

Fordham Urban Law Journal

REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS

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3. Ensure that acquaintance rape cases are treated with the same seriousness as stranger rape cases.

FOR POLICE DEPARTMENTS:

1. Establish specialized units to deal with sex offenses.
2. Ensure that police officers receive training as to the same particular areas recommended for judges.
3. Ensure that acquaintance rape complaints are treated with the same seriousness as complaints of stranger rape.

FOR BAR ASSOCIATIONS:

Coordinate efforts with rape crisis centers, prosecutors and police to provide community education similar to that recommended for judges.

FOR LAW SCHOOLS:

Ensure that criminal justice courses provide accurate information about rape similar to that recommended for judges.

FOR JUDICIAL SCREENING COMMITTEES:

Make available to all members information about rape similar to that recommended for judges.

B. The Courts' Enforcement of Women's Economic Rights

The "feminization of poverty"—the disproportionate representation of women among New York's poorest citizens—has impelled the legislative¹⁶¹ and executive¹⁶² branches of government to identify causes and seek solutions. For most women, unlike men, divorce causes extreme economic dislocation and thus has contributed significantly to the swelling ranks of female single-parent heads of households living in poverty.¹⁶³

The courts directly influence the economic welfare of a substantial

161. See generally NEW YORK CITY COUNCIL, *THE FEMINIZATION OF POVERTY, AN ANALYSIS OF POOR WOMEN IN NEW YORK CITY* (1984); THE STATUS OF OLDER WOMEN: A REPORT ON STATEWIDE PUBLIC HEARINGS CONDUCTED BY THE ASSEMBLY TASK FORCE ON WOMEN'S ISSUES AND THE ASSEMBLY STANDING COMMITTEE ON AGING (1983).

162. See generally *Minutes, Hearings on the Feminization of Poverty before New York Department of State*, New York City (June 14, 1984); *id.* Hauppauge (June 13, 1984); *id.* White Plains (June 12, 1984); *id.* Syracuse (June 6, 1984); *id.* Buffalo (June 5, 1984) [hereinafter *Feminization of Poverty Hearings*].

163. See D. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979); G. STERIN & S. DAVIS, *DIVORCE AWARDS AND OUTCOMES* (1981); J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP* (1980); L. WEITZMANN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); *cf.* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1983 CURRENT POPULATION REPORTS, Series P-23, No. 141, *CHILD SUPPORT & ALIMONY* (1985) [hereinafter *CHILD SUPPORT*].

number of women in New York when they adjudicate women's rights to: (1) property and maintenance upon dissolution of a marriage; and (2) child support. To determine whether the courts have contributed to the well documented trend of increased economic hardship for women, the Task Force examined the courts' decisions under the Equitable Distribution Law and child support laws.

1. THE EQUITABLE DISTRIBUTION LAW

New York's Equitable Distribution Law (EDL)¹⁶⁴—the statute that governs the economic rights of husband and wife upon the dissolution of a marriage—was enacted in 1980. Immediately prior to the EDL's enactment, New York was one of few remaining states in which property—*i.e.*, real estate, securities, bank accounts, businesses and other assets—was distributed strictly to the titleholder. Because wives rarely had assets in their own names, and because few assets other than the marital home were jointly held, property accumulated during the marriage usually went solely to the husband after divorce. A wife's years of contributions as homemaker, spouse and primary caretaker for the children had no impact on property distribution. Alimony was terminated on the husband's death and the former wife had no right to inheritance.

In 1985, the New York State Court of Appeals characterized the "conceptual base upon which the [EDL] rests" as an "economic partnership theory" of marriage.¹⁶⁵ The court expressly adopted a view of the EDL that one lower court "said so well":¹⁶⁶

[T]he function of equitable distribution is to recognize that when

164. See 1980 N.Y. Laws 281.

165. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985). In *O'Brien*, the issue was whether a license to practice medicine, "the parties' only asset of any consequence," constituted "marital property subject to equitable distribution." *Id.* at 580, 489 N.E.2d at 713, 498 N.Y.S.2d at 744. In holding that the license was subject to distribution, the New York Court of Appeals reversed the decision of the Appellate Division, Second Department, and overruled a decision of the Appellate Division, Fourth Department. See *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (4th Dep't 1982) (holding that a license to practice medicine, earned during marriage, is not marital property within § 236 of New York Domestic Relations Law). Judge Richard D. Simons of the Court of Appeals wrote:

The words [of the Equitable Distribution Law] mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and non-financial contributions made by caring for the home and family.

66 N.Y.2d at 584, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

166. *Id.* at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.¹⁶⁷

Contributions to the formation and growth of marital assets are to be "recognized, considered and rewarded" whether they are direct or indirect.¹⁶⁸ Indirect contributions not only include a spouse's services—such as child rearing and household management—that free the other spouse to pursue directly income-generating careers and the acquisition of assets, but also embrace the concept of opportunity cost. By undertaking homemaker's tasks, which require the development of skills not readily transferable to the paid labor market, the spouse makes an additional indirect contribution to the partnership enterprise by sacrificing her "own educational or career goals and opportunities."¹⁶⁹

Over twenty witnesses appearing at the Task Force's public hearings presented their views on the EDL. Some submitted articles and written commentaries on the reported decisions. Professor Henry Foster and others stated that "New York's EDL is alive and well and is being fairly administered,"¹⁷⁰ and that women are in a substantially better position now than in pre-equitable distribution days.¹⁷¹ Few witnesses concurred.

Current application of the EDL was overwhelmingly viewed as

167. *Id.* at 587, 489 N.E.2d at 717-18, 498 N.Y.S.2d at 748-49 (quoting *Wood v. Wood*, 119 Misc. 2d 1076, 1079, 465 N.Y.S.2d 475, 477 (Sup. Ct. Suffolk County 1983)).

168. *Id.* at 587, 489 N.E.2d at 718, 498 N.Y.S.2d at 749.

169. *Id.* at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747.

170. Foster, A Second Opinion: New York's EDL Is Alive and Well and Is Being Fairly Administered 1 (May 7, 1985) (unpublished manuscript available at *Fordham Urban Law Journal* office) [hereinafter *Second Opinion*]. Even these individuals agreed that *pendente lite* awards for counsel and experts have been inadequate, *see id.* at 8; that courts have applied the concept of rehabilitative maintenance inappropriately, *see* Statement Of Julia Perles, at 7 (undated) (available at *Fordham Urban Law Journal* office) [hereinafter *Perles Statement*]; and that substantial assets have been erroneously excluded from consideration as marital property. *See id.* at 9; Foster, N.Y.L.J., May 10, 1985, at 2, col. 6 (Letter to Editor).

