, research has shown that decisions made during negotiations in marital dissolutions are rarely truly voluntary. Erlanger, Chambliss, and Melli examined private ordering to determine whether couples using this method of dispute resolution have real choice in the decisions reached. The results show that in divorce informal settlement is often adversarial. In most cases "agreement" actually reflects unequal financial resources and emotional stamina. Parties often settle issues from nonlegal situational factors, such as impatience to end the divorce.⁶³ Despite these findings, the marital agreement process and its impact on support payments should not be dismissed. It may still allow some opportunity for the parties to express their feelings and resolve some conflicts. Although not entirely voluntary, couples have had some say in the agreement and may be more likely to abide by it.

G. Conclusion

Other research on why payors fail to meet their child support obligations consistently rejects inability and offers a variety of other possible explanations for nonpayment. Our own research which follows may help to further our understanding of why fathers don't pay.

⁶⁰ See, e.g., Freedburg, *The Custody Compromise*, CAL. LAW., June 1983, at 23.

⁶¹ J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP* 136 (1980).

⁶² See D. SAPONSNEK, *MEDIATING CHILD CUSTODY DISPUTES* 17-22 (1983).

⁶³ See H. ERLANGER, W. CHAMBLISS & M. MELLI, *COOPERATION OR COERCION: INFORMAL SETTLEMENT IN THE DIVORCE CONTEXT* 36-38 (1986); see also Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (classic article on this subject).

II. CHILD SUPPORT STUDY OF YOLO COUNTY, CALIFORNIA⁶⁴

During late 1987 and early 1988 data was collected from court files, phone interviews and mail-in questionnaires from payors, and phone interviews with attorneys.

A. Court Files

1. Methodology

Docket numbers from March to December⁶⁵ in 1985 and 1986 for all domestic relations cases were obtained from public records at the Yolo County Superior Courthouse in Woodland, California.⁶⁶ The docket numbers were recorded in the order they appeared on the daily court calendar. A random sample was obtained by pulling the file of every fourth number recorded from the daily court calendar.

Of this sample, files containing an order for child support and data providing a reasonable chance of contacting the payor of support were classified as acceptable. The others were rejected.⁶⁷ A history of the

⁶⁴ Yolo County, little more than an hour's drive northeast of San Francisco, is a predominantly rural area although the bulk of its growing population of 124,000 (July 1985) lives in urban areas. The university town of Davis with a population in excess of 40,000 is the largest city, followed by the county seat of Woodland, and then the city of West Sacramento. The county population consists of 75% Caucasians, 17% Latinos, 5% Asians, and 2% Blacks. In 1985, 6.4% were on Aid to Families with Dependent Children (AFDC). Ca. Dept. of Commerce, *The California Profile on Yolo County* (Sept. 1986).

⁶⁵ Docket numbers for January and February 1986 were not available at the time this material was reviewed. Accordingly, a decision was made to exclude those months for 1985 as well.

⁶⁶ We would like to extend thanks to Superior Court Judge James Stevens and the staff of the Yolo County Clerk's Office for their kind cooperation.

⁶⁷ Files were rejected if there was no support order (N/S); no minors (N/M); payor had left the state and the likelihood of obtaining his or her address was small (O/S); file could not be located because it was in use or misfiled (F/O); file dealt with domestic violence, not child support (D/V); file was a duplicate of a file previously recorded (DUP); miscellaneous reasons, such as dismissed action or a file lacking enough information (N/A). From a random sample of 422 pulled files, 311 were rejected. The distribution of the rejected files was:

No support	(N/S)	69	22.1%
No minors	(N/M)	57	18.3%
Out-of-state	(O/S)	15	4.8%
File out	(F/O)	78	25.0%
Domestic violence	(D/V)	21	6.7%
Duplicate file	(DUP)	38	12.2%
Miscellaneous	(N/A)	33	10.6%

award was recorded, including the amount of the award, the duration of the order, modifications of the order, and wage assignments for unpaid support. Additional information recorded included age, number and sex of children, custody and visitation orders, marital agreements, and income/job descriptions. From a total of 1,628 docket numbers over the twenty month period, 422 files were randomly pulled and scanned. Of these files, 111 were accepted and divided into three broad categories:

- (1) *Known defaulters*, evidenced by past due wage assignments, writs of execution, or orders detailing delinquency in paying support.
- (2) *Suspected defaulters*, evidenced by orders appointing the D.A. to enforce child support payments but with no specification of a prior failure to pay support.
- (3) *Payors in compliance* with support orders, evidenced by a lack of any indication whatever of failure to pay support.

2. Description of File Data

To examine factors contributing to nonpayment of child support, two basic areas were examined: (1) custody and visitation arrangements and (2) economic factors. The latter were measured by payor and payee income, child support as a percentage of payor's income, and marital agreements.

a. *Child Custody and Payment Performance*

The custody arrangements recorded from the court files fell into three categories: (1) joint legal, maternal or paternal physical; (2) joint legal, joint physical; and (3) sole custody. Our results show that while only a small number of payors were awarded joint legal, joint physical, they appeared to produce the best payment performance (75%). Payors granted joint legal, maternal or paternal physical custody or sole custody had nearly the same payment performance (42.0% and 45.1%, respectively). Firm conclusions about these comparisons are limited by the small size of the sample having joint legal, joint physical custody.

