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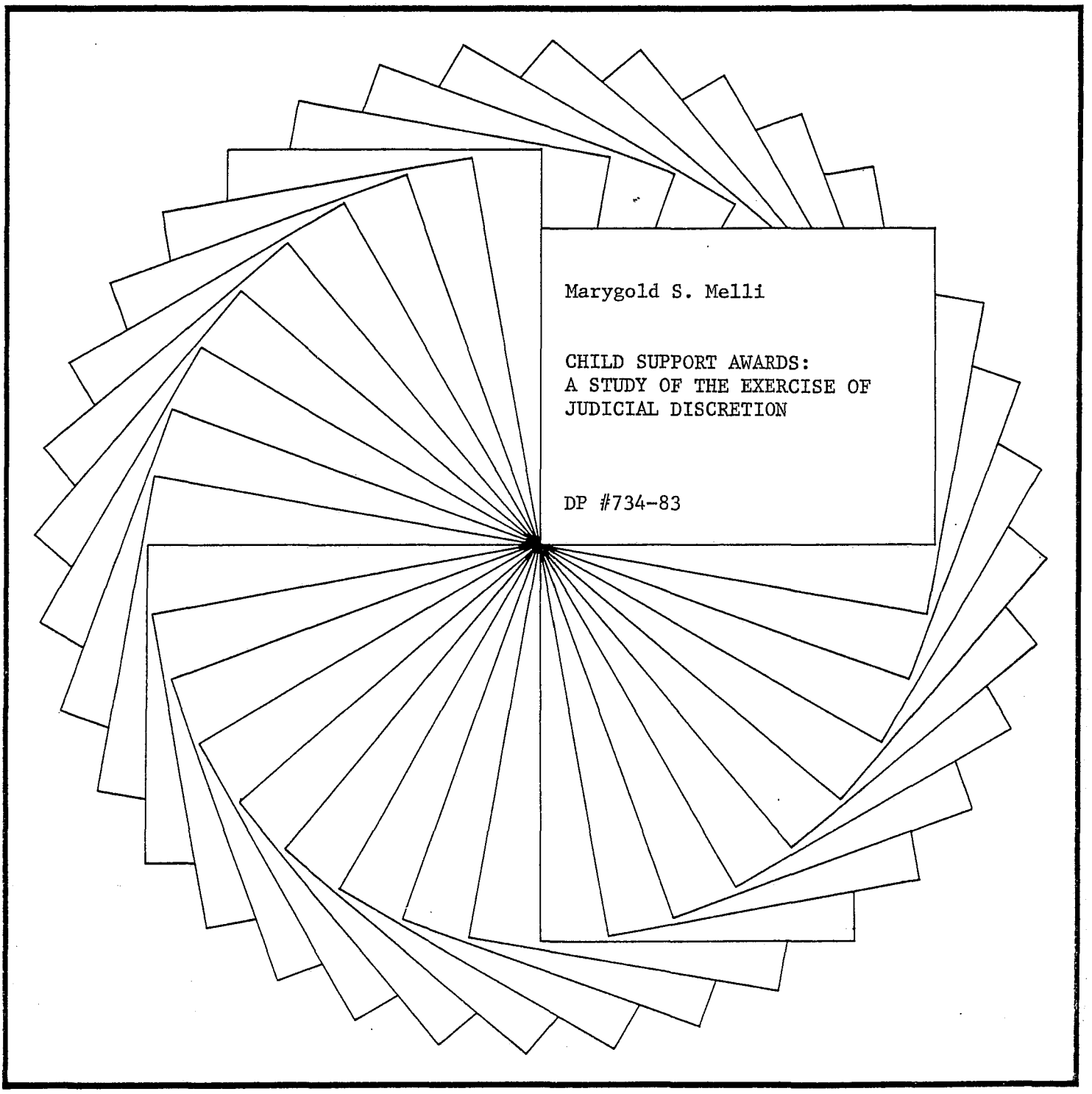

Marygold S. Melli

CHILD SUPPORT AWARDS:
A STUDY OF THE EXERCISE OF
JUDICIAL DISCRETION

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Child Support Awards: A Study of the Exercise of Judicial Discretion

Marygold S. Melli

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ABSTRACT

Currently, there is much concern about the need to control judicial discretion in awarding child support. This is a report of a pilot study which examined various factors thought to influence the amount of child support awards to determine the extent to which they did in fact affect the amount of the award.

The major findings of the study were that:

(1) The exercise of discretion by the judge in the cases studied appeared limited because the overwhelming number of the cases were based on a stipulation of the parties; and

(2) To the extent that the courts exercised discretion they appeared to have been influenced mainly by one factor, the income of the supporting parent.

CHILD SUPPORT AWARDS: A STUDY OF THE EXERCISE OF JUDICIAL DISCRETION

INTRODUCTION

This paper examines some issues related to the exercise of discretion by trial courts in awarding child support in divorce proceedings. Child support is the money ordered by the court to be paid by a noncustodial parent for the support of the child, usually in the care of the other parent. The award of child support, like many decisions in the family law system, particularly those relating to children, is in the discretion of the trial court.

The family law system is a particularly good area at this time for studying the exercise of judicial discretion. Historically, it has been a highly discretionary system, with actions taken by the court "in the best interest of the child" or as it "deemed just and reasonable." Recently, however, there has been much concern about the need for more determinative standards to limit this judicial discretion. For example, in the area of child support there has been a proliferation of legislative and administrative guidelines setting forth the factors to be considered by the court in setting the amount of the award.[1] Opportunities exist, therefore, to assess the effect of certain kinds of guidelines in controlling discretion.

The pilot study reported here is part of such an assessment attempt. It examines support awards made in 1977 in Dane County, Wisconsin, under a statute which authorized the court to set an amount of child support it considered "just and reasonable."[2] In 1978, a major reform of the Wisconsin divorce law was enacted, abolishing fault grounds and spelling out factors to be considered by the divorce court in exercising its discretion in the divorce process, including setting the amount of child

support.[3] A study now being conducted examines support awards granted after the adoption of the statutory guidelines.[4]

The Law of Child Support in Wisconsin at the Time of the Study

In 1977, at the time of the study, the Wisconsin statutes authorized the court to "grant such allowance to be paid by either or both parties for the support, maintenance and education of the minor children committed to the other party's care and custody as it deems just and reasonable."[5] The determination of the amount of child support award was, therefore, within the discretion of the trial court with no legislative guidance as to amount or as to the factors to be included in determining whether an amount is "just and reasonable."

Absent any legislative guides, a search was made of the appellate court case law in Wisconsin to determine what direction the trial court received from that source. This search consisted of checking all cases listed in West's Wisconsin Digest and Callaghan's Wisconsin Digest[6] under the relevant headings. It turned up only 28 cases decided by the end of 1977 (the year in which the divorces in the study were granted) in which the Wisconsin Supreme Court had dealt with the issue of the amount of the child support awarded.

The Wisconsin Supreme Court has used two different, but related, standards in reviewing decisions within the discretion of the trial court. Under one standard the trial court's discretion will not be disturbed unless against the great weight and clear preponderance of the evidence.[7] Under the other, a discretionary decision will be overturned only on a showing that the trial court abused its discretion. According to the cases, an abuse of discretion in an award of child support may be found in one of two situations: (1) The trial court made a mistake or error with respect to the facts on which its decision is

based. This includes a failure of the trial court to take testimony or to make proper findings of fact.[8] (2) The award, under the circumstances, is excessive or inadequate. In determining whether the amount of an award is excessive or inadequate the supreme court has said that it looks to whether the trial court considered the needs of the child and the ability of the noncustodial parent to pay. When it appears that the trial court considered the relevant factors, the appellate court will not find the amount of the award excessive or inadequate.[9]

As can be seen from this summary of the standard that the appellate court applies in reviewing child support awards, the decision at the trial court level is vitally important because it should be the final one in most cases. The standard of review is weighted in favor of upholding the trial judge. The cases we found confirmed that, in fact, great deference was accorded the decision of the trial court in matters of child support. In 21 of the 28 cases, or 75 percent, the Wisconsin Supreme Court affirmed the trial court decision. Little helpful information on the standard to be followed appeared in the seven cases in which the supreme court reversed the amount of the support awarded by the trial court.[10] In none did the court discuss the needs of the children.

One specific piece of information does emerge. In the two cases in which the supporting parent's income was given, the percentage of that parent's income allotted to child support by the supreme court was very similar: 21 percent in one and 20.7 percent in the other.[11]

Turning to the 21 cases in which the Wisconsin Supreme Court affirmed the trial court decision as to the amount of the support award,[12] there is very little discussion of the standards that supposedly were correctly applied. The standard that the court sometimes referred to was that the trial court had to consider the needs of the child and the ability of the

noncustodial parent to pay. An analysis of the 21 cases suggests that the beginning point is the ability of the supporting parent to pay. It seemed to underlie all other considerations.

On the other hand, there is very little detailed discussion of the needs of the children. This may be partially the function of lack of information in the record. In several cases, the supreme court lamented the lack of information: "The record is almost barren of testimony or other proof as to the financial needs of the . . . children. . . ."[13]

The Wisconsin Courts

At the time of the study, the Wisconsin court system consisted of a two-level trial court, a circuit court and a county court.[14] The county court was, as its name implies, a court whose geographical district was contiguous with the boundaries of the county. The circuit court, on the other hand, covered a district that might include several counties. However, for Dane County, the circuit court district was the county.