171. *See* Perles Statement, *supra* note 170, at 2. Attorney Herbert Siegel stated: I don't mean to say for a moment that women are not doing much better today under equitable distribution than they were doing prior to 1980, but it is my position in reference to day-to-day practice, that the economic partnership that I thought was established by way of the passage of the law is a long way off

Rochester Hearings, supra note 49, at 172 (testimony of Herbert Siegel).

working "unfairness and undue hardship" on women.¹⁷² New York City matrimonial attorneys Harriet N. Cohen and Adria S. Hillman studied seventy reported EDL decisions and offered the following overview which was confirmed by a similar study submitted by Joel R. Brandes, Esq.:

[D]ependent wives, whether they worked in home or in the paid market place were relegated to one or a combination of the following in an aggregate of forty-nine out of the fifty-four cases susceptible of this analysis: less than a fifty percent overall share of marital property; short term maintenance after long term marriage; *de minimis* shares of business and professional practices which, in addition, the courts undervalued; terminable and modifiable maintenance in lieu of indefeasible equitable distribution or distributive awards; and inadequate or no counsel fee awards.¹⁷³

The results of many lower court decisions involving property distribution and maintenance awards ignore the irretrievable economic losses women incur when they forego developing income-generating careers and vested retirement rights to become homemakers for the benefit of their families. Rather than recognizing the economic partnership theory of marriage, some judges appear predisposed to ensure that the EDL does not "make reluctant Santa Clauses out of ex-husbands."¹⁷⁴ Equitable sharing of this permanently lost earning

172. Statement of Joel R. Brandes, at 2 (undated) (available at *Fordham Urban Law Journal* office) [hereinafter Brandes Statement]. Lester Wallman, a New York matrimonial lawyer and member of the committee that drafted the New York Equal Distribution Law, recently stated: "Judges are completely misconstruing it, and women are being treated unjustly The answer is to make some very, very substantive changes in the law." Dullea, *Women's and Bar Groups Fault Divorce Law*, N.Y. Times, Aug. 5, 1985, at A1, col. 3. See generally *Joint Public Hearings of the Senate and Assembly Standing Comms. on the Judiciary Respecting Proposed Revisions to the Equitable Distribution Law* (Mar. 15, 1985) (statement of New York City Commission on the Status of Women); *Feminization of Poverty Hearings*, *supra* note 162.

173. H. COHEN & A. HILLMAN, ANALYSIS OF SEVENTY SELECT DECISIONS AFTER TRIAL UNDER NEW YORK STATE'S EQUITABLE DISTRIBUTION LAW, FROM JANUARY 1981 THROUGH OCTOBER 1984, 4-5 (1984) [hereinafter COHEN-HILLMAN STUDY]; see H. COHEN & A. HILLMAN, REPORT TO TASK FORCE, DIAGNOSIS CONFIRMED: EDL IS AILING 4 (1985) [hereinafter DIAGNOSIS CONFIRMED]. The authors pointed out that only seventy EDL decisions were reported between July, 1980 and October 15, 1984. See *New York City Hearings I*, *supra* note 27, at 79-80 (testimony of Cohen & Hillman). Joining Mr. Brandes, who reported sixty-five cases, *see id.* at 171 (testimony of Joel Brandes), the authors urged that more decisions be published. See *id.* at 79 (testimony of Cohen & Hillman). They also noted that it is these seventy judicial decisions that set the parameters for the 90 percent of matrimonial cases that end in negotiated settlements. See *id.* at 79, 87 (testimony of Cohen & Hillman).

174. See Foster & Freed, *Law and the Family: O'Brien v. O'Brien*, N.Y.L.J.,

capacity upon a marriage's dissolution does not, as some have written, confer a "free meal ticket" to the economically dependent spouse¹⁷⁵ but constitutes a recognition that each partner's contribution to the marital enterprise—whether through affirmative performance or through foregoing opportunity—will be equitably compensated out of assets accumulated during the marriage and the post-marriage earning capacity of each party.

(a) Distribution of Marital Property

The EDL directs the courts to consider two types of property upon the dissolution of a marriage: "marital" property and "separate" property. Separate property is defined as property acquired before the marriage or by descent or as a gift from a party other than the spouse or as compensation received for personal injuries. The appreciation in the value of separate property is not distributed and remains with the title-holding spouse "except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse."¹⁷⁶

Marital property is defined as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held."¹⁷⁷ Assets deemed marital property must be divided "equitably" according to nine statutory factors and "any other factor which the court shall expressly find to be just and proper."¹⁷⁸

Jan. 9, 1986, at 1, col. 1; *id.* at 2, col. 3 (chastising "enemies of equitable distribution" as having "abandoned the principle of equal rights" and advocating " 'grandmother clauses' in order to make reluctant Santa Clauses out of ex-husbands they may have rejected").

175. *Id.*

176. N.Y. DOM. REL. LAW § 236B(1)(d)(3) (McKinney Supp. 1985).

177. *Id.* § 236B(1)(c).

178. *Id.* § 236B(5)(d)(10). Section 236B(5)(d) of the Domestic Relations Law provides:

In determining an equitable disposition of property, . . . the court shall consider: (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action; (2) the duration of the marriage and the age and health of both parties; (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects; (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution; (5) any award of maintenance under subdivision six of this part; (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions

Judicial valuation and division of property determine many women's post-divorce economic well-being.¹⁷⁹ Lower courts in New York have construed the provisions of the EDL relevant to property division in a manner that greatly disadvantages women and pre-determines inequitable results. Economically dependent women's ability to litigate is hampered by inadequate awards of attorneys' and experts' fees. Property divisions place an inappropriately low value on homemakers' services and permanently lost earning capacity.

(i) *Women's Ability to Litigate.* The EDL empowers the courts to require either spouse to pay the other's attorney's fees so as "to enable that spouse to carry on or defend the action or proceeding."¹⁸⁰ Judges' refusals to award adequate or timely counsel and expert fees were repeatedly cited as critical barriers to women's receiving adequate representation in matrimonial cases.

Most women do not have the necessary resources to retain an attorney, who is very familiar with the law and its practice. No matter how well off the husband, by the time the parties are ready to retain lawyers the wife has been left with very little. Most attorneys require a retainer at the commencement of their representation and are forced to finance the case after the retainer has been used up. As a general rule, where an attorney has been paid a retainer, no matter how small the amount, the courts will not award *pendente lite* counsel fees. This creates financial pressure on the attorney to conclude the case and on the spouse who has to worry about the increasing cost of litigation.¹⁸¹

Respondents to the Attorneys' Survey said of counsel fees:

The courts do not make reasonable allocations for legal services

and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (7) the liquid or non-liquid character of all marital property; (8) the probable future financial circumstances of each party; (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party.

Id. § 236B(5)(d).

179. Due to the insufficiency of maintenance and child support awards and the extreme difficulty in enforcing them, many economically dependent wives may rely heavily on marital property awards for economic security and survival. See *infra* notes 194-209, 228-89 and accompanying text.

180. N.Y. DOM. REL. LAW § 237(a)(5) (McKinney Supp. 1985).

181. Brandes Statement, *supra* note 172, at 4. The Cohen-Hillman Study revealed that in the forty-seven reported decisions where counsel fees were at issue, twenty-one economically dependent wives received no counsel fees at the conclusion of trial. See COHEN-HILLMAN STUDY, *supra* note 173, at 91.

rendered to female litigants in matrimonial cases which has the effect of depriving female litigants of proper representation in situations where the husband controls the family purse strings and/or has the greater income—which is true in most cases.