Table 1⁶⁸
Default Status and Custody

Type of Custody	Known Defaulters		Suspect Defaulters		In Compliance		Total	
	#	%	#	%	#	%	#	%
Joint Legal, Maternal or Paternal Physical	16	32.0	13	26.0	21	42.0	50	100
Joint Legal, Joint Physical	1	12.5	1	12.5	6	75.0	8	100
Sole Custody	8	25.0	9	29.0	14	45.1	31	100

b. Visitation and Payment Performance

The visitation arrangements recorded from the files fell into three categories: (1) reasonable visitation (generally every other weekend); (2) liberal visitation (more than every other weekend); and (3) restricted visitation (less than every other weekend). Payors granted liberal visitation showed a higher rate of payment performance than did those payors granted reasonable visitation, 66.6% vs. 44.7%, respectively. The two cases of restricted visitation fell in the suspected default category. Firm conclusions about these comparisons are limited by the small size of the sample having liberal visitation.

⁶⁸ The number of cases reflected in each table may vary from the total of 111 ultimately included in the overall study. This variance is usually because of an inability to determine accurately the needed data for the particular table from the file being reviewed. In this Table, for example, only 89 files are included because the others did not clearly reflect the type of custody involved.

Table 2
Default Status and Visitation

Type of Visitation	Known Defaulters		Suspect Defaulters		In Compliance		Total	
	#	%	#	%	#	%	#	%
Reasonable	23	30.2	19	25.0	34	44.7	76	100
Liberal	2	22.2	1	11.5	6	66.6	9	100
Restricted			2	100.0			2	100

c. Payor's Income and Default

Income recorded from the court files ranged from below \$5,000 a year to over \$30,000 a year. Known defaulters were more concentrated in the lower income range. In contrast, payors appearing to be in compliance were more likely to have incomes greater than \$25,000 than those in the other two status groups.

The percentage of child support ordered varied by income level. Lower-income payors paid a greater proportion of their income as child support than did the high-income payors. Those in the known default group paid an average of 18.9% of their net income as child support. In contrast, those appearing to be in compliance paid 16.6% of their net income as child support.

Table 3
Payor Income and Default Status

Income × 10 ³	Default Known	%	Default Suspect	%	In Comp.	%
> 30	1	4.3			6	17.1
25-30	1	4.3	1	3.8	5	14.2
20-25	3	13.0	2	7.6	6	17.1
15-20	7	30.0	4	15.3	7	20.0
10-15	7	30.0	5	19.2	6	17.1
5-10	4	17.3	10	38.4	5	14.2
0-5			4	15.3		
	23	100.0	26	100.0	35	100.0

d. Payee's Income and Default

As with the payors, the payees showed a difference in income levels between the default status groups. While overall levels of payee income were lower than the levels recorded for payors, the number of payees earning \$10,000 or more was higher among the compliance group than among the known defaulters. Another difference was the presence of AFDC payees. Thirty-four percent of payees within the known defaulters group received AFDC. There was no record of any payee within the compliance group ever receiving AFDC.

Table 4
Payee Income and Default Status

Income × 10 ³	Default Known	%	In Comp.	%
> 30				
25-30			2	5.0
20-25	1	3.1	1	2.3
15-20	2	6.2	5	11.9
10-15	3	9.3	14	33.3
5-10	7	21.8	9	21.4
0-5	5	15.6	6	14.2
AFDC	11	34.3		
N/I	3	9.3	5	11.9
	32	100.0	42	100.0

e. Income, Marital Agreements and Default Status

The court files were analyzed to determine property settlements of \$10,000 or greater. Only 6% of known defaulters showed settlements at or greater than this level. In contrast, 55% of those payors in the compliance group showed settlements of \$10,000 or greater.

The trends discussed above for Table 3 can be further examined when the presence or absence of a marital agreement is controlled in Table 5a. Those payors in compliance remained nearly uniformly distributed across income categories when there was a marital agreement. When there was no marital agreement, the distribution across income categories was less even, showing very few cases in the highest income group. Nearly all the default and suspected default cases occurred when there was no marital agreement, as shown in Table 5b. What appeared to be a direct relationship between income and default status in Table 3

is more likely an indirect relationship, being qualified by the presence of a marital agreement.

Table 5a
Income, Marital Agreements, and Default Status

Marital Agreement														
Income × 10 ³	Yes							No						
	Default Known	Default %	Default Suspect	Default %	In Comp.	In %	All %	Default Known	Default %	Default Suspect	Default %	In Comp.	In %	All %
> 30	1	33.3			6	24.0	22.5							
25-30					4	16.0	12.9	1	5.0	1	4.5	1	10.0	5.7
20-25			1	33.3	4	16.0	16.1	3	15.0			2	20.0	9.6
15-20	2	66.6			4	16.0	19.3	5	25.0	4	18.1	3	30.0	23.0
10-20			2	66.6	5	20.0	22.5	7	35.0	3	13.6	1	10.0	21.1
5-10					2	8.0	6.4	4	20.0	10	45.4	3	30.0	32.6
0-5										4	18.1			7.6
	3	100.0	3	100.0	25	100.0	100.0	20	100.0	22	100.0	10	100.0	100.0

Indeed, the greatest difference between the default status categories was demonstrated by the presence or absence of a marital agreement. When a marital agreement was present, 81% of the cases were in compliance, 11% were known defaulters and 8% were suspected defaulters. In contrast, when there was no marital agreement, 17% were in compliance, 37% were known defaulters, and 45% were suspected defaulters.

Table 5b

Marital Agreement

Default Status	Yes		No	
Known Default	4	11.1%	28	37.3%
Suspect Default	3	8.3	34	45.3
In Comp.	<u>29</u>	<u>80.6</u>	<u>13</u>	<u>17.3</u>
	36	100.0%	75	100.0%

f. Amount of Default

Table 6 shows the amount of child support owed by the known defaulters. The maximum default was \$8,954; the minimum default was \$36.

Table 6

Amount of Default

<u>\$</u>	<u>#</u>	<u>%</u>
> 4000	3	10.3
3001-4000	2	6.9
2001-3000	4	13.8
1001-2000	5	17.3
501-1000	6	20.7
<u>≤ 500</u>	<u>9</u>	<u>31.0</u>
	29	100.00

g. Length of Default

Table 7 shows the number of months child support was owed by the known defaulters. The maximum number of months was 155 months; the minimum number was one month.