The two courts, circuit and county, had concurrent jurisdiction for all practical purposes. In other words, the cases involved in this study could have been handled in either the county or the circuit court. However, as a matter of court operation, there was some degree of specialization in the courts, and divorces were handled in the county court by judges who were assigned to that duty by the board of judges made up of all the judges in the county.

The cases in this study were handled by a total of ten judges: six of them were judges who sat in branches of the county court to which divorces were assigned; the other four were judges assigned to help in periods of vacation or illness of the sitting judges or to ease a case overload. Three of these judges were from other counties; the fourth was

a retired circuit judge from Dane County who sat as a "reserve" judge.

In Wisconsin, in divorce matters, the family court commissioner is an integral part of the court system. One of the duties of that office is to act in a judicial capacity in temporarily determining disputes between the parties to a divorce after a divorce action has been started but before the final court decision is made. The statutes authorize either the court or the family court commissioner to make temporary orders concerning custody or support of children, spouse support, counsel fees, use of property of the parties, and personal relationships of the parties.

At the time of this study, the office of family court commissioner in Dane County was staffed by a commissioner and three assistants, all four of them lawyers, employed under civil service standards.

THE STUDY

The Sample

The sample used in the study consisted of 203 divorce cases that had proceeded to final judgment in Dane County, Wisconsin, in 1977. Data collection was limited to information contained in court files. The files examined contained a number of different items that varied from case to case. In all files, a complaint and a final judgment were found. In practically all files, a document entitled "Findings of Fact and Conclusions of Law," drafted by counsel for the winning party, was present. A family court commissioner's questionnaire, which sought information on the assets, income, and economic needs of the parties, was present in many of the files. Depending on the activity in the case, there might be a temporary order that set support, awarded custody, or dealt with other matters--for example, who should live in the family home--pending the final determination of the divorce. If the custodial

parent had applied for AFDC, there were documents related to that activity, such as an assignment to the state of the parent's right to receive child support. If the supporting parent had failed to comply with the support order, there were documents on the enforcement actions taken. In addition, notes taken by the family court commissioner at hearings held by that officer on requests for temporary orders were in some files as well as notes on telephone calls, letters, and other miscellaneous items.

A second-year law student and a recent law graduate spent two months sorting through the information contained in these files and recording the data.[15]

Some Characteristics of the Divorcing Families in the Sample

Although much of the information gathered about the 203 families in the sample will be discussed in examining the factors that appear to influence the amount of child support awarded, a brief overall view of the families that made up the sample may be instructive. Because this study deals with one of the economic aspects of divorce, the award of child support, most of the information we gathered related to economic characteristics of the families involved. However, we did include some other facts which may be of interest to anyone attempting to obtain a fuller picture of the families of divorce.

Several characteristics of the families were undoubtedly influenced by the fact that the sample was limited to families with children under the age of eighteen, i.e., minor children for whom the parents have a duty of support.

The couples involved in the study were relatively young. The median age of the plaintiffs was 31.4 and of defendants 32.7. The marriages were of considerable length: the mean length of marriages was 11.6

years, ranging from one to 33 years. Slightly over half of the couples, 50.2 percent, had been married ten years or more. This was considerably higher than the statewide percentage for all divorces in Wisconsin in 1977, which shows that only 38.3 percent of the couples divorced had been married ten years or more at the time of divorce.[16]

The number of minor children ranged up to six, but in 81 families, or 39.9 percent, there was only one child; in another 81 families, there were two children; 32 families had three children; eight had four children; and only one had six.

The children were young. In almost half the cases (49.7 percent) the youngest child was under school age (i.e., under six years old). The median age of the eldest child in each family was 8.9 years.

The families were healthy--at least to the extent that could be determined from the court files. In only four cases were health problems noted for the children. In only one case was a major health problem indicated for the plaintiff, and in four cases for the defendant.

The families were local. In well over half the cases (149) both parties were residents of Dane County. In fact, only three plaintiffs and 17 defendants resided outside Wisconsin.

Assets of the families were limited. In 95 cases, they did not own a home. In 27 cases, the family did not own a car. In 46 cases, the family had no assets other than a house or car.

Some General Facts on the Process

Looking at some characteristics of the process itself, we noted that the plaintiffs were overwhelmingly women--in 169 or 83 percent of the cases. This was higher than the statewide percentage of women plaintiffs in divorce actions, which was about 75 percent in 1977.[17]

A temporary order, dealing with child support pending the resolution

of the divorce, was entered in 114 of the cases. In 169 of the 203 cases, the final child support award was based on a stipulation, a written agreement of the parties filed with court.

In 40 cases, enforcement activity had taken place. This should not be taken for a relatively low level (slightly less than 20 percent) of enforcement activity because the files were examined in the summer of 1978 and none of the divorces had been granted more than one and one-half years earlier. Studies show the nonpayment of child support, which should trigger enforcement activity, increases as the length of time after divorce increases.[18]

The most common type of enforcement involved a judicial citation for contempt for nonpayment, to the parent ordered to pay support.[19] In 33 of the cases this was the type of enforcement pursued.

Custody

One of the important decisions made in the course of a divorce is how the custody of the minor children of the parties will be handled. Custody is important in a study of child support because it is the contributions of the noncustodial parent that are the subject of study, although the custodial parent clearly provides support also--in many cases, the major share of that support.

In the overwhelming number of cases custody of the children is awarded to the mother. This preference for the mother custodian has been attributed to a variety of causes, including the fact that traditionally the law has given preference, either by statute or by case law, to the mother at least when the children are young.[20] However, as in so many areas of family law, this maternal preference in custody is changing. At the time this study of Dane County was made, the Wisconsin statute required that the custody award be sex neutral.[21] Notwithstanding the

statute, the award of custody in the cases in the study followed the traditional pattern: in 184 of the 203 cases, custody went to the mother. In eleven cases, custody was awarded to the father. In two cases, the parents shared the custody of the children, i.e., the children spent time with both parents. In four cases, the custody was split between the parents, i.e., each parent received some of the children as custodial parent. In one case, the custody was split between the parents and an agency, with the mother receiving custody of one, the father of two, and the agency of a fourth. In still another case, neither parent received custody; custody of the child was awarded to an agency.

ADEQUACY OF THE CHILD SUPPORT AWARDS

Cases in Which No Child Support Was Awarded

In 23 of the cases studied (11.3 percent), no child support was ordered by the court. Those cases fell into two groups: (a) the court did not consider the issue of support or (b) the court had considered support and decided against awarding it.

There were eight cases in which the court did not consider the issue of support. In four cases, a support award could not be made because the noncustodial parent was outside the state and, apparently, no attempt was made to obtain jurisdiction over him or her for a support order.[22] In one case, the court obtained jurisdiction over the noncustodial father at the beginning of the action, but he disappeared during the divorce process. In two cases, the mother had taken the children and had left the state. She did not participate in the divorce proceeding, and therefore no request was made for a support order. In one case, the husband was found not to be the father of the child.

Fifteen cases were in the other group of cases, in which the court

considered the issue of child support but decided not to award it. It appears that support was not ordered in some cases because the noncustodial parent had little or no income. This group included noncustodial parents who were unemployed, ill, or disabled. In six of these cases the court kept open the issue of child support pending a later order when the parent would be employed.

However, in three cases the court may have concluded that the resources of the custodial parent were sufficient so that, given the circumstances of the noncustodial parent, it was not necessary to look to that parent for support, and, therefore, the issue of support was not held open. For example, in one case the father was receiving disability payments and the custodial mother's net income was $1,050 per month. In another case the custodial father had substantial assets (his net worth, according to information in the file, was almost $1,600,000) and a monthly gross income of $1,667, and the mother had no employment income.

One further item of interest involves the gender of the parent not ordered to pay child support. In 11 of the 23 cases, or about half of the cases in which no child support was ordered, the father was given custody of the child or children. These were the 11 cases in which custody was awarded to the father; child support was not ordered in any case in which the father obtained custody. We tried to determine whether the failure to order child support when the father obtained custody was a gender-based discrimination against fathers, i.e., noncustodial mothers were not seen by the system as sources of child support. A closer look at the cases yielded perhaps a little evidence of reluctance to see mothers as sources of support. Of the 11 cases, the mother was out of the state in two cases, and apparently no attempt was made to obtain jurisdiction over her for a support order. In five cases the mother had

no employment income, although in one case she received a substantial property settlement award of $155,000 payable in semiannual installments over more than ten years. However, in only one of the five cases did the file indicate that the issue of child support was left open pending a later order when the mother would be employed.

In four of the 11 cases in which custody was awarded to the father, the mother had some income, but it was minimal: $107 per month, $200 per month, $350 per month, $480 per month. However, in the case of the mother whose income was $480 per month, the income of the custodial father was $500 per month, only $20 per month more than the mother.

Adequacy of Support Awards That Were Granted

How did the children of absent parents who paid child support fare in this study of support?

We began by looking at the mean monthly child support awarded from two perspectives. In one computation, we included all the cases in which the court had considered the issue of child support. This meant that our figures were based on 195 cases because eight cases in which the court did not consider awarding child support were excluded. Using this base, the mean monthly child support awarded was $206.

The other computation excluded all cases in which no child support award was made, i.e., 23 cases. Based on this group, the mean monthly child support award was $224.

We recognized, however, that the adequacy of a child support award can be assessed only in the context of the custodial family. Therefore, we analyzed our data to determine the income of the custodial parent.