*Seventy-year-old rural male*¹⁸²

The greatest area of discrimination in Monroe County involves court awards of counsel fees to women. The courts are excessively stingy and inconsistent in cases where [the] wife has no identifiable assets and husband is able to pay. As a result, members of the private bar will not accept this type of matrimonial case, and deserving women go unrepresented.

*Thirty-year-old rural male*¹⁸³

I've curtailed my matrimonial practice because I can't afford to handle the cases. Most contested matters are guaranteed losers for the wife. Most of [those] I've handled, the husband has the resources to enter into protracted litigation while the wife does not. If I've invested \$5,000-\$10,000 worth of time into one of these divorces, the court might—on a good day—award me \$2,500. The women who most need my services will never have the resources under the present system to be able to pay my fee.

*Thirty-six-year-old urban female*¹⁸⁴

The EDL provides that funds for retaining accountants and appraisers may be awarded to needy spouses "as justice requires."¹⁸⁵ Because the wife must prove the value of the husband's assets, business or professional practice, fees for experts are essential. This "prove it or lose it" aspect of EDL litigation often presents, in practice, acute problems for the economically dependent spouse.

Herbert M. Siegel, a Buffalo attorney, testified that "applications to the courts . . . for accounting fees, for appraisal fees and evaluation fees are not being met kindly."¹⁸⁶ He described a case in which his firm advanced \$5,000 for an appraisal of a husband's business and was awarded only \$400 as reimbursement. Noting that few law offices are willing or able to make large disbursements for

182. R.L. ASSOCIATES, *supra* note 23, app. B, at 5 (Survey Respondent No. 0125M).

183. *Id.*, app. B, at 10 (Survey Respondent No. 0288M).

184. *Id.*, app. B, at 50 (Survey Respondent No. 1163M).

185. N.Y. DOM. REL. LAW § 237 (McKinney 1977 & Supp. 1985); *see also* Gueli v. Gueli, 106 Misc. 2d 877, 878, 435 N.Y.S.2d 537, 538 (Sup. Ct. Nassau County 1981).

186. *Rochester Hearings*, *supra* note 49, at 168 (testimony of Herbert Siegel). The Appellate Division, Second Department has held that expert fees are not to be "granted routinely." *Ahern v. Ahern*, 94 A.D.2d 53, 58, 463 N.Y.S.2d 238, 241 (2d Dep't 1983).

experts in matrimonial cases, Mr. Siegel concluded that “oftentimes women are not obtaining the necessary expert analysis that they should have prior to going to trial.”¹⁸⁷

(ii) *Property Division*. The pattern of property division in reported decisions reveals that the view of marriage as an economic partnership has not taken hold. Lillian Kozak, C.P.A., Chair of the NOW-New York State Domestic Relations Task Force testified:

An examination of decisions reveals that one family asset which is divided 50/50 most of the time is the marital residence. Since the vast majority of houses are jointly owned and were therefore divided equally under the old law, the equal division of houses is hardly evidence of an egalitarian perspective. In the few cases where the wife has been awarded the whole marital residence, she has been deprived of a far greater interest in income-producing property, including businesses, and in pension plans and to obviously-hidden wealth.

Although cash savings are also being divided, where they have been substantial there has not been an equal division.

In the realm of property division, the valuation of businesses . . . has been a hoax, and the percentage of the hoax awarded to the wife has been [twenty-five] percent or less. There seems to be no offset, in the main, for leaving the husband with this major income-producing asset.¹⁸⁸

The Cohen and Hillman study analyzed fifteen reported cases in which a marital business property was at issue, of which thirteen involved marriages of long duration ranging from seven years to forty-one years. Eighteen percent of marital property was the median award to wives.¹⁸⁹ In only two cases were equal awards made. In six cases, the wife was completely denied a share of the business property.¹⁹⁰

The courts appear to be ignoring wives’ “contributions and services as a spouse, parent, wage earner and homemaker, and . . . the

187. *Rochester Hearings*, *supra* note 49, at 168 (testimony of Herbert Siegel). The combined effect of a heavy burden of proof, courts’ denial of awards and “often unrealistic” awards of *pendente lite* experts’ fees, significantly undercuts the EDL’s purpose, making “possession . . . 9/10ths of the law.” *Second Opinion*, *supra* note 170, at 8; see Brandes Statement, *supra* note 172, at 7.

188. *New York City Hearings I*, *supra* note 27, at 141 (testimony of Lillian Kozak).

189. See COHEN-HILLMAN STUDY, *supra* note 173, at 90.

190. One appellate division opinion suggested that the wife’s homemaker services should be rebuttably presumed to be equal in value to the husband’s earnings. See *Conner v. Conner*, 97 A.D.2d 88, 103, 468 N.Y.S.2d 482, 493 (2d Dep’t 1983).

career or career potential of the other party.”¹⁹¹ These criteria (which apply both to distribution of marital property and to awards of maintenance) require the courts to consider the contributions made to the “economic partnership,” by the nontitleholding, non-wage earning spouse.¹⁹² Supreme Court Justice Betty Ellerin, Deputy Chief Administrative Judge for Courts within the City of New York, testified that “the value of a homemaker/wife’s contribution to a marriage is again all too often valued in terms of societal attitudes the deprecate the woman’s role or contribution.”¹⁹³ Attendees at the Oswego County listening session reported that farmers’ wives who have spent all their adult lives helping to keep a farm going do not have their contribution valued and end up with very little in equitable distribution.

One reason for the undervaluation of homemakers’ contributions suggested by a survey respondent is that some judges “cannot conceive of a woman having a right to a share of ‘the man’s business[.]’ Judges, too, often refer to it as ‘his business’ and ‘their house’ and ‘his pension[.]’ Under equitable distribution it should be thought of as ‘their business’ and ‘their pension[.]’ etc.”¹⁹⁴

Among survey respondents, seventy-two percent of women and thirty-two percent of men reported that equitable distribution awards “sometimes,” “often” or “always” reflect a judicial attitude that property belongs to the husband and a wife’s share is based on how much he could give her without diminishing his current lifestyle.¹⁹⁵ Sixty-two percent of the male respondents and twenty percent

191. N.Y. DOM. REL. LAW § 236B(5)(d)(6) (McKinney Supp. 1985); *see id.* § 236B(6)(a)(8).

192. Professor Thomas Kershner of the Department of Economics at Union College testified that “economists have made considerable economic advances in identifying and measuring the various jobs and tasks that homemakers, wives and mothers do.” *Albany Hearings, supra* note 57, at 229-30 (testimony of Thomas Kershner). However, Judith Avner, Esq., Assistant Director of the New York State Women’s Division, cautioned that evaluation of the value of particular services as the sole measure of a homemaker’s contribution, as opposed to the joint enterprise concept, can deteriorate into a debate at the level of whether the homemaker left a “ring-around-the-collar.” *Id.* at 138 (testimony of Judith Avner); *see Avner, Valuing Homemaker Work: An Alternative to Quantification*, 4 FAIRSHARE 11 (1984).