Table 7
Length of Default

<u>Months</u>	<u>#</u>	<u>%</u>
> 72	4	14.3
49-72	3	10.7
25-48	3	10.7
13-24	4	14.3
7-12	8	28.6
<u>≤ 6</u>	<u>6</u>	<u>21.4</u>
	28	100.00

B. Payor Phone Interviews and Mail-in Questionnaires

1. Methodology

One-hundred-and-eleven files listing names and addresses of both payors and payees were obtained from public records. Telephone numbers for 22 payors and 2 payees were also collected from the files. The 22 payors were phoned to determine their willingness to answer questions about their support, custody, and visitation orders. The telephone interviewer used an identical method of introduction for each payor successfully contacted by phone. The interviewer stated that she was attempting to collect information about the family court system from people who had experienced it. The payors were assured that their identity would be totally confidential. Those payors refusing to answer questions over the phone were asked if they would prefer an in-person interview. Payors who rejected the in-person option were asked to fill out a questionnaire that would be sent to them through the mail.

Out of 22 phone calls placed, 6 payors consented to a telephone in-

interview. Three payors preferred to answer a questionnaire sent through the mail. Three payors refused all three options. The remaining 10 payors could not be contacted.

A written interview identical to the telephone format was mailed to all 111 payors. Initially, mailed interview forms were filled out by payors and returned to the researchers. Over 30 mailed interviews were returned marked address unknown. A second mailing of the address unknown payors was conducted through the Yolo County District Attorney Family Support Division.⁶⁹ This produced only 1 more filled out form for a total of 7.

Thus a total of only 13 payors provided information in the interviews (6 by phone, 7 by mail).⁷⁰ Unfortunately, the small size of the payor responses makes for little predictive value. In addition, the payors that responded to our interview (mail and phone) often failed to answer all of the questions. Despite these problems, the interviews did yield much interesting information, and that so many mailed interviews came back marked address unknown is certainly logically related to the high default rate.

1. Description of Phone and Questionnaire Data⁷¹

a. *Profile of Responding Payors*

Six of the responding payors appeared to be in compliance, as measured by the lack of a default order in their files. These payors were:

- 3 in compliance, joint legal, physical to mother
- 2 in compliance, joint legal, joint physical
- 1 in compliance, joint legal, physical to father

Five of the payors were known defaulters, as evidenced by the presence of a default order, or wage assignment in their file. These payors

⁶⁹ Mr. Arvid Johnson, the Deputy District Attorney supervising this office, was extremely helpful in early discussions about this project. The empirical data for this study would undoubtedly have been far more extensive if the file and computer resources of his office could have been utilized. However, despite our assurances of absolute voluntariness and confidentiality, higher county officials declined to allow us access to these resources because of potential financial liability concerns. Accordingly, the only participation of that office was to forward our returned mail to any payor for whom they had a different address (undisclosed to us) than that contained in the public records.

⁷⁰ As is always possible, the form and content of the cover letter and questionnaire perhaps contributed to this very small response. They are set out as appendices to this Article.

⁷¹ All respondents did not answer all questions, so responses for some will number less than 13.

were:

- 4 known defaulters, joint legal, physical to mother
- 1 known defaulter, legal and physical to mother

Two of the payors were suspected defaulters, as measured by a court order payable to the District Attorney. These payors were:

- 1 default suspected, joint legal, physical to mother
- 1 default suspected, legal and physical to mother

Seven of the payors responding to our questionnaire had income of \$30,000 or greater. In fact, several payors reported income over \$40,000.

b. Child Custody

Twelve payors stated that they were agreeable to the custody ordered by the court. Only 1 payor objected to the custody ordered. This payor, a mother who received joint legal and sole physical custody, consistently reported the most negative answers out of all the payors.

Out of 12 responses, only 1 payor reported trying to change the custody order. This payor, a known defaulter with joint legal and physical to the mother, tried unsuccessfully to change the custody to joint physical. There was no indication if change was attempted in or out of court. He sought the change "because the child lives with you."

Nine payors rated their custody order as satisfactory. Six stated that the order was satisfactory because they had agreed to it or that they had few disputes with the payee.

Three payors rated the custody orders as unsatisfactory. One payor (default suspected, joint legal, physical to mother) reported that he never saw his daughter. A second payor (in compliance, joint legal, physical to father) reported that the arrangement harmed the daughter, the father gave bad care, and as a result, the daughter was now pregnant. The third payor (known defaulter, legal and physical custody to mother) stated that he wished for joint custody now.

One payor (known defaulter, joint legal, physical to mother) rated the custody as slightly satisfactory. This payor reported that he only had the kids once every three weeks and that he sometimes had to skip visits.

Therefore, 3 of the 5 known defaulters who answered our questionnaire showed some dissatisfaction with their custody order. This dissatisfaction was based on the infrequent contact they had with their children.

c. Visitation

Twelve payors stated that they had initially been agreeable to the court-ordered visitation. One payor (in compliance, joint legal, joint physical) had not been agreeable. This payor stated that he wanted the order spelled out better.

Nine payors rated their visitation order presently satisfactory:

- 4 known defaulters, joint legal, physical to mother
- 1 known defaulter, legal and physical to mother
- 3 in compliance, joint legal, physical to mother
- 1 in compliance, joint legal, joint physical

Three payors rated their visitation order presently unsatisfactory:

- 1 default suspected, joint legal, physical to mother
- 1 default suspected, legal and physical to mother
- 1 in compliance, joint legal, physical to father

The payor in compliance was the only payor to state why the order was unsatisfactory; she should have had custody, not visitation.