To do this, we first excluded all cases in which AFDC was being received and then considered both employment income and other income reported by the custodial parent. The result was a mean net income of

$474 for non-AFDC custodial parents. Adding this amount to the mean child support award of $224 resulted in a mean monthly net income of $698 for the custodial family.

To obtain some idea of the adequacy of this income, we looked at several things. First, we tried to find out the extent to which the standard of living of the children in the sample remained unchanged after divorce. However, we had no direct information on the incomes of the families in the sample because our data dealt with the income of the parties at divorce. We, therefore, constructed a mean monthly net family income for the families by adding together the income of both parents as reported to the court at the time of divorce. We did this because we know that in many families both parents worked.[23] The mean family net income as determined by this method of computation was $1,116 per family per month. Using this information, we estimated that the custodial unit, now missing one member, the absent parent, had a net income of approximately 60 percent of that of the family when it was intact. For the custodial unit of two or more persons, an income at 60% of that prior to divorce resulted in a reduced standard of living in most cases.

We also wanted to determine the relative situation of the custodial unit and the supporting parent. Using the data from the files, we estimated the net income of supporting parents at $884 per month. Subtracting the mean child support award of $224 from this amount left the supporting parent with a monthly net income of $660 as compared with the $698 for the rest of the family. The single supporting parent appears to be in better economic circumstances than the custodial unit of a parent and the children.[24]

FACTORS AFFECTING THE AMOUNT OF CHILD SUPPORT

At the outset of the data collection on child support awards, we tried to identify all the factors we thought might be related to the amount of award set. At the time, the literature on child support awards was very sparse, but the studies available were reviewed.[25] Preliminary interviews were conducted with some attorneys who practice in the family law area, family court commissioners, and judges. Finally, personnel of the state Child Support Enforcement Bureau were extensively involved in the fashioning of the structure of the data collection instrument.

Thirteen factors were identified as possibly affecting the amount of child support awarded. We divided these 13 factors into two groups.

The first group consisted of factors we thought ought rationally to affect the amount of child support. These we called case-related determinants.

1. Income of the supporting parent.
2. Number of children supported.
3. Age of the children.
4. Income of the custodial parent.
5. Whether the custodial parent received alimony or the family home.
6. Health problems of the children.
7. Health problems of the parents.

The second group consisted of factors related to the judicial system, not the circumstances of the parties. In our view, these factors rationally should not make any difference in the amount of the child support award. These we called system determinants.

8. Whether the custodial family was receiving Aid to Families with Dependent Children.

9. Whether the order was based on a stipulation of the parties.

10. If temporary support was ordered, the amount of temporary support.

11. Whether the parent ordered to pay support was represented by counsel.

12. Who counsel was in the case.

13. Who the judge was who ordered the support award.

The remainder of this paper is a description of the relationship of the amount of the child support award to these factors. The discussion follows the same grouping as outlined above, but we have combined several factors together for purposes of discussion. Additionally, in the consideration of the case related determinants, we have not discussed factors (6) and (7) because health problems were noted for children in only four cases and for parents in only five cases.

Income of the Supporting Parent

How important a role does the supporter's income play in setting the amount of child support?

Our review of the available literature and the case law and our interviews with practitioners in the field of child support indicated that it is probably the most important consideration: it appears to be the base on which the decision on amount is built.[26]

In obtaining information on the income of the supporting parent, the first problem was to determine who should be considered a supporting parent. All noncustodial parents are, of course, potentially supporting parents, i.e., the court may order them to pay support. However, in eight cases in the sample the court did not consider the issue of support. Taking these cases out left a sample of 195 cases. These are the cases on which our information on supporting parents is based.

The information in the files on the income of the parties was quite

sketchy. In 18 cases there was no information at all. Furthermore, in 69 of 168 cases where employment income was reported, only the gross amount, not the net amount, was given. This created an obvious problem in comparing incomes. Therefore, we decided to try to translate all incomes into net incomes by taking into account deductions that are universally made--social security and federal and state income tax withholding.

An approximate amount for these items was computed in the following manner. The social security (Federal Insurance Contribution Act or FICA) tax was determined by multiplying the gross monthly income by the 1977 FICA rate of 5.85 percent. Because no FICA taxes were deducted in 1977 on yearly wages exceeding $16,500, ($1,375 per month) the maximum monthly FICA for those few cases with monthly incomes over $1,375 was determined by multiplying $1,375 by 5.85 percent for a monthly deduction of $80.44.

To determine federal and state withholding, the standard 1977 federal and state monthly-payroll-period tax tables were used. Wives were assumed to have claimed one withholding allowance. Husbands were assumed to have claimed one plus the number of their minor children as withholding allowances. The FICA and federal and state withholding taxes were then added, and this total subtracted from gross monthly income, leaving an estimated net monthly income.

The net employment income of supporting parents (considering both those who reported net incomes and those for whom net incomes had to be estimated) ranged from 0 to $4,800 per month with a mean of $845.

Twenty-two supporting parents reported other income. When other income was added to the employment income of supporting parents, the mean was increased to $884.

To illustrate the relationship between the income of the supporting

parent and the amount of child support awarded, the supporting parents in the sample were divided into four groups by the amount of their net income. As can be seen in Table 1, these groups ranged from parents with $650 or less net income per month to those with over $1,100.

Table 1

Relationship of Income of Supporting Parent to Size of Award

	Net Income of Supporting Parent			
	0-$650	$651-$800	$801-$1,100	$1,101+
Mean Monthly Child Support Award	$125	$213	$236	$416
Percentage of Income	25.9%	29.5%	25.3%	26.6%

It is clear from Table 1 that the amount of child support increases in relation to the income of the supporting parent. The mean child support award where the net income of the supporting parent is $650 per month or less is $125 as compared with a mean award of $416 per month when the net income of the supporting parent is more than $1,100 per month.

In addition to looking at the relation of the supporter's income to the amount of child support, we were interested in determining the percentage of the supporter's income that was taken for child support. Excluding cases in which no child support award was made, we looked at the percentage of income allotted for child support. The results are also shown in Table 1. The amount of the supporter's income allocated to child support by the support award is in the range of 25 percent-30 percent (25.3 percent-29.5 percent) regardless of the amount of the income.

The Number and Age of Children

Two characteristics of the children themselves were thought to affect

the amount of the child support award: the number of children in the supported unit and the age of those children.

Although estimates of the cost of raising children vary, it is generally agreed that the cost of raising two children is more than the cost of raising one. There is also good evidence that the cost of raising two children is not double the amount of raising one, but again estimates vary on how much more it costs to raise two children.[27]

We were interested in finding out how much child support awards increased with the number of children. Because we knew the amount of child support is affected by the income of the supporting parent we looked at the relation of the amount of the support award, the income of the supporting parent, and the number of children. The results of that comparison are shown in Table 2. That table indicates increasing amounts of child support as additional children are supported.

Table 2

Relationship of Child Support Award to Number of Children

	Net Income of Supporting Parent			
Support Award	0-$650	$651-$800	$801-$1,100	$1,101+
For 1 Child	$107	$158	$191	$283
For 2 Children	140	263	248	350
For 3+ Children	154	90[a]	350	556
Mean	125	213	236	416

[a] There was only one case in this income range with three or more children.

Table 3 shows the relation between the number of children supported and the amount of the supporting parent's net income allocated to child support. Generally, a higher percentage of income is taken for child support for more than one child, but as Table 3 indicates, the additional

percentage is usually small.

Table 3

Proportional Increase in Child Support for Additional Children

	Net Income of Supporting Parent			
No. of Children	0-$650	$651-$800	$801-$1,100	$1,101+
1	25.3%	22.5%	20.9%	20.8%
2+	26.8	34.3	27.9	28.2
Mean	25.9	29.5	25.3	26.6

The cost of raising children may be affected by the age of the children for two discrete reasons having opposite effects. First, studies of the costs of raising children indicate that the cost of raising a child increases with the age of the child. Second, the older the child, the more feasible it is for the custodial parent to work full time or part time.

To obtain some idea of whether the amount of the award is affected by the age of the child, we divided the families into four groups by the age of the youngest child: 5 years and younger, 6-11 years, 12-14 years, and 15-17 years. These age groups roughly correspond with preschool, elementary school, middle school, and high school, which are the school groupings used in the largest city in the jurisdiction studied. The largest number of youngest children, 96, were in the 5 and under group; and the next largest, 65, were in the 6-11 year age group.

Looking at these children from the cost-of-raising-children perspective, those in the 5 and younger category would receive the smallest child support award and those in the 15-17 year group, who were the oldest, would require the largest child support award. Viewing the group of children in terms of the custodial parent's ability to work, we hypothesized that a custodial parent of a child 5 years old or younger

probably would not work outside the home. If the child was in elementary or middle school (i.e., ages 6 through 14), the custodial parent might be employed part time. If the child was in high school, the custodial parent might work full time.

As Table 4 indicates, the data bore out both of these theories to an extent. The lowest amount of child support awarded, $162, involved families where the youngest child was in high school, thus reinforcing the theory that the custodial parent could work full time at this point. The next lowest child support award was for families where the youngest child was a preschooler, which could be said to reflect the lower cost of preschool children, although it might contradict the assumption that these custodial parents were not employed outside the home.