193. *New York City Hearings I, supra* note 27, at 284 (testimony of Betty Ellerin).

194. R.L. ASSOCIATES, *supra* note 23, app. B, at 78 (Survey Respondent No. 1745F) (emphasis in original).

195. Female and male survey respondents (F%/M%) reported that equitable distribution awards reflect a judicial attitude that property belongs to the husband, and a wife’s share is based on how much the husband could give her without diminishing his current lifestyle:

of the female respondents reported that this occurs “rarely” or “never.”

Seventy percent of women and forty-four percent of men also reported that judges “sometimes,” “often” or “always” refuse to award fifty percent of property or more to wives even though financial circumstances are such that even with such an award husbands will not have to reduce their standard of living substantially but wives will.¹⁹⁶ Forty-nine percent of the men and eighteen percent of the women reported that this occurs “rarely” or “never.”

Other witnesses and respondents stressed the fact that the judiciary is overwhelmingly male and may have little understanding of what homemaking involves. Some judges appear unaware of the economic opportunity cost to the one who has devoted long years to unpaid labor for her family. Rockland County Legislator Harriet Cornell observed:

[M]ale perspective on family life has skewed decisions in equitable distribution cases. The perception of most men—and the judiciary is mostly male—is that care of the house and children can be done with one hand tied behind the back. Send the kids out to school, put them to bed, and the rest of the time free to play tennis and bridge. They think any woman—no matter her age or lack of training—can find a nice little job and a nice little apartment and conduct her later years as she might have done at age [twenty-five].¹⁹⁷

Lillian Kozak’s reference to the valuation of businesses as “a hoax” was also noted in the Cohen-Hillman study, which cited several cases in which courts credited the husband’s experts’ valuation even while acknowledging the husband’s financial chicanery. These cases can be read as encouraging a husband to undervalue or hide

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 12/2 | 35/10 | 25/20 | 13/31 | 7/31 | 9/6 |

Id., app. A, at 26.

196. Female and male survey respondents (F%/M%) reported that judges refuse to award 50% of property or more to wives even though the probable future financial circumstances indicate that even with such an award husbands will not have to substantially reduce their standard of living but wives will:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 10/2 | 41/16 | 19/26 | 12/31 | 6/18 | 11/8 |

Id.

197. *Albany Hearings*, *supra* note 57, at 51-52 (testimony of Harriet Cornell).

assets because such behavior is ultimately rewarded in the division of marital property.¹⁹⁸

(b) Maintenance

The EDL provides for the ordering of "temporary maintenance or maintenance to meet the reasonable needs of a party to the matrimonial action in such an amount as justice requires" as determined by ten factors.¹⁹⁹ In his legislative memorandum in support of the EDL, Gordon Burrows of the Assembly Judiciary Committee stated:

The objective of the maintenance provision is to award the recipient spouse an opportunity to achieve independence. However, in marriages of long duration, or where the former spouse is out of the labor market and lacks sufficient resources, or has sacrificed her business or professional career to serve as a parent and homemaker, "maintenance" on a permanent basis may be necessary.²⁰⁰

Maintenance awards are critical to the economic security of the vast majority of economically dependent wives. Lillian Kozak testified: "The greatest asset in most families is the earning power of the supporting spouse to which the homemaker has contributed. The only possible distribution of this asset is via alimony-maintenance."²⁰¹

198. See COHEN-HILLMAN STUDY, *supra* note 173, at 6-7.

199. Section 236B(6)(a) of the Domestic Relations Law provides, in relevant part:

[I]n any matrimonial action the court may order temporary maintenance or maintenance to meet the reasonable needs of a party to the matrimonial action in such amount as justice requires In determining the amount and duration of maintenance the court shall consider: (1) the income and property of the respective parties . . . including marital property distributed pursuant to subdivision five of this part; (2) the duration of the marriage and the age and health of both parties; (3) the present and future capacity of the person having need to be self-supporting; (4) the period of time and training necessary to enable the person having need to become self-supporting; (5) the presence of children of the marriage in the respective homes of the parties; (6) the standard of living established during the marriage where practical and relevant; (7) the tax consequences to each party; (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (9) the wasteful dissipation of family assets by either spouse; and (10) any other factor which the court shall expressly find to be just and proper.

N.Y. DOM. REL. LAW § 236B(6)(a) (McKinney 1977 & Supp. 1985).

200. Memorandum of Assemblyman Gordon W. Burrows, *reprinted in* [1980] N.Y. LEGIS. ANN. 130. The fact that the term "permanent maintenance" is not used in the statute may mislead some judges. At a New York City regional meeting an attorney described an argument before a Nassau County judge who insisted that the EDL bars permanent maintenance.

201. *New York City Hearings I*, *supra* note 27, at 143 (testimony of Lillian Kozak).

(i) *Duration of Award.* The legislature intended maintenance awards to be short-term when the non-wage earning or economically dependent spouse is young or has a strong potential to become self-supporting after a period of support for education or training. The Task Force found that this concept of "rehabilitative" maintenance is being widely abused. Judges are too frequently awarding minimal, short-term maintenance or no maintenance at all to older, long-term, full or part-time homemakers with little or no chance of becoming self-supporting at a standard of living commensurate with that enjoyed during the marriage.²⁰² Among survey respondents, sixty-two percent of women and thirty-eight percent of men reported that older, long-term homemakers with little chance of obtaining employment above minimum wage are "sometimes," "rarely" or "never" awarded permanent alimony. Survey comments on maintenance included:

While I generally support rehabilitative maintenance, I do not believe that a [fifty-]year-old woman who has always been a housewife can be rehabilitated. However, permanent awards for such women are almost non-existent.

*Thirty-six-year-old urban female*²⁰³

I am *very disturbed* by the court's reluctance and often refusal to award adequate and/or long-term maintenance orders to wives especially those from lengthy marriages (15-30+ years). I am also disturbed by the meager temporary (*pendente lite*) awards of support which are usually "barely getting by" awards, especially when the cases involve husbands and fathers with significant income (\$50,000 and more).

*Fifty-four-year-old-rural male*²⁰⁴

A woman who is minimally self-supporting often receives no maintenance or minimal [maintenance] (\$25-\$50/week) for a limited period of time, when the man may be earning \$30,000-\$50,000/year.

*Twenty-eight-year-old urban female*²⁰⁵

202. Female and male survey respondents (F%/M%) reported that older displaced homemakers, with little chance of obtaining employment above minimum wage, are awarded permanent maintenance after long-term marriages:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 4/15 | 24/43 | 36/24 | 21/10 | 5/2 | 10/6 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 30.

203. *Id.*, app. B, at 50 (Survey Respondent No. 1181F).

204. *Id.*, app. B, at 25 (Survey Respondent No. 0652M) (emphasis in original).