Nine payors reported that neither they nor their ex-spouse had tried to change the order. In contrast, four payors stated that they had tried to change the order:

- 1 known defaulter, joint legal, physical to mother
- 1 known defaulter, legal and physical to mother
- 1 default suspected, legal and physical to mother
- 1 in compliance, joint legal, joint physical

Only one payor (known defaulter legal and physical to mother) reported being successful in changing his order. This payor sought the change because his ex-spouse was denying him visitation.

Four payors reported problems when visiting or alternating custody:

- 1 in compliance, joint legal, physical to father
- 1 in compliance, joint legal, joint physical
- 1 default suspected, legal and physical to mother
- 1 default suspected, joint legal, physical to mother

Three reported some kind of interference by the other parent. One payor (in compliance, joint legal, physical to father) stated that her ex-spouse poisoned her daughter's mind against her. A second payor (default suspected legal and physical to mother) reported that his ex-spouse had taken the child and moved 3,000 miles away.

Seven payors reported that they missed visits or alternated custody:

- 2 known defaulters, joint legal, physical to mother
- 1 known defaulter, legal and physical to mother
- 2 in compliance, joint legal, physical to mother
- 1 in compliance, joint legal, joint physical
- 1 default suspected, legal and physical to mother

The primary reason why most payors report missing their visits or alternated custody is because they had to work or had some other time conflict. Only 3 payors gave estimates on how often they missed the visits or alternated custody. All three reported that they missed only once or twice a year.

Satisfaction or dissatisfaction with visitation or alternated custody did not establish even the slightest trend.

d. Child Support

Ten payors reported that they were agreeable to their child support order. In contrast, 3 payors reported that they were not agreeable:

- 1 in compliance, joint legal, physical to father
- 1 in compliance, joint legal, physical to mother
- 1 default suspected, joint legal, physical to father

Eleven payors reported that there had been no attempt to change their support orders. One payor (in compliance, joint legal, physical to mother) stated that their ex-spouse had unsuccessfully attempted to modify the order for more money. A second payor (known defaulter, joint legal, physical to mother) reported that he had successfully modified his order to pay nothing.

Nine payors reported that they provided more support than ordered:

- 4 known defaulters, joint legal, physical to mother
- 2 in compliance, joint legal, physical to mother
- 1 in compliance, joint legal, physical to father
- 1 in compliance, joint legal, joint physical
- 1 default suspected, legal and physical to mother

Only four of these payors offered estimates or examples of the extra support they provided. These included medical or school expenses and allowances.

Only two payors explicitly stated that their ex-spouse spent the money properly on the kids. Four stated that their ex-spouse *did not* properly spend the money:

- 1 in compliance, joint legal, physical to father
- 1 known defaulter, joint legal, physical to mother
- 1 default suspected, legal and physical to mother
- 1 default suspected, joint legal, physical to mother

Seven payors stated that they were *not sure* if their ex-spouse properly spent money on the kids:

- 2 in compliance, joint legal, physical to mother
- 2 in compliance, joint legal, joint physical
- 2 known defaulters, joint legal, physical to mother
- 1 known defaulter, legal and physical to mother

Seven payors make their payments directly to their ex-spouse. Three pay to the District Attorney. One pays to the court. One pays through wage withholding. Ten payors stated that they would not prefer another method of payment. Two payors preferred another method, paying the spouse directly.

Six payors admitted that they sometimes missed payment deadlines:

- 3 known defaulters, joint legal, physical to mother
- 1 known defaulter, legal and physical to mother
- 1 in compliance, joint legal, physical to mother
- 1 in compliance, joint legal, joint physical

Five of these payors gave estimates of how often they missed deadlines.

- (1) "about half the time," (known defaulter, joint legal, physical to mother)
- (2) "three-and-one-half months while not working," (known defaulter, joint legal, physical to mother)
- (3) "once," (known defaulter, joint legal, physical to mother)
- (4) "quite often, in the beginning," (known defaulter, legal and physical to mother)
- (5) "it depends on monthly income," (in compliance, joint legal, physical to mother).

Six payors reported that they do not miss payment deadlines.

Four payors stated that they sent less than the full amount:

- 2 known defaulters, joint legal, physical to mother
- 1 known defaulter, legal and physical to mother
- 1 in compliance, joint legal, physical to mother

How often and how much?

- (1) "less than half the time," (known defaulters, joint legal, physical to mother)
- (2) "two times and \$50 less each month," (known defaulter, joint legal, physical to mother)
- (3) "it depends on monthly income," (in compliance, joint legal, physical to mother)

Nine payors stated that they *did not* send less than the full amount. Only one payor (known defaulter, joint legal, physical to mother) reported missing payment completely.

This category provided some useful information. First, 3 of the 5 payors who seemed to be in compliance reported that they sometimes fail to meet their support deadlines or send the full amount. In contrast, 3 of the 5 known defaulters reported that they don't send less than the full amount. Only 1 defaulter reported that he sometimes missed altogether. Given that the court files prove that these payors are in default, they are simply not telling the truth.