Table 4

Relationship Between Age of Child and Size of Award

	Age of Child			
	1-5	6-11	12-14	15-17
Mean Award[a]	$180	$250	$231	$162
Number of Cases[b]	96	64	17	15

[a] These amounts include cases where no support was awarded.

[b] In three cases, age of children was not available in the court records examined.

Income of the Custodial Parent

Although we speak of the noncustodial parent as the supporting parent and the child support award is made by the court against that parent, the literature suggests that the major support for children of divorce is provided by the custodial parent.[28] This circumstance is usually seen

as the result of two facts: nonpayment of support by noncustodial parents and inadequate amounts of child support awarded. Although the problem of nonpayment of support is beyond the scope of this study, the adequacy of the child support award is a central focus. We wondered if the amount of the support award might actually reflect a consideration by the court of the custodial parent's ability to support the child. In other words, was the amount of the child support awards affected by the custodial parent's income?

The income of the custodial parent was known in 183 of the cases. To ascertain whether the amount of child support was affected by the income of the custodial parent we divided the cases into four equal groups by amount of income, with the results shown in Table 5. As Table 5 illustrates, the child support award was considerably lower in the case of the highest income custodial parents than it was in the case of the lowest income group of custodial parents. Therefore, it appears that the income of the custodial parent affects the amount of the child support award.

Table 5

Relationship of Custodial Parent's Income to Child Support Award

Custodial Parent's Income	Child Support Award per Month	Number of Cases
Low	$292	46
Medium-Low	159	44
Medium-High	201	48
High	150	45

However, one caveat should be noted. Further checking revealed that the increase in child support related to the decreasing custodial parent income might really be the result of increased income by the supporting parent. When we compared supporting parent's income with that of the

custodial parent we found that as supporting parent income increased, custodial parent income decreased. In other words, supporting parents with high incomes tended to have ex-spouses with no income or lower incomes at the time of divorce. Although we had no information on the income of the divorcing parents prior to the divorce, we hypothesized that higher income men had wives who did not work during marriage. At the time of the marriage dissolution they were either still unemployed or were employed at a low rate because of their earlier absence from the job market.

Relationship of Child Support to Alimony and Property Division

The subject of this study, child support, is only one of the economic problems that must be handled in divorce. When a divorce is granted, in addition to provision for support of any children of the marriage, the law must deal with two other economic problems caused by the breakup of the family unit: the property acquired by the parties during the marriage must be divided, and provision must be made, when necessary, for support for a dependent spouse, usually a wife, who has not been employed in the marketplace and who has no skills by which to support herself.

In theory, the law deals with each of these problems separately. If there are statutory provisions setting standards for the award, different standards are prescribed for each area.[29] The enforcement devices available differ: the collection of spouse support and child support usually may be enforced by contempt proceedings, but a property division may not.[30]

The bankruptcy laws treat the items differently: child support and spouse support are not dischargeable in bankruptcy; amounts due under a property division are.

Tax treatment is different: a property division is seen as a

settlement between the parties of marital property rights and has no income tax or gift tax consequences.[31] Periodic payments made for the support of a spouse are treated as income to that spouse and are deductible by the supporting spouse.[32] Amounts set for child support, on the other hand, are not taxable as income to the custodial parent and are not deductible by the supporting parent.[33] One of the parents is, of course, entitled to claim the child as a dependent.[34]

Operationally, however, the courts, in some cases the tax laws, and most of all, the parties themselves often view the three legally separate entities of property division, spouse support, and child support as an economic package to provide support to dependent family members although the original unit is now broken.[35] This attitude is in keeping with the way in which an intact family operates. Income is earned and expended for "the family" with little earmarking of specific amounts for the parents or the children. Assets acquired are usually seen as part of the total family support picture.

The fact that the three sources of income are interdependent poses problems for a study of child support alone. To obtain a complete picture of child support, information must be obtained on property division and alimony awards also.

The purpose of a property division on divorce is influenced by the laws of the jurisdiction on marital property. In the United States there are two major matrimonial property regimes, known as community property and separate property.

Separate property is the most common marital property regime in the United States. Wisconsin, where this study was conducted, is a separate property state. Under this type of ownership, property acquired during the marriage is the property of the party who acquires it, whether that

acquisition is made with funds inherited, obtained by gift, owned prior to marriage, or earned during the marriage.

On divorce in Wisconsin, the role of the court is to divide the separate property of the parties equitably. At the time of the study, the Wisconsin Supreme Court had developed a number of guidelines for the trial courts to observe in making an equitable division of property. Although these factors relate primarily to the division of the assets on the basis of the contribution of the parties to the accumulation of assets during the marriage, the factors also included the ability of the parties to support themselves and responsibility for the support of children.[36] Therefore, it might be expected that the property division would have some effect on the amount of child support awarded.

Once it was determined that, under the law, one might expect to find that the property division affected the amount of child support awarded, the next step was to examine (1) the amount of assets that the parties had and (2) the relationship between the way in which the property was divided and the amount of child support.

Property Division. The most striking thing about the data on assets was the lack of them. For most of us, our home is our major holding. This was true here also; but in 95 of the 195 cases in which the court had jurisdiction to determine support, no home was owned. In fact, in 60 of the cases, there were no assets other than household belongings.

In many of the 100 cases in which the parties owned a home, the court had little information on the value of that asset. In only 37 cases was the information in the file sufficient to enable the researcher (and presumably the court) to determine the value of the equity of the parties in the home. In those 37 cases, the equity of the parties in the home ranged from $1,000 to $93,000, with the mean being $10,000.

It was thought that in American society, particularly in the small midwestern city where the study was conducted, ownership of a car would be universal. However, in 27 cases, no car was owned. Again information on the value was missing in most cases. In only 69 cases was a value placed on the automobile, and for those cases the mean value was $2,156.

In 46 cases there were no assets such as savings accounts, stocks, or other holdings. Only three families listed assets above $300,000.

The relationship between the way in which property is divided and the amount of child support awarded is complex. At least two aspects of a property division might be found to affect the child support: first, the proportion into which it is divided (i.e., was it 50-50 or 30-70) and second, the kind of property given to the custodial parent.

Because values were not given in the court files for much of the property owned by the parties, it was not feasible to look at the first aspect, although what evidence we could glean from the files indicated that the courts in Dane County divided the property generally on approximately a 50-50 basis. As to the second, an examination of which party received the family home seemed most relevant. A common assumption in divorce is that the family home will be awarded to the custodial parent if possible.

Information on the 100 cases in which a home was owned is set forth in Table 6. The home was awarded to the custodial parent in 52 of those cases.

Table 6

Party Receiving Family Home

Award of Home	Number of Cases	Mean Child Support Award
Custodial Parent	52	$277
Split Between Parents	41	239
Supporting Parent	7	201

What effect, if any, did award of the family home have on the amount of child support? One hypothesis of the study was that the award of the home to the custodial parent would reduce the amount of child support because the cost of housing would be less. However, this did not prove to be the case. In fact, as Table 6 shows, awards were higher in those cases. The mean child support award in cases where the custodial parent received the home was $277.

After a closer look at the cases, it appeared that the higher awards probably resulted because the homes were not paid for, and keeping the home was a more expensive way of providing housing. Therefore, on divorce, the home can be retained only in those cases where the child support paid by the supporting parent or, perhaps more important, the total income of the custodial family (including income of the custodial parent) is sufficient to enable her to continue to pay off the mortgage. This became clearer when the next largest group was examined--the 44 cases in which the home was sold. As table 6 indicates, in those cases the mean child support ordered was $239, $38 less than the mean child support if the custodial parent received the home.

In seven cases, the home was awarded to the noncustodial parent. We tried to determine whether these cases shared some characteristics that

set them apart from the others. We noted, for example, that in six of the seven cases only one child was involved. We noted, also, that the mean child support was considerably lower than in the other cases--$201. Furthermore, all cases were determined by agreement of the parties (i.e., the order was based on a stipulation of the parties). However, none of these factors explained why the parties in dividing the property--probably on a 50-50 basis--chose to give the family home to the noncustodial parent.

Spouse Support. There are two specific reasons why the amount of child support awards might be affected by an alimony award. The first is the law's view of the purpose of alimony. The second is the impact of the tax laws on the way in which alimony and child support are formally awarded.

Alimony has its origin in the recognition that traditional marriage involves a role division between the provider (usually the husband) and the home caretaker (usually the wife). Alimony is a protection the law provides for the partner who agrees to care for the home and, therefore, is dependent on the other spouse for support. When the marriage ends in divorce, alimony provides for a continuation of that support at least until the dependent spouse can become self-supporting. However, the ability of a formerly dependent spouse to become self-supporting may be materially affected because that spouse is also a custodial parent. Consequently, awards of alimony may reflect the fact that support for a child must provide sufficient spouse support to enable the custodial parent to refrain from working or to work part time. Therefore, one might expect alimony to be awarded to a custodial parent.

The second aspect of spouse support that is of importance to a study of child support is the impact of the tax laws on the way in which

alimony and child support are formally awarded. As pointed out earlier, alimony and child support are treated differently for income tax purposes. Because alimony is deductible to the payor (usually the husband) and taxable to the recipient (usually the wife), it is often a tax saving device. In some income brackets, particularly when the wife is not working or has a low income, a husband may be able to pay her a larger total amount if the alimony payments are large and the child support payments are small or perhaps nonexistent. The subsuming of child support in alimony is made possible because the Internal Revenue Code, as interpreted by the courts, does not consider payments as child support unless they are specifically limited to that purpose.[37]

Since the sample in the study involved only divorces of couples with minor children, it might be expected that because of the two reasons outlined above, alimony awards would be frequently made. This was not the case. In only 18 of the cases was there an alimony award.[38]

The single case where alimony was awarded to a noncustodial parent involved a stipulated decree under which the father received custody and the mother, who planned to return to school, was awarded alimony. The agreement stipulated that the alimony was to end when she completed her education.