205. *Id.*, app. B, at 64 (Survey Respondent No. 1496F). Another survey respond-

Cohen and Hillman analyzed forty-nine reported decisions involving requests for maintenance. In forty-seven of these cases, the marriages ranged from seven and a half years to fifty-seven years in duration. In ten cases, economically dependent wives married between ten and fifty-seven years (with eighteen years of marriage being the median) were totally denied a maintenance award. In fifteen cases, economically dependent women who had been married between eight and thirty-six years (twenty years of marriage being the median) were awarded only rehabilitative maintenance for periods ranging from one and a half years to five years. In the remaining nineteen cases, economically dependent women were awarded long-term or permanent maintenance.²⁰⁶

(ii) *Amount of Award.* Some judges appear to be ignoring “the standard of living established during the marriage” and are relying on a parsimonious interpretation of the wife’s “reasonable needs.” As a result, even women who can obtain employment enjoy a far less generous post-divorce standard of living than do their husbands. The question of post-divorce parity was raised by Herbert Siegel, Esq., who asked:

When it comes to equitable distribution and the talk of economic partnership, why should there not be an economic partnership not only in property, but in the ability to support themselves or live in a way to maintain a certain standard of living. . . . I think there should be some parity when it comes to the dissolution of marriages and the question of maintenance itself.²⁰⁷

ent sought to explain the reasons behind courts’ failure to award appropriate maintenance:

The attitude seems to be one of “You’ve gotten your fair share of the marital assets and you’re capable of working (whether the wife is 25 or 55 years old; having been married 5 years or 35 years) therefore if you are careful and invest what you have received you will be able to get along.” This attitude prevails irrespective of the standard of living of the couple prior to divorce, the presence of children in the wife’s home (pre-school or otherwise), past employment or lack thereof by the wife, her level of education or job training, and the disparity of post-divorce income of the couple. (Almost no effort is given to fashioning parity, even for a short duration.) . . . The inequities are apparent, yet the courts (including the appellate courts) have for the most part chosen to ignore them. . . . The insensitivity of the courts in this regard is egregious.

Forty-nine-year-old urban male

Id., app. B, at 68-69 (Survey Respondent No. 1584M).

206. See COHEN-HILLMAN STUDY, *supra* note 173, at 93. The range of duration of marriage of the latter group was seven-and-a-half to forty-one years, with the median duration of seventeen years. See *id.*

207. *Rochester Hearings*, *supra* note 49, at 170-71 (testimony of Herbert Siegel).

Julia Perles, Esq., Chairperson of the Equitable Distribution Committee of the Family Law Section of the New York State Bar Association, testified that inadequate maintenance awards are "unfair," but they are "not the fault of the EDL; I think it's the fault and the prejudice of particular judges who hear the cases."²⁰⁸

Justice William Rigler, Presiding Judge of Special Term, Part 5 (the matrimonial part), in Kings County Supreme Court, suggested that the problem is that this kind of gender bias is injected by the parties themselves. He cited a case in which a physician husband admitted to a net annual income of about \$50,000 and the wife, who had worked to put the husband through medical school and had no college degree, requested support for herself and her children and funds to complete her education. The husband rejected this request and submitted his own estimates of what his wife's expenses should be. "His list included only the bare necessities for his wife, while his own list of expenses was quite expansive and generous, taking into account the social and professional position as a physician."²⁰⁹

(c) Provisional Remedies and Enforcement

Despite statutory provisions for full financial disclosure, the preservation of assets, enforcement of awards and interest on arrears, enforcement is seriously deficient.

Practitioners assert that there are no useful sanctions in the EDL to compel disclosure. As a result, "stonewalling" is commonplace.²¹⁰ If effective temporary restraining orders are granted to maintain the status quo for equitable distribution,²¹¹ judges rarely impose mean-

Female and male survey respondents (F/M) reported the duration of rehabilitative maintenance awards based on length of marriage as:

| DURATION OF MARRIAGE | AVERAGE YEARS OF MAINTENANCE |
|----------------------|------------------------------|
| 10-20 | 4/5 |
| 21-30 | 6/8 |
| More than 30 | 8/9 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 30.

208. *New York City Hearings I*, *supra* note 27, at 29 (testimony of Julia Perles).

209. *New York City Hearings II*, *supra* note 50, at 101 (testimony of William Rigler).

210. Brandes Statement, *supra* note 172, at 5-6.

211. Female and male survey respondents (F%/M%) reported that effective temporary restraining orders are granted to maintain the status quo for equitable distribution:

ingful sanctions when they are violated.²¹²

In an enforcement action, the EDL requires a judge to enter a judgment for arrears unless "good cause" is shown for failure to seek relief from the amount of maintenance awarded.²¹³ Ex-husbands often respond to enforcement actions with meritless motions for downward modification or claims that they are financially unable to comply. Myrna Felder, Esq., Chair of the Matrimonial Committee of the Women's Bar Association of the State of New York, testified that a motion for downward modification "automatically stops enforcement proceedings in their tracks,"²¹⁴ leading to nine to twelve months of delay before the Special Referee's hearing and confirmation of the Referee's report by the supreme court judge who made the reference.

If a year later, after hearings and the entry of contempt, it turns out that he was able to comply all along, is there a penalty for the man? No. Are there damages? No. Is there an extraordinary counsel fee? No. The fellow has learned a lesson that our courts are teaching the men around the state: It's better not to be so quick to pay.²¹⁵

Survey respondents reported that courts do not uniformly grant maintenance retroactive to the initial motion date as required by the Domestic Relations Law and Family Court Act,²¹⁶ or effectively

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 2/4 | 15/30 | 35/37 | 33/15 | 4/5 | 11/8 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 25.

212. Female and male survey respondents (F%/M%) reported that judges impose meaningful sanctions, including civil commitment, when injunctions are violated:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| */2 | 5/9 | 12/20 | 46/45 | 26/14 | 10/10 |

Id. The asterisk (*) means less than half of one percent. *See id.*

213. *See* N.Y. DOM. REL. LAW § 244 (McKinney 1977 & Supp. 1985).

214. *New York City Hearings I, supra* note 27, at 247 (testimony of Myrna Felder).

215. *Id.* at 248.

216. *See* N.Y. DOM. REL. LAW § 236B(6)(a) (McKinney Supp. 1985); N.Y. FAM. CT. ACT § 440(1) (McKinney 1983 & Supp. 1985).