Finally, 4 payors did not think that their ex-spouse spent money

properly on the children and seven were not sure if the support money is spent properly. These responses may indicate a lack of knowledge about the children's needs due to the payor's limited contact. On the other hand, it could simply point out the lack of confidence these payors feel about their ex-spouse's spending habits.

e. Marital Agreements

Nine payors reported that they had signed written agreements on support/custody. (However, some of these payors may be referring to stipulations and not formal marital agreements.) Six of the payors are satisfied with the agreement. Three are not satisfied. Four of the payors appearing to be in compliance were satisfied with the agreement.

f. Placing Marital Breakup Fault

Nine payors felt that both they and their ex-spouse were responsible for the marriage breakup. Eight payors stated that they were happy they got divorced.

g. Current Relationship with Ex-Spouse

Three payors rated their present relationship with their ex-spouse as unsatisfactory. Two explained why:

- (1) "we disagree about raising the child," (in compliance, joint legal, joint physical)
- (2) "we just don't get along" (known defaulter, legal and physical to mother)

Two payors rated the relationship as slightly satisfactory:

- (1) "the relationship changes from week to week," (known defaulter, joint legal, physical to mother)
- (2) "never can say," (default suspected, legal and physical to mother)

Three rated the relationship very satisfactory:

- (1) "the mediation process really helped us" (known defaulter, joint legal, physical to mother)
- (2) "I don't see or talk to her" (default suspected, joint legal, physical to mother)
- (3) "we still like each other" (in compliance, joint legal, physical to mother)

Analysis of the responses suggests that actually 6 out of 11 payors probably have less than satisfactory working relationships with their ex-spouse.

h. Joint Decisions on Child Rearing

Seven payors reported that they don't make joint decisions, though some had joint legal. Three payors, some not joint legal, stated that they did make joint decisions about school, sports, and lifestyle.

i. Satisfaction with the Court Process

Seven of the payors rated their experience with the court process as satisfactory:

- 3 known defaulters, legal and physical to mother
- 3 in compliance, joint legal, physical to mother
- 1 in compliance, joint legal, joint physical

These payors rated the court process as satisfactory because they believed they got what they wanted. (Several payors indicated they did their own divorce).

In contrast, 4 payors rated the process as unsatisfactory:

- 1 known defaulter, joint legal, physical to mother
- 1 in compliance, joint legal, physical to father
- 1 in compliance, joint legal, joint physical
- 1 default suspected, joint legal, physical to mother

These payors were evenly split. Two felt that the courts are dishonest. Two felt that the child support awards and lawyers' fees were out of line.

In recommending improvements for the court system, three payors indicated that the courts should do their job quicker, but more thoroughly. One payor, without elaboration, felt child support should only be based on the payor's salary.

C. Domestic Relations Attorney Phone Interviews

Twenty attorneys appearing frequently in the domestic relations files pulled from the Yolo County public records were contacted by phone. Of those 20, 11 provided their opinion to 3 questions:

- (1) Why do people fail to pay child support?
- (2) Does a marital agreement affect payment of child support?
- (3) If it does affect payment of child support, how and why?

The survey of attorneys reported that anger at the ex-spouse was the major reason for late or nonpayment of child support (33.3%). Furthermore, 18.5% of the attorneys believed default was caused by the payor's callous or irresponsible personality, while 11.1% of the attorneys cited bad financial planning and real financial problems. Visitation problems (7.4%) and financial responsibility to a new family (7.4%) were also

cited by more than one attorney.

Table 8

Attorney Survey: Why Payors Fail to Pay Child Support

Response	#	%
Anger at ex-spouse	9	33.1
Irresponsible personality of the payor	5	18.5
Bad financial planning	3	11.1
Punishment for not paying is not bad enough	1	3.7
Real financial problems	3	11.1
Financial obligation to new family	2	7.4
Visitation problems	2	7.4
Inadequate custody	1	3.7
Default divorces lead to payor indifference	1	3.7
	27	100.00

All of the attorneys surveyed reported that a marital agreement would establish better payment patterns by the payor. The greatest number of attorneys believed that people making a marital agreement were generally more responsible people (28.5%). To the attorneys, responsibility refers to a payor who takes his obligations seriously. Several attorneys believed white-collar payors would be more likely to meet their child support payments. A total of 23.8% of the attorneys stated that the marital agreement exerted a psychological impact on the payor. These attorneys believed the payor would abide by the agreement because it was voluntary, not court fashioned. Another 23.8% believed that people with marital agreements have more money and can meet their support obligations more easily.

Table 9

Attorney Survey: Why Marital Agreements Produce Better Payment

Response	#	%
Psychological impact of the agreement	5	23.8
People making them are more responsible	6	28.5
People making them have more money	5	23.8
Payee more likely to use attorney to enforce the support	1	4.7
Better counseling by the attorney	2	9.5
People making them have more respect for the law	1	4.7
Better relationship between payor and payee	1	4.7
	21	100.00

D. Summary and Discussion

The most noteworthy patterns identified from the court files are the following:

- (1) Custody was most often assigned joint legal, physical to mother. However, the best payment performance was recorded where joint physical custody was awarded. Payors granted joint legal, whether maternal or paternal physical custody, or sole custody, had nearly the same payment performance as each other.
- (2) Most payors in the study were granted reasonable visitation (every other weekend). However, payors granted liberal visitation (more than every other weekend) showed a higher rate of payment performance than payors with reasonable visitation.
- (3) On average, income levels for known and suspected defaulters were lower than the income levels of payors appearing to comply with their child support obligations.
- (4) Low income payors paid a greater percentage of their income as child support than payors with higher incomes.
- (5) Payees in the known and suspected default groups showed lower levels of income than payees in the compliance group.
- (6) Over 50% of those in the compliance group had property settlements

at or greater than \$10,000. Only 6% of known defaulters and 9% of suspected defaulters showed settlements at this level.

- (7) The majority of payors in the compliance group had a marital agreement. Nearly all known and suspected defaulters lacked a marital agreement.

Not surprisingly, the availability of wealth appears to be a significant factor in child support compliance or default. The higher income and property settlements of the compliance group certainly suggests that payors within this group can meet their child support obligation more readily. However, it is interesting to note that the *payees* in the compliance group also show a higher level of income and property. Perhaps this result is simply a function of their payor's status. However, independent of status, these payees may be less likely to take legal action when the payor is late with payments because of the availability of their own resources. They may be better able to wait the payor out until he finally makes his payment. Although these payees may have better access to their lawyers, they may use them more to prompt the payor into meeting his obligations, rather than directly seeking court enforcement of the order.