The alimony awarded ranged from $20 per month to $750, with a mean alimony award of $280, which was higher than the mean child support award of $224. Child support and alimony awards were combined to determine what percentage of the supporter's income was now going to the custodial family. The range here was tremendous--from 16.7 percent to 63.7 percent of the supporter's income after deductions for taxes and social security.

Regarding the seventeen cases in which alimony was awarded to a custodial parent, we looked to see to what extent the two considerations,

discussed earlier, were present: enabling the custodial parent to provide child care and providing alimony in lieu of child support for tax considerations.

The provision of alimony to a custodial parent because the child in that parent's care needs child care may result from a number of circumstances. The presence of preschool age children requiring full-time care may affect the ability of a custodial parent to work and be self-supporting. The number of children requiring care will also affect that ability. However, neither of these factors seemed significantly present here. Only four of the custodial parents receiving alimony had children under the age of 6 (i.e., preschool age). In fact, an equal number, four, had high school age children, age 14 and older. Furthermore, although the four custodial parents with three children and the one with four meant that there was a higher percentage of three- and four-children families in this group than in the sample as a whole, this disproportionate incidence of three- and four-child families in the sample of seventeen families was too few to be considered a serious factor. Also, there were more one-child families in this group than in the sample as a whole. In addition, nine of the 17 custodial mothers reported earned income ranging from $90 to $640 per month. This group with earned income included all but one of four mothers with preschool children.

We investigated one other factor that we thought might possibly be related to the need for the custodial parent to provide child care. In six cases, the alimony awarded was for a limited time--two to five years. We thought this might be a recognition of the need of a custodial parent to remain home with young children. However, none of the mothers with this limited alimony had preschool age children and, therefore, we

concluded that the provision of alimony was based on other considerations.

Although child support was ordered in every case in which alimony was decreed to a custodial parent, the data indicated that tax considerations played a role in determining that a portion of the money to the custodial unit be allocated to spouse support, thus making that payment tax deductible for the supporter.

In the first place, this group of supporters was more affluent than the sample as a whole. The income after tax and social security ranged from $620 to $3,680 per month. The median income was $1,500 and the mean $1,760, almost twice the mean income of the sample as a whole. In these income brackets the supporting parent clearly would prefer to be able to deduct payments to a spouse and children. Also in about a third of the cases the amount allocated to alimony was higher than that given to child support.

However, if the parties wished to take full advantage of the tax deductibility by the payor of the support payments, one might expect to find some cases in which alimony, but not support, was ordered. This was not the case. In all of the cases, child support was also awarded. Of course, child support might be awarded to satisfy concerns of the trial judge about the legality of subsuming child support in spouse support payments. In that case, however, one would expect to find the child support somewhat lower than usual. We found some evidence of this. For example, while the mean percentage of supporting parents' income allocated to child support for all cases where support was ordered was 26.7, the mean percentage for the cases where alimony was also awarded was only 21.9.

Table 7

Alimony and Child Support, by Monthly Income of Supporting Parent

No. of Children	Income of Supporting Parent	Child Support Amt.	Child Support %	Alimony Amt.	Alimony %	Child Support & Alimony Amt.	Child Support & Alimony %	Custodial Parent Income	Total Custodial Unit Income
1	$ 620	$150	24.2	$ 20	3.2	$ 170	27.4	$ 0	$ 170
1	840	70	8.3	70	8.3	140	16.7	420	560
1	880	80	9.0	200	22.7	280	31.8	290	570
1	1,060	340	32.1	180	17.0	520	49.1	460	980
1	1,120	180	16.0	50	4.5	230	20.5	640	870
3	1,140	430	37.7	100	8.8	530	46.5	230	760
1	1,450	420	28.9	500	34.5	920	63.4	0	920
3	1,530	450	29.4	150	9.8	600	39.2	140	740
1	1,590	200	12.5	250	15.7	450	28.3	450	900
2	1,890	250	13.2	750	39.7	1,000	52.9	90	1,090
3	1,960	750	38.2	500	25.5	1,250	63.8	0	1,250
2	2,020	700	34.6	450	22.3	1,150	56.9	0	1,250
3	2,390	860	36.0	300	12.5	1,160	48.5	*	1,160
2	2,450	250	10.2	450	18.4	700	28.6	670	1,370
4	3,170	800	25.2	400	12.6	1,200	37.9	0	1,200
2	3,680	540	14.6	710	19.3	1,250	34.0	0	1,250

Note: In one case, the income of the supporting parent was unknown so, for the purpose of figuring total income for the custodial unit, it was figured as 0.

Some General Observations on the Alimony Award Cases. Table 7 shows the cases in which alimony was awarded a custodial parent by the income of the supporting parent. The alimony awarded ranged from $20 per month to $750, with a mean alimony award of $280. Combining child support and alimony awards to determine the amounts transferred from the supporting parent showed a range of $140 per month to $1,250 per month.

To obtain some idea of the economic status of the custodial unit, we combined the child support, alimony, and custodial parent's income. Although the custodial unit's income increases as the income of the supporting parent does, the increase is clearly due in part to the income of the custodial parent. The courts definitely seem to be taking account of the custodial parent's income in these cases. Furthermore, once a plateau of about $1,250 per month for the custodial unit is reached, the courts do not increase the amount transferred to the custodial unit, although the amount of supporting parent's income increases.

This can be seen strikingly by looking at the seven highest income supporting parents in the table. Their income ranges from $1,890 to $3,680 per year, but the income of the custodial unit (child support plus alimony plus custodial parent income) is only between $1,090 and $1,250.

Custodial Family Receiving Aid to Families of Dependent Children

In 202 of the 203 cases, information in the file indicated whether the custodial parent was receiving Aid to Families with Dependent Children (AFDC). In 56 of the cases, or 27 percent, this support was being received.

The receipt of AFDC was considered a relevant factor in assessing the amount of child support awarded because the state is involved in these cases not only in the collection of the support award, but also in setting the amount the noncustodial parent is ordered to pay. At the

time of the study, the office of the district attorney in the county where the study was conducted had a special unit that dealt with the collection of support for children on AFDC. This unit contained a full-time attorney and a law student who worked part time. Although the major task of the unit was to enforce as vigorously as possible any support awards ordered by the courts, it also reviewed all support awards for persons on the AFDC caseload to determine whether the awards were adequate, given the income of the noncustodial parent. If an award was considered inadequate, the unit would seek redetermination of the amount. The basis for intervention by the office of the district attorney was the assignment to the state by the custodial parent of the support ordered by the court from the noncustodial parent.

The data seem to indicate, however, that the presence of AFDC does not increase the amount of child support awarded. The mean child support awarded where AFDC was involved was $139, well below the mean for all children ($206). However, the mean net income of supporting parents where AFDC payments were being made was also low, well below that of all parents--$503 per month compared with $884 per month for all supporting parents.

We wondered about the influence of the state involvement in the child support award on other parts of the process. We looked, for example, to determine if the presence of AFDC always resulted in some child support award, no matter how small. We found that in six of the cases in which AFDC was involved, no child support award was made. In two cases the father, the potential supporting parent, was either disabled or had a major medical problem. In two cases, the father, the potential supporting parent, had disappeared. In two cases the final custody award was to the father, and the AFDC was provided only during the period of

temporary custody with the mother, pending the granting of the divorce.

Our conclusion was that support had been ordered in all cases where it was reasonable, although we had no way of determining whether this was the result of any particular activity on the part of the Child Support Enforcement Unit.

Agreement by the Parties

Perhaps one of the most significant findings of the pilot study was the confirmation of the common belief that agreement by the parties as to the amount of child support plays a very important role in the operation of the system. Information was available on whether the support order was based on a stipulation in 193 of the 195 cases in which the court considered the issue of child support. In 169 cases, or 87.6 percent, a stipulation was entered into by the parties as to the amount of child support.

One caveat must be observed here: although the parties may enter into an agreement, the decision is that of the court. By statute all stipulations must be approved by the court, and the case law stresses the need for an independent assessment by the court.[39]

Was the amount of child support affected by whether there was a stipulation? To try to get some idea of that relationship, we compared the mean child support award for stipulated cases with that for nonstipulated ones. The mean child support award for the 169 stipulated cases was $212.43; for the nonstipulated ones, it was $160.83. This was clearly a significant difference.

However, we next analyzed the income of the supporting parents to compare stipulated with nonstipulated cases. We found that the mean income of the supporting parent in cases where there was no stipulation was $600 whereas in cases where there was a stipulation, it was $833.

Therefore, although stipulated child support awards were significantly higher than court-made awards, the income of the supporting parents was significantly higher also. Supporting parents with higher incomes were more likely to agree on an amount of child support.

The indication from the data that the overwhelming majority of awards are based on the parties' agreement as to amount indicates a clear need for further study of several items: (1) the mechanism by which the courts assess these agreements; (2) the type of review actually made by the courts of proposed agreements on support; (3) the manner in which the parties handle the negotiation of support; and (4) the explanation, if any, for the difference in the income of supporting parents who stipulate and those who do not.