Female and male survey respondents (F%/M%) reported that maintenance is granted retroactive to the initial motion date:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 10/16 | 19/29 | 26/23 | 31/20 | 5/6 | 9/6 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 32.

enforce the maintenance awarded.²¹⁷ Sixty percent of women and fifty-six percent of men survey respondents reported that interest is “rarely” or “never” awarded on arrears.²¹⁸ The inability of women to afford counsel and the refusal of the courts to award realistic counsel fees were also cited as a factor in enforcement problems.²¹⁹

SUMMARY OF FINDINGS

1. The manner in which judges distribute a family’s assets and income upon divorce profoundly affects many women’s economic welfare. Women who forego careers to become homemakers usually have limited opportunities to develop their full potential in the paid labor force.
2. The New York Court of Appeals has recognized that the EDL embraces the view of marriage as an economic partnership in which the totality of the nonwage-earning spouse’s contributions—including lost employment opportunity and pension rights—is to be considered when dividing property and awarding maintenance.
3. Many lower court judges have demonstrated a predisposition not to recognize or to minimize the homemaker spouse’s contributions to the marital economic partnership by:

217. Female and male survey respondents (F%/M%) reported that the courts effectively enforce maintenance awards:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 1/4 | 12/27 | 27/38 | 45/22 | 10/3 | 4/5 |

Id.

218. Female and male survey respondents (F%/M%) reported that interest on arrears is awarded as provided by statute:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 2/4 | 10/5 | 19/17 | 40/39 | 20/17 | 10/7 |

Id., app. A, at 34.

219. The importance of fees sufficient to vigorously litigate were expressed by a survey respondent who wrote:

The courts’ failure to enforce child support and maintenance awards, whether *pendente lite* or after trial, is a disgrace. I am ashamed to tell my female clients that an award of maintenance and/or child support and/or arrears for same is generally not worth the paper it is written on unless (a) there is an endless supply of money to litigate enforcement or (b) the defendant-husband voluntarily complies with the order directing the award.

Fifty-five-year-old New York City female

Id., app. B, at 30 (Survey Respondent No. 0752F).

- a. awarding minimal, short-term maintenance or no maintenance at all to older, long-term, full- or part-time homemakers with little or no chance of becoming self-supporting at a standard of living commensurate with that enjoyed during the marriage.
 - b. awarding homemakers-wives inequitably small shares of income-generating or business property.
4. Economically dependent wives are put at an additional disadvantage because many judges fail to award attorney's fees adequate to enable effective representation or experts' fees adequate to value the marital assets.
 5. Many judges fail to order provisional remedies that ensure assets are not diverted or dissipated.
 6. After awards have been made, many judges fail to enforce them.

RECOMMENDATIONS

FOR COURT ADMINISTRATION:

Take necessary steps to assure that judges are familiar with the statutory provisions governing and the social and economic considerations relevant to equitable distribution and maintenance awards, including studies, statistics and scholarly commentary on the economic consequences of divorce, women's employment opportunities and pay potential, and the cost of child rearing.

FOR THE LEGISLATURE:

Enact legislation that:

1. Makes equitable sharing of the homemaker's lifetime reduced earning capacity an express factor in the division of property and awarding of maintenance.
2. Provides that a spouse's indirect contribution to the appreciation of separate property (e.g., through homemaker's services) causes such property, to the extent of appreciation, to become marital property.
3. Requires the judge to assume a primary role in the identification and valuation of assets through court appointment of special masters or through required compensation from marital assets of necessary experts retained by the parties.
4. Provides that marital standard of living, not the "reasonable needs" of the party seeking maintenance is the standard by which maintenance should be awarded and that if assets and income are insufficient to maintain both parties at that standard, the reduction in living standard should be equally shared.
5. Provides for mandatory awards *pendente lite* of counsel fees appropriate to the duration and complexity of the case sufficient to enable both parties to pursue litigation.

FOR BAR ASSOCIATIONS:

1. Develop informational materials respecting the social and economic considerations relevant to equitable distribution and maintenance awards including studies, statistics and scholarly commentary on the economic consequences of divorce, women's employment opportunities and pay potential, and the costs of child rearing, and make these materials available to members for use in submissions to courts considering petitions for equitable distribution and maintenance awards.
2. Invite judges to join in continuing legal education programs concerning EDL.

FOR JUDICIAL SCREENING COMMITTEES:

Make available to all members information concerning the economic consequences of divorce similar to that recommended for judges.

2. *DAMAGE AWARDS IN PERSONAL INJURY SUITS*

Concerns raised in other jurisdictions led the Task Force to attempt to determine whether gender affects the amount of damage awards women receive in personal injury suits.²²⁰ Marion Silber, Esq., a New York personal injury lawyer, testified that after extensive research, discussion with other litigating attorneys and a review of recent cases, she concluded that it appears that juries today are awarding women and men comparable damages for comparable injuries, a significant change from her experience in prior years.

Implicit in this perception, as contrasted with attorneys' perceptions concerning property and maintenance awards in matrimonial actions, is that in personal injury cases homemakers' services are being adequately valued and compensated. This fact might be explained by a greater availability of counsel in contingency-fee cases who may, in turn, have greater incentive to advance fees for expert witnesses. Another possibility is that the equity of awards is more apparent in the case of a physically injured plaintiff. A third is that these cases are heard by juries.

Ms. Silber advanced three reasons for the improvement in damage awards to women: (1) there are now more women on juries;²²¹

220. The Report of the New Jersey Supreme Court Task Force on Women in the Courts recognized the lack of a jury charge that recognizes the economic value of women's unpaid work in the home and some judges' refusal to admit expert testimony on this point as problems in New Jersey. See *FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS* 25-32 (1984).

221. Ms. Silber's theory that changes in jury attitudes toward female personal

(2) these women are themselves in the workforce and are familiar with and able to understand the issues involved in awarding damages; and (3) plaintiffs are introducing expert economic testimony as to the value of homemaker work into personal injury and wrongful death cases.²²²

After the decision of the New York State Court of Appeals in *De Long v. County of Erie*,²²³ the jury charge relating to homemaker's and maternal services was added. It provides:

In fixing that value you must take into consideration the circumstances and condition of her husband and children; the services she would have performed for her husband and children in the care and management of the family home, finances and health; the intellectual, moral and physical guidance and assistance she would have given the children had she lived. In fixing the money value of decedent to the widower and children you must consider what it would cost to pay for a substitute for her services, considering both decedent's age and life expectancy and the age and life expectancy of her husband and each of her children.²²⁴

It appears that counsel in New York have the incentive and zeal to seek adequate awards for women who are killed or injured and that the technical legal framework is present to protect such women. The equity of awards is, however, more difficult to assess. Attorneys' Survey respondents were almost evenly split as to whether men receive higher awards for pain and suffering than do women.²²⁵ More per-

injury plaintiffs are due in part to the increased presence of women on juries is of particular interest. New York women were barred from jury service until 1940 and granted automatic exemption from jury duty until 1975. *See supra* notes 9-10 and accompanying text.

222. *See Albany Hearings, supra* note 57, at 90-92 (testimony of Marion Silber).

223. 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983). In *De Long*, the court held:

It is now apparent, as a majority of courts have held, that qualified experts are available and may aid the jury in evaluating the housewife's services not only because jurors may not know the value of those services, but also to dispel the notion that what is provided without financial reward may be considered of little or no financial value in the marketplace.

Id. at 307-08, 457 N.E.2d at 723, 469 N.Y.S.2d at 617-18 (citation omitted).

224. 1 NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 2:320.2 (Supp. Feb. 1986).