The small number of payors responding to the phone interviews and mail-in questionnaires makes it impossible for us to make predictions about why people do or don't pay support on the basis of that data. However, some useful information emerged nonetheless.

- (1) Three of the 5 known defaulters responding expressed some displeasure with the custody order. Only 1 in compliance had this complaint.
- (2) Although there were several complaints about visitation or alternating custody no pattern on the bases of compliance or default can be found.
- (3) Some payors deemed to be in compliance fail to meet their deadlines or send the entire amount. However, the magnitude of their failure to do so appears to be much less dramatic than known defaulters.
- (4) Although no relation to compliance or default was apparent, the perceptions of how child support payments are used was very interesting. Only 2 stated that the money they provided was properly used for the children; 4 said it was not, and 7 were not sure.
- (5) Current relationship with ex-spouse and joint decision making split from very satisfactory to unsatisfactory, across all categories of payors. Interestingly, however, of the two of three "unsatisfactory" relationships who explained that they didn't get along or disagreed over raising the child, the one in compliance had joint *physical* custody.

Attorneys interviewed provided the following insights:

- (1) Anger at the ex-spouse was the most common reason cited by the attorneys for nonpayment of support. Irresponsibility by the payor,

bad financial planning, and real financial problems were the next most common reasons.

- (2) All the attorneys surveyed believed that marital agreements would make payors more likely to fulfill their support obligations.
- (3) The greatest number of attorneys believed that payors making a marital agreement were a more responsible type of people. The attorneys also believed that a marital agreement exerted a psychological impact on the payor.

In considering child support patterns, some researchers have focused on the relationship between payment and access arrangements. Pearson and Thoennes have reported that joint physical custody, while infrequently awarded, produces the best payment performance, followed by joint legal, maternal or paternal physical custody, and sole custody last.⁷² While our results did show that payors receiving joint custody produced the best payment performance, the sample was too small to draw firm conclusions. However, our results do not support the past research in which sole custody and joint legal, maternal or paternal physical is concerned. There is no clear difference in payment performance between these two groups.

Wallerstein and Huntington suggest that the more frequent the payors' visits, the better the child support payment.⁷³ Similarly, our results show that payors granted liberal visitation produced the best payment performance. Unfortunately, however, again our results are limited by a very small sample. Although the court files yielded little information about the actual amount of contact the payors had with their children, some dissatisfaction with custody orders, visitation arrangements and hindrances, and missed visitation surfaced in the questionnaires and interviews.

Our research shows economic differences between the group appearing to be in compliance and the other two status groups. Research is divided as to whether lower income explains poor payment. Pearson and Thoennes count economics as a factor in nonpayment.⁷⁴ Chambers⁷⁵ and Weitzman⁷⁶ point to their research showing that often men with low income levels do pay their child support, while some men at high levels won't pay. Our research shows this pattern also. A sizable number of payors with low income (below \$15,000) appeared in the compliance group, while some payors with high incomes appeared in

⁷² See *supra* note 53 and accompanying text.

⁷³ See *supra* note 52 and accompanying text.

⁷⁴ See *supra* note 33 and accompanying text.

⁷⁵ See *supra* note 12 and accompanying text.

⁷⁶ See *supra* note 10 and accompanying text.

the default group. Similarly, although the lower income payors must pay a larger percentage of their net income as support, some of these payors appear to meet their obligations.

Although Weitzman discounts the payee's financial resources as a significant factor,⁷⁷ our results indicate it may play some part in payment patterns. One possibility is that a payee with greater financial resources may use different tactics when the payor is late with payments. They may be able to withstand lapses in support by the payor until he fulfills his obligations. These payees may also use their attorneys as a district attorney to enforce the child support. This last possibility points to the fact that the court files tell us only that the compliance is not legally in default. It is likely that a portion of these payors fail to carry out the terms of their child support obligations. In such a case, the actions of the payee could be significant.

Finally, our results show that what appears to be a direct relationship between income and default status may be an indirect relationship, qualified by the presence of a marital agreement. However, the marital agreement may be the product of other socio-economic factors, such as education and occupation. These factors may result in several different approaches by payors and payees in working out conflicts over support. Recent research into the dynamics of private ordering reveals that it is often marked by a high degree of emotionalism and uneven bargaining power.⁷⁸

In short, our sample is too limited to draw any hard conclusions. Economic factors certainly appear to play a substantial role in payment patterns. However, it also seems that economic factors must be combined with the array of interpersonal factors discussed to provide the best prediction and explanation of payment performance.

III. PHASING OUT NONCUSTODIAL PARENT COURT-ORDERED CHILD SUPPORT

Some will see red simply upon reading the title of this Part. However, David Chambers of the University of Michigan Law School first presented this thought in 1979 and elaborated upon it in 1982.⁷⁹ After all, he points out, who could have predicted at the turn of this century such events affecting the family as the current high rate of divorce and the concomitant number of children living in single parent families?⁸⁰

⁷⁷ See *supra* notes 8-10 and accompanying text.

⁷⁸ See *supra* note 63 and accompanying text.

⁷⁹ See D. CHAMBERS, *supra* note 11.

⁸⁰ *Id.* at 1615.