Order for Temporary Support

The processing of a divorce action may take several months. In the first place, by statute in Wisconsin a divorce action cannot be set for hearing for several months after it is begun.[40] Crowded court calendars may result in even greater delays. Therefore, it is usually necessary to resolve such matters as custody of and support for the children pending the final divorce hearing. As explained earlier,[41] the office of the family court commissioner is authorized to make these temporary orders.

In 116 of the 195 cases (57 percent) there was a temporary order by the family court commissioner. The amount of the temporary support award was considered relevant to the study because it was seen as affecting the final court award for several reasons. Once temporary support is awarded, the parties may find that they can get along on the amount of that award, and the final order may be stipulated at the same amount. Or, even if the parties do not agree, the judge finds that they can get

along on that amount, and the award is set accordingly.

Interviews with the family court commissioners at the time of the study revealed that they felt strongly that their awards did not and should not influence the final award. They pointed out that the temporary awards were made on the basis of limited information, in an informal procedure, with full realization on the part of the decision-maker (the family court commissioner) that the award was for a limited time. On the other hand, the judges who were interviewed pointed to the temporary orders as important factors in their decision-making process.

The importance of the temporary order seemed to be borne out by the data. As illustrated by Table 8, in almost half, 52 of the 116 cases (44.7 percent), the amount of the final child support award was the same as the temporary order. In 28 of the cases (24 percent), the final award was greater than the amount of the temporary order. In 36 cases (31 percent), the final award was less than the temporary order.

Table 8

Comparison of Final Award with Temporary Order

Relation of Child Support Award to Temporary Order	No. of Cases	% of Cases
CS = Temporary order	52	45%
CS > Temporary order	28	24
CS < Temporary order	36	31

The Role of the Attorney

How much difference does a lawyer make in the determination of a support award? The answer is "not much," judging from the data we were able to obtain.

The following is an analysis of our data which shows why the above conclusion was reached. It is broken down by two ways in which we considered that attorney representation may be relevant to a study of child support awards:

1. Were either one or both of the parties not represented by counsel?
2. Who were the attorneys representing the parties?

In both cases, the process (i.e., whether the issues will be litigated or negotiated), as well as the amount of the award, may be affected.

Divorce is one judicial process that the parties may consider handling pro se. In fact, an increasing amount of literature advocates and discusses self-representation in divorce, and the number of agencies and individuals prepared to help persons who wish to represent themselves in a divorce action is increasing.[42] In Dane County, Wisconsin, where this study was conducted, a community law office operated by students from the University of Wisconsin--Madison assisted some members of the community in handling their own divorces without the aid of an attorney of record. However, of the 203 cases in the study, in only one was the divorce obtained by the parties without counsel. The lack of self-representation in these cases may be because the study was limited to divorces in which there were minor children. Many persons involved in advising pro se divorcers do not recommend that course if there are complications such as children.

A much more usual situation in terms of lack of representation involves the failure of the defendant to use counsel.

Ninety-one defendants, in addition to the defendant whose plaintiff spouse was also not represented, did not have an attorney. This means that 45 percent of the defendants did not have counsel in the divorce

proceedings. Looking at these figures, the first question is why so many defendants did not have counsel. Several explanations have been offered. Defendants may not bother to obtain counsel because they feel that counsel for the plaintiff will represent the interests of both parties and obtaining additional counsel is a waste of money; or they may not be sufficiently sophisticated to realize what an attorney might accomplish; or they may not have enough money to afford to employ counsel.

To investigate the question of whether defendants did not seek representation because they could not afford to do so, the income of unrepresented defendants was compared with the income of represented ones. Money did not appear to be the problem. The mean income of represented defendants was $799 per month and that of unrepresented ones was $746.

We also compared the income of represented and unrepresented supporting parents. In this sample, the mean incomes were somewhat higher, but the result was the same--money did not affect the ability to obtain counsel: the mean monthly income of unrepresented supporting parents was $846 compared to $855 for represented ones.

How did the unrepresented defendants fare? In trying to obtain information on this issue, two general areas were explored:

Did the lack of representation for the defendant affect the way in which the matter was handled? For example, when the defendant was not represented by counsel, were the parties more likely to agree on the amount of child support (i.e., to file a stipulation settling the matter either before or at the court hearing)? There are some reasons to think that this might be the case. In the first place, there is the view that attorneys increase the adversariness of the proceeding, so that parties who might agree without lawyers do not do so. In the second place, the

defendant who does not seek counsel may not do so because the parties have agreed on the outcome and the plaintiff uses counsel primarily to aid in the esoteric journey through the court system.

Did the lack of representation for the defendant affect the award in any way? Was an unrepresented defendant more likely to be ordered to pay alimony, to contribute to the cost of the plaintiff's attorney, to pay a higher amount of child support? All of these seem to be logical results of nonrepresentation.

Effect of Nonrepresentation on Process. Most of the literature on the role of attorneys in divorce cases focuses on the issue of whether they increase the amount of adversariness in the process. The evidence, however, is somewhat conflicting. Do attorneys, trained in the adversary process, inevitably increase adversariness? In fact, some researchers have found that the presence of an attorney may bring adversariness to a situation in which agreement had been reached. Other studies, however, have shown that attorneys decrease the amount of adversariness in a divorce by guiding their clients to an agreement. In one study, for example, 76 percent of the cases handled by an attorney resulted in a negotiated settlement as compared with 68.6 percent of the cases where there was no representation.[43]

It may be, of course, that the effect of the attorney on the way in which the case is handled varies according to the personal style of the attorney. Some attorneys may be "advocate" types, who see their roles as litigating the issues, while others may see themselves as "counselors" who help their clients arrive at a negotiated settlement.[44]

Because our study was made of records only, we had no way of assessing the personal style of the attorneys, but the information we gathered does bear out the finding that lawyers seem to decrease the

adversariness of the proceeding, at least to the extent of having more cases finally determined by agreement of the parties. In 96 of the 173 stipulated cases in the study (55.5 percent), both parties had counsel. Looking at the issue slightly differently, 88 percent of the cases in which both parties had counsel were stipulated, as compared with slightly less than 84 percent of those without counsel.

Effect of Nonrepresentation on Award. In dealing with the issue of the effect of representation on the award, we changed the perspective from which we viewed the data; instead of looking at defendants, we looked at supporting parents. Of the 195 supporting parents in the sample, 80 (41 percent) were not represented by counsel.

As stated earlier, it seems logical that the amount of money that a supporting parent would be ordered to pay would be affected by a lack of representation. There is evidence, for example, that supporting parents who are represented by counsel pay lower child support awards.[45] If this is true, it may follow that other economic decisions related to the divorce are affected by the lack of counsel. Therefore, the cases in the study were examined to determine whether unrepresented parties were more likely to be required to pay alimony and attorney fees as well as higher child support awards.

As to the child support award itself, we found, somewhat surprisingly, that whether the parent was represented by counsel did not significantly affect the amount of the child support award. The mean child-support award that unrepresented parents were ordered to pay was $212 or 25 percent of the mean income ($846) of unrepresented supporting parents. The mean child support award that represented parents were ordered to pay was $201 or 23 percent of the $855 mean income of represented supporting parents.

Alimony was awarded in only 18 cases. However, although 41 percent of the supporting parents were not represented by counsel, only four (22 percent) of the parents who were ordered to pay alimony were not represented. Therefore, the award of alimony did not seem to be a function of lack of representation.

The picture on the payment of attorney fees was somewhat similar. Fifty-eight defendants and 11 plaintiffs were ordered to contribute to the attorney fee for their spouse. All 11 plaintiffs had attorneys so we looked at the 58 defendants. Exactly half, 29 of them, were represented by counsel. We then looked at the defendants who were not ordered to contribute to their spouse's attorney fee. Our theory was that a defendant represented by counsel might be less likely to have to pay attorney fees for the other party. The data seem to bear this out. Of the defendants who were not ordered to pay attorney fees for spouses, 58.5 percent were represented by counsel and 41.5 percent were not. Looking at the issue from another perspective, 73.1 percent of the defendants who were represented by counsel were not ordered to pay, while 65.9 percent of those without counsel did not have to pay.

Choice of Counsel. The other factor related to attorney representation that we thought might be relevant to the award of child support is who the particular attorney is. Are attorneys who specialize in a field (i.e., who handle a large volume of cases) more effective than others?

Interestingly, the data on attorneys for the 202 cases in which at least one party was represented by counsel proved not to be helpful on these issues. Taking the 202 cases in which the plaintiff was represented by counsel plus the 111 cases in which the defendant was represented by counsel makes a possible 313 instances of attorney

representation. In this sample, 163 different attorneys were involved. In addition, at least one plaintiff was represented by Dane County Legal Services, a locally funded legal service office for the poor, and in 10 cases a firm name rather than an individual attorney's name was all that was available. Very few of the attorneys appeared in more than one or two cases, and none in as many as a dozen cases. Furthermore, those attorneys who handled a number of cases represented both plaintiffs and defendants in different cases. The only conclusion we could arrive at from this data is that the processing of divorces is clearly spread over a large segment of the bar.