225. Female and male survey respondents (F%/M%) reported that men receive higher awards than women for pain and suffering:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 2/1 | 16/6 | 31/19 | 31/34 | 9/31 | 12/9 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 76.

ceived that women employed outside the home received higher awards than homemakers received for pain and suffering,²²⁶ and that husbands received higher awards than did wives for loss of consortium.²²⁷

3. CHILD SUPPORT

Children living with their mother alone are almost five times as likely to be poor as children in two-parent families. In 1984, 34.5% of female-headed single-parent families were in poverty as compared to 13.1% of male-headed single-parent families. Only 6.9% of two-parent families were poor.²²⁸

Gross inadequacies, nationwide, in the ordering and enforcement of child support led Congress to enact the Child Support Enforcement Amendments of 1984.²²⁹ In response to the Act's requirement that states conform their laws to the new federal requirements, the New York 1985 Support Enforcement Amendments were enacted.²³⁰

226. Female and male survey respondents (F%/M%) reported that women employed outside the home receive higher awards than homemakers for pain and suffering:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 9/3 | 36/28 | 26/28 | 9/19 | 3/11 | 17/12 |

Id., app. A, at 77.

227. Female and male survey respondents (F%/M%) reported that husbands receive higher awards than wives for loss of consortium:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 7/1 | 25/12 | 29/23 | 20/27 | 5/25 | 15/12 |

Id., app. A, at 76.

228. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-60, No. 149, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1984 (1985) [hereinafter MONEY INCOME].

229. See Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of titles 26 and 42 of the United States Code).

230. See 1985 N.Y. Laws 809. The principal provisions of this law require: (1) hearing examiners in family court to provide an expedited process for establishing and enforcing obligations of support, see N.Y. FAM. CT. ACT §§ 439, 439-a (McKinney 1983 & Supp. 1985); (2) an income execution or court-ordered income deduction from salary and other income to be triggered automatically whenever a payment arrearage accrues that is equal to the amount of support payable for one month, or when the person owing support fails to pay three payments on the dates they were due, see N.Y. CIV. PRAC. L. & R. §§ 5241, 5242 (McKinney Supp. 1985); (3) elimination of the current three-tiered statute of limitations for instituting paternity proceedings, and establishment of a uniform statute of limitations that allows a cause of action until the child's twenty-first birthday and gives a child standing

Provisions of the newly enacted New York law address problems brought to the Task Force's attention, including long delays in obtaining orders of support and inadequate enforcement of support orders. Expedited procedures are authorized. Hearing examiners or judges must make an immediate temporary or permanent order.²³¹ Child support must take priority over all other levies.²³² New, flexible income-execution and income-deduction procedures are provided. State-tax refund intercepts for past due support are authorized, and services of support collection units are now available to persons who are not receiving public assistance. The federal law also requires states to develop guidelines that more realistically establish the amount of support that should be awarded.²³³

These changes in the law make clear the judiciary's obligation to assist in ensuring, and the strong public policy favoring, timely and adequate child support. Notwithstanding these legislative advances, the policies and practices that made this remedial legislation necessary bear continuing examination. Without recognition of the informational and attitudinal barriers in the judiciary that, in part, contributed to the child-support crisis, reform will be incomplete.

On October 1, 1985 the New York State Commission on Child Support, established by Governor Cuomo in conformance with the requirements of the Federal Child Support Enforcement Amendments

to commence paternity proceedings, *see* N.Y. FAM. CT. ACT § 517 (McKinney Supp. 1985); (4) broader use of state tax refund interception for past-due child and spouse support by making it available to persons receiving child or spouse support who are not recipients of public assistance, *see* N.Y. SOC. SERV. LAW §§ 111-m, 111-n (McKinney Supp. 1985); (5) release by local social services districts of information concerning past due support in amounts over \$1,000 to consumer credit reporting agencies who request such information, *see id.* § 111-c; (6) availability to non-AFDC recipients of all the enforcement tools previously available only to AFDC recipients. *See id.* § 111-n.

Prior to the enactment of this law, the New York Family Court Act and Domestic Relations Law already provided for numerous enforcement remedies, including income deduction orders, posting of surety, sequestration, money judgment for arrears, interest on arrears and contempt, commitment, probation and criminal proceedings for nonsupport of a child. *See* NEW YORK STATE COMMISSION ON CHILD SUPPORT REPORT 52 (Oct. 1, 1985) [hereinafter CHILD SUPPORT REPORT]. The Child Support Commission reported that the greatest number of complaints it received asserted that "[j]udges are unwilling to require compliance with court-ordered support or to impose penalties for willful-noncompliance." *Id.* at 73.

231. *See* N.Y. FAM. CT. ACT §§ 433(b), 435(b) (McKinney Supp. 1985).

232. *See* N.Y. CIV. PRAC. L. & R. §§ 5241(h), 5242(c) (McKinney Supp. 1985).

233. New York has enacted legislation on the guidelines. *See* 1986 N.Y. Laws 892. Guidelines used in some states are based on a percentage of gross income, others on net income. Some give priority to the needs of first families. Some take into consideration the needs of second families. Very different results may be reached depending upon the guidelines adopted by a state.

of 1984, submitted its report, documenting in detail the massive failure of the system and making extensive recommendations for reform. The Task Force's independent inquiry revealed the attitudes in our judicial system that compelled federal intervention in what had always been a state function and raised profound concerns as to how effectively the new laws will be administered. The Task Force received compelling evidence of human suffering resulting from: unconscionable delays in courts' hearing child-support petitions; inadequate child-support awards; courts' failure to impose sanctions for nonpayment of awards as authorized by law; and courts' forgiveness of arrears of unpaid child support. Children living in single-parent households, headed by their mothers, are the fastest growing group of persons living in poverty in the United States today.

(a) Judicial Attitudes Towards Husbands and Wives

Judith Reichler, Esq., Project Director of the New York State Commission on Child Support, summarized the situation that many women face:

It may seem fanatical to allege that the run around these women are getting in court is a result of gender bias since some men would also tell you that they receive similar treatment, but I believe that what we are seeing is a not-so-subtle form of bias against women as we continue to see them through this process as litigious, vexatious, harassing, and a little bit crazy, if they continue to pursue something to which they are entitled.