Thus, like divorce, which may never be commended, nonpayment of child support by the noncustodial parent may be condoned.⁸¹ Chambers argues that this change in the law will require either a substantial reduction in the number of children considered to be in need or a change in our view of the moral responsibility that absent parents bear, or both.⁸²

On the subject of need, Chambers suggests that changes occurring today may come sufficiently to fruition in the next fifty years to alter the current notion of need from the standard of living of a two-parent family to a standard of making do by a single parent.⁸³ On the one hand, continued increase in father custody and joint physical custody awards will provide direct access for support from the father's usually greater earnings. However, if maternal custody awards continue to predominate (as they most likely will), "roughly equal opportunities for employment and for advancement" would lead to all single parents being able to earn an adequate income.⁸⁴

But even if the circumstances and conceptualization of a child's need for support change, how can the law abrogate its long recognition of the moral responsibility for support by those who bring children into being? Even those who strongly denounce most other laws promoting morality, paternalism, and government intervention do not hesitate to urge ever more stringent legal sanctions and even longer child support orders.⁸⁵ Again, Chambers sees changes that have occurred which dramatically affect the idea of moral responsibility. For example, if abortion is ever perceived as as morally neutral as contraception, and if it remains unilaterally the mother's decision, the responsibility for birth and the obligations for rearing the child, when the father does not want it, may be hers alone.⁸⁶ Similarly, the voluntary decision of a recipient of sperm from a sperm bank to bear a child is seen today as the relevant act for determining liability.⁸⁷

Perhaps this logic may follow for children who are not the product of a family living relationship, married or not. On the other hand, what if children are a product of a family relationship? In this instance, Chambers says that "there is more than just a 'causal link' to justify

⁸¹ *Id.*

⁸² *Id.* at 1614.

⁸³ *Id.* at 1617.

⁸⁴ *Id.*

⁸⁵ See *supra* note 5 and accompanying text.

⁸⁶ See Chambers, *supra* note 6, at 1619.

⁸⁷ *Id.* at 1620.

holding the absent father liable"; the child is "typically the product of a joint decision or at least the product of a complex set of mutual expectations."⁸⁸ Nonetheless, Chambers argues:

But, however reasonable the grounds for assuming (and requiring) that parents who *live* with a child support the child, the reasons are substantially more brittle for imposing long-term financial liability on a parent who has never lived with a child or who once lived with a child but has not so lived for many years.⁸⁹

In other words, as the family unit changes so do the expectations, interactions, and obligations of its members. Indeed, with the increase in divorce, remarriage, and nonmarital cohabitation, the very concept of family is changing with corresponding impacts upon the felt obligations of the participants, particularly those who have been or are members of more than one unit involving children. Thus, in the future the law may come to more accurately reflect this reality by defining family members, for child support purposes, as those who "live together in intimacy at a given point in time." Financial responsibility will then drop out or switch to new step-relationships after a period of physical separation and economic adjustment.⁹⁰

Chambers' argument gives credence to the Yolo County study; namely, there are substantial reasons in addition to greed which contribute to nonpayment of child support and which would remain unaffected by additional sanctions. He asserts that the "principal messenger" for the postulated change is the absent parent's historical pattern of decreasing support payments and child visitation as time elapses.⁹¹ Alleging that "neither love nor a sense of moral responsibility induces most absent parents to pay [or visit] as much as they could,"⁹² and ascribing "more sympathetic causes for declining feelings of responsibility over time" than mere "indifference to their children's welfare,"⁹³ Chambers sees the causes behind child support default for many non-custodial fathers quite differently. The once a week or every other week visitation relationship is viewed by the noncustodial parent as unnatural and unsatisfying. "Over time, they feel less and less a part of their children's lives."⁹⁴ This feeling is particularly exacerbated by the entry into the child's living unit of any surrogate for the absent parent. In

⁸⁸ *Id.* at 1621.

⁸⁹ *Id.* at 1618.

⁹⁰ *Id.* at 1622.

⁹¹ *Id.* at 1623.

⁹² *Id.*

⁹³ *Id.* at 1624.

⁹⁴ *Id.*

any event, over time child support comes to be looked upon as "taxation without representation."⁹⁵ Such "taxation" (as well as time to visit) may become doubly difficult to bear, despite the love one may continue to feel for one's biological child, when the noncustodial parent also begins to share his day-to-day life with others in a new family setting.⁹⁶

While Chambers acknowledges that heightened male interest and involvement in nurturing, more liberal visitation orders, increased paternal custody orders, and the trend toward joint physical custody may produce closer ties between the child and both biological parents, "the pattern of perpetual or eventual disengagement, describes the position of more than half of the noncustodial parents" today.⁹⁷ Assuming that this trend is irreversible, how might the law react to these situational realities if women's income increases, the standard of a child's need is re-evaluated, and our ideas of parental responsibility change? Chambers suggests a limited-term child support, something like the concept of rehabilitational or transitional spousal support:⁹⁸

[O]rders of support might run for only three or four years, except, perhaps, in cases in which the custodial parent was physically disabled. Court-ordered visitation might also expire at the same point. Thereafter, payments and visitation would be encouraged . . . but not enforced by government action.⁹⁹

This policy would reflect the psychological disengagement over time, respond to the immediate financial, emotional and custodial needs of the child, and allow the custodial parent time to acquire decently compensated full-time employment or economic realignment.¹⁰⁰ Some families would, of course, make agreements going far beyond this legal limitation. But for most, "all links, legal and social, between the absent parent and his children would end."¹⁰¹

Professor Chambers concludes that the simplicity of this approach and, above all, the curtailment of most long-term government intervention outweighs the problems undoubtedly created for some children.

[S]uch a change in the law would be wise even if it meant that some

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1626.

⁹⁸ *Id.* at 1632-33. However, one trouble with this analogy is that the pendulum may already be swinging back to more and longer spousal support awards. *See, e.g., Angel, Alimony Debate Rages in State and Across U.S., L.A. Daily J., Apr. 24, 1987, at 1, col. 1.*

⁹⁹ *See* Chambers, *supra* note 6, at 1632.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

children a few years after divorce would have less income available to them than they do under the current system. It would probably be wise even if that minority of children who maintained regular contact with an absent parent seemed happier or better adjusted than the children who lost contact with their father and even if in some modest number of cases enforced support produced more regular visits. It would be wise in part because of an as yet unexpressed virtue of the curtailment of liability. That is the virtue of removing government from coercive involvement in people's lives. . . .