The Role of the Judge

In a discretionary matter such as the setting of the amount of child support, there is often an assumption that different decision-makers will use different standards. Two empirical studies of child support awards bear this out. The Yee study of URESA child support cases in Denver found that "the variation among the orders of the judges involved . . . indicates that the personality, beliefs, and attitude of the particular judge who hears a case have a distinct impact on the outcome of the case."[46] The White and Stone study of 532 cases in Florida found that "the results of the analysis clearly support the hypothesis that . . . there was no consistency among judges. . . ."[47]

The cases in this study were handled by ten different judges. Of these, four handled a sufficient number of cases, from 23 to 47 cases each, to enable us to make some observations about the judges. All four were judges regularly assigned to hear divorce cases.

Table 9

Sizes of Child Support Awards Made by Different Judges

Judge	Median Amount of Monthly Award	Median Income of Supporting Parent	No. of Cases
A	$163	$647	41
B	183	774	23
C	221	787	47
D	245	929	37

As can be seen from Table 9 the median amount of child support awarded differed considerably among the judges, from a low of $163 per month for Judge A to a high of $245 per month for Judge D; the highest median support award was 50% higher than the lowest. It appeared, then, that the amount of the award in our study, like the two earlier ones, was affected by the judge hearing the case.

However, we next looked at the income of the supporting parents in the cases decided by each of the four judges. As Table 9 shows, the median income of supporting parents varied from $647 per month for the lowest to $929 per month for the highest. Judge A, who set the lowest amount of child support, was also dealing with the parents whose income was the lowest. Conversely, Judge D, who set the highest amount of child support, was handling cases where the median income of the supporting parent was the highest.

We concluded that what appeared to be a difference between judges in the amount set for child support was to a large extent a function of the differing incomes of the supporting parents.

CONCLUSIONS

Probably the single most important piece of data from this study is

something we all knew before: judicial decision-making on child support may be a myth. In 87 percent of the cases studied, the support order was based on an agreement by the parties. If we are interested in determining the factors that influence the amount of a child support award we may be searching in the wrong arena if we look only at the judicial process.

This does not mean that the court plays no role in the award decision, since the court must still approve the parties' agreement. The issue now becomes: What kind of review is actually made by the courts of proposed agreements on support. Is it pro forma only? What are the perceptions of the parties as to the need to satisfy the judge?

The central role, however, can now be seen as that of the parties and their lawyers. How is their discretion controlled by "laundry lists" in the statutes of factors to be considered? Perhaps, this type of decision-making responds only to the use of presumptions as to amount or percentage of income or the employment of some kind of formula.

A second significant finding from the data is the dominant role of the income of the supporting parent. In each case analysis of the data suggested that differences in child support awards were attributable to differences in the income of the supporting parent, though the number and ages of the children had some bearing on the size of the award.

One conclusion that might be drawn from this study is that concern about the need to control discretion is exaggerated. With only a very general direction by the legislature to order support which is "just and reasonable" decision-makers have fashioned a reasonably predictable response.[48]

Furthermore, the choice of the income of the supporting parent as the major determinant of child support is one which is supported by those who

have set up guidelines for child support. When arguments for the need for controlling judicial discretion are made they usually demonstrate the inequities of the discretionary system by citing instances of supporting parents with similar incomes paying differing amounts.

A third conclusion that can be drawn from the data is that supporting parents fare better after divorce than their children and the custodial parents. Based on our analysis the income of the supporting parent after deducting child support is about the same as that of the custodial unit. If we assume that the supporting parent has only one person to support (admittedly a tenuous assumption in these days of serial monogamy), that one person is better off than the custodial unit of a parent and one or more children. In addition, the figures on the percentage of income of the supporting parent which goes to child support indicate that the supporting parent retains over 75 percent of income after paying child support. In using the income of the supporting parent as the major determinant of the amount of child support, the present system seems to have ignored--or at least undervalued--the need for adequacy of the amount from the child's perspective.

FOOTNOTES

1. See statutes cited in M. Melli, Child Support: A Survey of the Statutes (University of Wisconsin-Madison, Institute for Research on Poverty, 1983); C. Kastner and L. Young, A Guide to State Child Support and Paternity Laws (National Conference of State Legislatures, 1981).

2. Wis. Stat. § 247.26 (1975).

3. Wis. Stat. § 767.25 (1981-82).

4. This study uses not only court files but also interviews with parties and their attorneys. It is being conducted by Howard S. Erlanger and Marygold S. Melli of the University of Wisconsin Law School and The Institute for Research on Poverty and is supported by a grant from The National Science Foundation.

5. Wis. Stat. § 247.26 (1975).

6. Wis. Key Number Dig. (West) 1981 supp.; Wis. Dig. (Callaghan) 1981 supp.

7. Farwell v. Farwell, 33 Wis.2d 324, 147 N.W.2d 289 (1967); Bliffert v. Bliffert, 14 Wis.2d 316, 111 N.W.2d 188 (1961).

8. Dittberner v. Dittberner, 54 Wis.2d 671, 196 N.W.2d 643 (1972).

9. Edwards v. Edwards, 97 Wis.2d 111, 293 N.W.2d 160 (1980); Bussewitz

v. Bussewitz, 75 Wis.2d 78, 248 N.W.2d 417 (1977).

10. These cases are: Moul v. Moul, 30 Wis. 203 (1872); Lewis v. Lewis, 201 Wis. 343, 230 N.W. 77 (1930); Ausman v. Ausman, 31 Wis.2d 79, 141 N.W.2d 869 (1966); Farwell v. Farwell, 33 Wis.2d 324, 147 N.W.2d 289 (1967); Shohet v. Shohet, 40 Wis.2d 48, 161 N.W.2d 235 (1968); Balaam v. Balaam, 52 Wis.2d 20, 187 N.W.2d 867 (1971); Rosenheimer v. Rosenheimer, 63 Wis.2d 1, 216 N.W.2d 25 (1974).

11. Farwell v. Farwell and Shohet v. Shohet, supra, note 10.

12. These cases are: Williams v. Williams, 36 Wis. 362 (1874); Hiecke v. Hiecke, 163 Wis. 171, 157 N.W. 747 (1916); Lerner v. Lerner, 252 Wis. 87, 31 N.W.2d 208 (1948); Baldwin v. Baldwin, 253 Wis. 200, 33 N.W.2d 198 (1948); Borchers v. Borchers, 254 Wis. 302, 36 N.W.2d 79 (1949); Hansen v. Hansen, 259 Wis. 485, 49 N.W.2d 434 (1951); Burg v. Burg, 1 Wis.2d 419, 85 N.W.2d 356 (1957); Anderson v. Anderson, 8 Wis.2d 133, 98 N.W.2d 434 (1959); Gissing v. Gissing, 13 Wis.2d 556, 108 N.W.2d 916 (1961); Kritzik v. Kritzik, 21 Wis.2d 442, 124 N.W.2d 581 (1963); Medved v. Medved, 27 Wis.2d 496, 135 N.W.2d 291 (1965); Jackowick v. Jackowick, 39 Wis.2d 249, 159 N.W.2d 54 (1968); Wahl v. Wahl, 39 Wis.2d 510, 159 N.W.2d 651 (1968); Schmidt v. Schmidt, 40 Wis.2d 649, 162 N.W.2d 618 (1968); Beberfall v. Beberfall, 54 Wis.2d 329, 195 N.W.2d 625 (1972); Dittberner v. Dittberner, 54 Wis.2d 671, 196 N.W.2d 643 (1972); Heitung v. Heitung, 64 Wis.2d 110, 218 N.W.2d 334 (1974); Miller v. Miller, 67 Wis.2d 435, 227 N.W.2d 626 (1975); Anderson v. Andrson, 72 Wis.2d 631, 242 N.W.2d 165 (1976); Bussewitz v. Bussewitz, 75 Wis.2d 78, 248 N.W.2d 417 (1977); Johnson v. Johnson, 78 Wis.2d 137, 254 N.W.2d 198 (1977).

13. Jackowick v. Jackowick, supra note 12 at 258 and 59.

14. Wisconsin now has a single-level trial court, called the circuit court. Wis. Stat. c.753 (1981-82).

15. These forms are available from the author on request.

16. Marriage and Divorce in Wisconsin 1968-77 (Wis. Dept. of Health and Social Services) p.20.

17. Ibid. at p.35.

18. See K. Eckhardt, Deviance, Visibility and Legal Action: The Duty to Support, 15 Soc. Prob. 470 (1968); C. Jones, N. Gordon and I. Sawhill, Child Support Payments in the United States, Working Paper 992-03, The Urban Institute (1976); Note, Child Support Enforcement, 52 Wash. L. Rev. 169 (1976).

19. This was authorized under Wis. Stat. § 247.29 (1975).

20. H. Clark, Law of Domestic Relations (West, 1968) 584.

21. Wis. Stat. § 247.24(3) (1975).

22. Although personal jurisdiction is required to give a court authority to order a parent to pay support, Kulko v. Calif. Sup. Ct., 436 U.S. 84, 98 S.Ct. 1690, 56 L. Ed. 132 (1978), Wisconsin had a statute which authorized personal jurisdiction in child support cases where the

defendant had lived in the state with the plaintiff in a marital relationship for not less than six consecutive months within the six years next preceding the commencement of the action. Wis. Stat. §§ 247.055(1M) and 247.057 (1975).

23. At the national level it was estimated that in 1977 46% of wives with children between six and 17 were in the labor force. A. Grossman, Children of Working Mothers, March 1977, 101 Monthly Lab. Rev. 30 (Jan. 1978). Census bureau statistics for 1970 for the Madison, Wisconsin, Standard Metropolitan Statistical Area (SMSA) showed that in 28.4% of the families with children under the age of 18 both mother and father were in the labor force. U.S. Bureau of the Census, Census Population: 1970, Vol. 1, Characteristics of the Population, Part 51, p. 582, Wisconsin (1973).