. . . If children's basic needs could be met without compulsory support in the great majority of cases, it might be a better world — it would surely be a simpler one — if a few years after separation, adults were forced to work out voluntarily the terms of their relationships just as we require them to do today in nearly all matters when they live together. . . .

In many respects, the future I depict is bleak. There is nothing attractive about the increasing proportion of children who are born to single parents or the increasing incidence of the breakup of two-parent families. Single parents and recently divorced men and women are among America's least happy people. Children suffer greatly when their parents separate. It would be a better world if mothers, fathers and children stayed together, living happily ever after. It would probably be a better world if children whose parents never lived together or children whose parents lived together and separated sustained active ties to both parents throughout their childhood. I hope that is what the future holds. But if that is not what is going to happen, we should be reluctant to retain a system of government enforced nostalgia for a world that has been lost.¹⁰²

CONCLUSION

The overall goal of this Article has been quite simply to motivate the rethinking of the why, who, what, and how of one of the most sacrosanct concepts of our family law — child support. Indeed, the recent wide range of creative additions to the traditional arsenal of sanctions imposed upon the payor of child support may produce some significant results.¹⁰³ Perhaps these additional sanctions should continue to be the way to go. But, given the dramatic technological, sociological, and legal changes surrounding creation and rearing in the last 25 years, is it not reasonable that the economic issue should at least be seriously reconsidered in light of these new realities?

In this century alone, the underlying issue of child custody itself has bounced from the paternal property concept, to the maternal tender years doctrine, to gender neutral and psychological parent considerations, to the recent joint custody rage, and soon, perhaps, on (or back)

¹⁰² *Id.* at 1633-34.

¹⁰³ *See supra* note 2 and accompanying text.

to the primary caretaker idea.¹⁰⁴ Ironically most, if not all, of these presumably different custody arrangements have been ordered while applying the same best interests of the child test. If custody orders all based on this same fundamental test can undergo so much creative thought and actual change, why not child support?

In addition to the difficult hurdles of economic need and moral responsibility tackled by Chambers in his unique evaluation of the child support problem, an increasingly politicized family law makes rethinking child support a dangerous endeavor. No issue more than child support, or the implications of custody on support, so pits male against female. All other considerations seem to get lost in the battle of the sexes over money. This focus is perhaps understandable since those in the pits are immediately affected by any change. However, this focus on money becomes regrettable when long-term policy makers like scholars and legislators also succumb.

This Article provides no clear-cut answer to how or even whether child support notions should be changed. However, many important issues have been raised for serious discussion which will hopefully motivate extensive research by others for rethinking this very sensitive area.

Three approaches to child support enforcement have been suggested. First, efforts should continue to improve creatively on the traditional child support collection system through methods of proving paternity, locating defaulters, discovering and collecting assets, and otherwise forcing payments until majority or beyond. Second, notions of child support collection should expand beyond mere sanctions to include changes in any aspect of family law and procedure which are found to impact upon the payment of child support. Third, the traditional long-term view of child support should move toward a short-term perspective because of the reality of serial family units, the potential for economic gender parity, the psychological disengagement of most children and their noncustodial parent, and the desirability of less long-term government involvement in the lives of the multitude.

The first approach, continuing to create sanctions, represents current thinking. The rethinking called for by this Article requires that this approach be set aside so that the other approaches can be seriously considered.

¹⁰⁴ The question arises, "Who is the primary caretaker in today's society?" At the Family Law Section Meeting of the January 1987 AALS Conference, Professor Robert Levy of the University of Minnesota Law School posed that question. His answer: "Child Care!" How does that controversial fact fit into the "Best Interests of the Child" equation daily facing our courts everywhere?

The second approach, expanding collection efforts beyond direct sanctions, has already begun as a result of the research which discovered a relationship between some custody and visitation orders and the payment of child support. Despite the limitations of our modest study we also found a positive relationship between joint physical custody as well as liberal visitation and a comparatively better level of child support compliance. In addition, we found the presence of marital agreements more often in situations of support compliance than in situations of default. At the very least, this data relevant to an expansion approach should encourage others: (1) to engage in further investigation of the aforementioned process relationships and search for additional ones; (2) to add to our still very limited store of knowledge from payees and their lawyers concerning their perceived reasons for nonpayment; and (3) to gather from all the other participants (payees and children) as much data as possible about the after-divorce dynamics arguably relevant to the payment of support.¹⁰⁵

The final approach, changing to transitional child support, requires economic, moral, and political changes as preconditions. Nonetheless, its bottom line question — the extent of desirable governmental intrusion into the lives of its citizens — is one which cuts broadly across many areas of the law. Any governmental intrusion is felt most in the primarily private interpersonal relationships of family law and particularly when the government applies the so-called best interests of the child test. Thus, at the very least, this fundamental jurisprudential question should be considered now in the child support context while we await the preconditions for change to occur from long-term to short-term child support.

Clearly, we think more sanctions will be forthcoming — even though we may run out of creativity (and significantly more collection success) in applying this first approach. Almost as clearly, we believe collection expansion by the second approach will find its way into law and practice as more research and ideas are presented. Will this combination of the first two approaches to child support enforcement simply be an intermediate stage before the coming of the Chambers' transitional support idea? Most clearly of all, we haven't the foggiest idea! However, given the changes in the last quarter century in technology, morality, and family law, we certainly wouldn't bet against short-term child support in the twenty-first century.

¹⁰⁵ There are two extensive, interesting studies in progress: (1) Mnookin, Powlishta, Maccoby, and Depner at Stanford University; and (2) Ilfeld and Steward at the University of California, Davis.