24. L.J. Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 U.C.L.A. Law Rev. 1181 at 1249 (1981); D. Chambers, Making Fathers Pay (Univ. of Chicago, 1979) 53.

25. Four studies were found at the time which looked either at the process by which trial court discretion is exercised in awarding support or at the factors that might influence that discretion. The earliest, a classic study of divorce actions in Maryland and Ohio in 1929 and 1930 was L.C. Marshall and G. May, The Divorce Court (Baltimore: Johns Hopkins Press, 1932). Although the study reported the number and amount of alimony and child support awards, the only finding related to what influenced the awards was the one that alimony, if it was received at

all, was more likely to be awarded to the custodial parent.

A study closer to the concern of this inquiry was a 1961 pilot study of a sample of divorce cases from four counties in Kansas. (D. Hopson, The Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level, 11 Kan. L. Rev. 107 (1962).) Hopson was specifically interested in what he called the economics of divorce: the standards trial courts used in granting alimony, dividing property, and providing child support. In half of the 40 cases studied there were minor children eligible for support awards. In all 20 cases the court had jurisdiction over the noncustodial parent; child support was awarded in 16. It was not sought in the other four cases. In fact, child support was not sought in a total of six cases, but in two cases the court awarded it without a request.

Hopson looked in detail at the amount of the awards, trying to determine whether the amount was affected by the agreement of the parties, by the income of the noncustodial parent (in all cases the father), or by the presence of property acquired during the marriage.

In nine of the 16 cases, the amount of support was reached by agreement of the parties. The father's income was set out in the petition in 10 cases (apparently the petition was the only source of information on income). In five of these cases there were also assets of the marriage. Hopson concluded that although there were "too few cases to prove much," fathers with assets had higher incomes and paid higher child support. Also, child support awards set by the court were lower than those agreed to by the parents.

Two more recent studies looked only at support awards by trial courts. One of the studies, like the two discussed earlier, focused on the award of support (both child support and spousal support or alimony)

in divorce actions. (K. White and R. Stone, Jr. A Study of Alimony and Child Support Rulings with Some Recommendations, 10 Fam. L. Q. 83 (1976).) The researchers studied 532 cases disposed of in Orange County, Florida, between July 1, 1971, and the end of 1974. Nine variables were identified which were considered to cover all essential factors in determining the amount of a child support award. These were: estimated financial needs of wife, estimated financial needs of husband, total assets, total liabilities, number of children, age of children, net income of husband, net income of wife, and duration of the marriage. For all 532 cases the rank ordering of seven of the variables was: net income of the husband, estimated financial needs of the wife, number of children, estimated financial needs of the husband, net income of the wife, total assets, and total liabilities. However, when the cases decided by each of the nine judges involved (the number of cases handled by the judges ranged from 28 for two judges to 72 for one judge) were analyzed the ranking of the variables was quite different. For example, for three judges the most important variable was the income of the husband; for two, the estimated financial needs of the husband was the most important variable; the other four judges each had used another variable as the most significant (needs of the wife, duration of the marriage, the number of children, and the net income of the wife). The conclusion was that although each judge was consistent as to his own model, there was no uniform consistency among the judges. To attain consistency the researchers suggested the development of a model to be followed by the courts in setting child support and alimony. In addition to insuring more equitable treatment, the researchers thought there would be considerable saving of judicial time.

The other study of the amount of child support awards was made by

L.M. Yee, What Really Happens in Child Support Cases: An Empirical Study of the Establishment and Enforcement of Child Support Awards in the Denver District Court, 57 Denver L. J. 21 (1979). She examined a random sample of 135 cases handled in the Denver, Colorado, district court between January 1, 1977, and September 30, 1978. Unlike the other studies that focused on divorces, this one was limited to support actions brought under the Uniform Reciprocal Enforcement of Support Act (URESA).

The Uniform Reciprocal Enforcement of Support Act has been adopted in some form by all American states. It provides a state-supported, cooperative mechanism by which a custodial parent in one state can inexpensively enforce a support claim against a nonsupporting parent in another state. Support orders entered in URESA cases may demonstrate elements different from those involved in divorce cases. URESA actions involve cases where the defendant is not subject to the jurisdiction of the court in the state where the children live and the support action is brought because support is not being paid because either an order was not entered or the order is not being obeyed.

The judge's decision may be influenced by the fact that the children are residents of another state while the nonsupporting parent, usually a father, is a local resident, often with obligations to support a new family. Furthermore, in those cases where an order entered by another state was not being paid, the court must be influenced by the amount of the out-of-state award. If the state where the child lives thinks the child can live on X number of dollars, the trial judge in a URESA action may feel no need to require more.

Another difference between the URESA actions in Denver and divorce cases is that the URESA cases were all brought by two lawyers from the same law office, the Child Support Division of the Denver district

attorney's office. Divorce cases will normally be brought by a variety of different lawyers.

Yee selected six items as possibly affecting the amount of the child support award: the income of the noncustodial parent, the judge who heard the case, the presence or absence of an attorney for the noncustodial parent, the pattern of conduct by the district attorney's office, the fixed living expenses of the noncustodial parent, and the time of year at which the case was heard.

Yee found great variations in the amount of child support awards. For example, one judge ordered child support payments of $120 in one case and $60 in another although both cases involved two children and fathers who had net monthly incomes of $450. Furthermore, that same judge ordered another father of two children to pay only $50 a month child support although his net monthly income of $900 was twice that of the other fathers.

Yee concluded that none of the six factors she looked at--some of which rationally ought to relate to the amount of the award although others ought not affect it--adequately explained the wide variations in amounts of awards. She further concluded not only that there was no consistency between judges but that individual judges were erratic as to the amount of the award.

26. See discussion of Wisconsin cases, supra p. 2 and articles discussed in footnote 25, supra.

27. J. van der Gaag, On Measuring the Cost of Children in Vol. III Child Support: Weaknesses of the Old and Features of a Proposed New System (Institute for Research and Poverty, University of Wisconsin-Madison,

1982); T.J. Espenshade, The Cost of Children in Urban United States (U. of Calif. Berkeley Population Monograph Series #14, 1973) 45, 54.

28. N. Hunter, Child Support Law and Policy: The Systematic Imposition of Costs on Women, 6 Harv. Women's L. J. 1 (1983).

29. See, for example, Uniform Marriage and Divorce Act §§ 307 Disposition of Property, 308 Maintenance and 309 Child Support.

30. H. Clark, supra note 20.

31. 1980 Divorce Taxation Handbook (BNA) 47-62.

32. 26 U.S.C. §§ 71(a) and 215; Stand. Fed. Tax Rep. (C.C.H.) ¶ 6679.

33. 26 U.S.C. § 71(b); Commissioner v. Lester, 366 U.S. 299 (1961).

34. 26 U.S.C. § 152(e).

35. For example: "While division of an estate, an alimony award and a support award are all separate and distinct awards, they cannot be made in a vacuum. The amount of support money will affect the ability of a spouse to make alimony payments and the division of property will effect (sic) the need and the amount of the other awards." Johnson v. Johnson, 78 Wis.2d 137, 148, 254 N.W.2d 198, 204 (1977).

36. Parsons v. Parsons, 68 Wis.2d 744, 227 N.W.2d 629 (1975); Lacy v. Lacy, 45 Wis.2d 378, 173 N.W.2d 142 (1970).

"We consider the allowance to the wife in this case as being to a large extent for the benefit of the children. Considering the welfare of the children, no fair and reasonable alternative to awarding respondent the homestead property was presented to the trial court." Burg v. Burg, 1 Wis.2d 419, 422, 85 N.W.2d 356, 358 (1957).

37. Citations at note 33, supra; Stand. Fed. Tax Rep., supra, note 32.

38. Other studies have found a similar lack of alimony awarded. See, for example, L.C. Marshall and G. May, supra note 25, Vol. I at 311 and 312.

"In general, a request for alimony fared best when it was evidently connected in some way with the welfare of the children. . . .

"Although statistical evidence in such a matter is not necessarily conclusive, the figures probably reflect in judicial attitude a drift to a belief that under modern social conditions the dissolution of the marriage relationship need not involve long-continued payments to the wife unless required by the interests of the children or by some peculiar situation confronting the wife herself."

39. Wis. Stat. § 247.10 (1975).

40. Wis. Stat. § 247.081 (1975).

41. See page 5, supra, and Wis. Stat. § 247.23 (1975).

42. See, for example, Comment, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L. J. 104 (1976).

43. L. M. Yee, supra note 25, at 32.

44. This description of lawyer roles was developed by H. J. O'Gorman in Lawyers and Matrimonial Cases (Free Press, 1963) 132.

45. L. M. Yee, supra note 25, at 32.

46. Ibid., at 23.

47. K. White & R. Stone, Jr., supra note 25, at 76.

48. The tendency of decision makers, who have broad authority to individualize decisions, to limit the factors on which they base their decisions has been noted elsewhere. See, for example, V. J. Konecni and E. B. Ebbesen, Eds., The Criminal Justice System (Freeman, 1982) Chap. 11 An Analysis of the Sentencing System; L. K. Garrison, The National Railroad Adjustment Board, 46 Yale L. J. 567, 583-584 (1937).