It is almost like a little game, a game where a person with power can put his hand on the head of the person who is angry and let that person flail away, continue to move until he drops from exhaustion, and many do drop from exhaustion. In fact, perhaps the most stable of them do drop from exhaustion or say "[t]he hell with it, let's let him keep his money."²³⁴

The views of almost all the fifteen witnesses who testified about child support were reflected in the testimony of Carol Lefcourt, Esq., Counsel to the New York State Division for Women, who reported:

Each year . . . I have spoken to hundreds of women who call and write the women's division and other organizations and at-

234. *New York City Hearings II*, *supra* note 50, at 81-82 (testimony of Judith Reichler).

torneys, seeking help with their child support problem. They have invariably had a disappointing if not devastating experience in the courts. . . . They complain of low court ordered support awards, minimal enforcement of their support orders, even after they have secured them, and disrespectful treatment from anyone from guards in the courthouse, to judges.²³⁵

Lynn Vallone, Chair of the Coalition of Women for Child Support, a Buffalo-based organization that includes women from all parts of western New York and all walks of life, testified that, on average, members have spent over seven years trying to have court-ordered child support enforced. Four-fifths of the members have had to apply for public assistance after divorce, although none of these women had been on welfare before. Ms. Vallone testified, “[i]ndividually we have been told that our unsuccessful attempts to collect uncollected child support builds character. . . . We have also been told that we are vindictive, money-grabbing, that we made our bed[s] and now we must lie in them.”²³⁶

New York Secretary of State Gail Shaffer testified that “[f]amily [c]ourt has made women feel that their attempt to support their children is vindictive, unimportant or even a joke.”²³⁷

At the Jefferson County listening session, attendees asked: “Why must the burden be put on the custodial parent to look for services?” “Why do social service people and the courts treat women like they were criminals because they have no money?”

By contrast, several witnesses and survey respondents reported that fathers’ oral representations about their finances are accepted without a demand for proof.²³⁹ At the Rochester regional meeting, an attorney reported that that afternoon she had been at a conference in chambers on behalf of a woman who had been attempting to enforce a child-support award for fourteen years. The father’s attorney

235. *New York City Hearings I*, *supra* note 27, at 222 (testimony of Carol Lefcourt).

236. *Rochester Hearings*, *supra* note 49, at 35 (testimony of Lynn Vallone). A random sample study of the members showed that over 50% of the women had their already low child support awards reduced over time whereas only 15% had their awards increased. *See id.* at 39. Among the membership is a group of 20 mothers to whom \$225,000 in child support arrearages is owing, and who have collectively made over 275 court appearances in their efforts to collect. *See id.* at 39-40.

237. *Albany Hearings*, *supra* note 57, at 21 (testimony of Gail Shaffer).

238. LISTENING SESSIONS, *supra* note 18, at 11.

239. *See Rochester Hearings*, *supra* note 49, at 36 (testimony of Lynn Vallone); *see also New York City Hearings I*, *supra* note 27, at 146 (testimony of Lillian Kozak).

said to the judge, “[a]fter all these years, why doesn’t she leave him alone?” and the judge said to the mother’s attorney, “Yes, why doesn’t she leave him alone?”²⁴⁰

At the Oneida County listening session, another woman who has spent years trying to enforce child support stated that every time she went to court she was “put on the dime” and made to defend every item she had purchased for the children, whereas very little was said about the fact that her husband was not paying.²⁴¹

Carol Lefcourt, Esq., reported that one chief clerk told her that the judges he knew did not enter money judgments because they did not want to ruin fathers’ credit ratings.²⁴²

Judith Reichler, Esq., testified that judges around the state have told her they will not set a temporary award because they might set it too high and the respondent, usually the father, would be stuck with it. This prospective concern for the father leaves the total burden of support on the mother.²⁴³

Fran Mattera of For Our Children and Us, Inc. (FOCUS), a nonprofit agency that assists in the collection of child support in Queens, Nassau and Suffolk, said that many judges are unwilling to issue a wage deduction order against a father out of concern for a negative reaction from his employer.²⁴⁴ Similarly, Secretary of State Gail Shaffer testified:

The judicial branch does not often treat the child as a legitimate creditor with interests in unpaid, accrued child support that should not be compromised by parent or by judge without fiduciary accountability.

The Judiciary must insist that child support be the first deduction from [the father’s] disposable earnings and not the last. It should come before the boat or the house or the luxury items that are often put at the top of the list . . . [with the attitude that] “Well, when we get to the bottom, we’ll decide what we do with the children with what’s left over.”²⁴⁵

240. One survey respondent noted: “Almost daily, I am at a loss to explain to women clients why their husbands can cease or never start obeying a court order, and the court will do little more than (after 2-3 months) order him, again, to do it.” R.L. ASSOCIATES, *supra* note 23, app. B, at 65 (Survey Respondent No. 1498F).

241. LISTENING SESSIONS, *supra* note 18, at 6.

242. See *New York City Hearings I*, *supra* note 27, at 227-28 (testimony of Carol Lefcourt).

243. See *New York City Hearings II*, *supra* note 50, at 83 (testimony of Judith Reichler).

244. See *New York City Hearings I*, *supra* note 27, at 130-31 (testimony of Fran Mattera).

245. *Albany Hearings*, *supra* note 57, at 24-25 (testimony of Gail Shaffer).

(b) Custodial Mothers' Access to Counsel

Numerous respondents pointed out that, as in divorce litigation, the inability of women to afford counsel makes it virtually impossible for them to enforce child support awards. Fran Mattera of FOCUS testified:

Many men conceal their assets. A woman as a petitioner has the burden of proof when she goes into court. But because women have exhausted their resources . . . to engage a private attorney, and because free legal services are unavailable to them on support matters, the burden of proof is too difficult. However, a man as a respondent in a case is entitled to legal aid if he can prove financial hardship. It seems the court bends over backward to protect a man's rights, but children's rights, through their mother's actions in court, are not being protected.²⁴⁶

Typical of the comments on the Attorneys' Survey is the following:

I have found it almost impossible to obtain counsel fees for relatively indigent clients, thus effectively shutting them out of effective enforcement procedures.

*Thirty-seven-year-old rural female*²⁴⁷

Judith Reichler, Esq., pointed out that although a petitioner can go into family court in the first instance without an attorney, she will not know and will not be told how, for example, to subpoena the father's financial records. Moreover, if an order is made which she believes is incorrect, it will be extremely difficult for her to appeal the decision without the assistance of an attorney.²⁴⁸

(c) Timeliness of Awards

The new child-support legislation requires hearing examiners to make an award upon the custodial parent's first appearance. This provision seeks to remedy the financial hardship to mothers with custody of their children who have frequently been denied child support awards immediately upon the separation of the parties. Among respondents to the Attorneys' Survey, thirty percent of

246. *New York City Hearings I*, *supra* note 27, at 131-32 (testimony of Fran Mattera).

247. R.L. ASSOCIATES, *supra* note 23, app. B, at 49 (Survey Respondent No. 1149F)

248. See *New York City Hearings II*, *supra* note 50, at 78 (testimony of Judith Reichler).

women and twenty-two percent of men indicated that temporary child support is "rarely" or "never" granted pending a hearing on the motion *pendente lite*.²⁴⁹ The Child Support Commission stated that "the inability to obtain temporary support orders was reported in most of the cases that came to the attention of the commission."²⁵⁰ Judges are perceived to be more favorably disposed toward the interests of the father and reluctant to award support without a hearing. Such hearings are easily delayed for several months because of court congestion.

The primary problem is that custodial parents must wait months before obtaining any relief including child support and maintenance. Thus, there is no interim support and the household suffers drastically.

*Thirty-five-year-old New York City female*²⁵¹

Wynn Gerhard, Esq., acting director of a neighborhood legal services program serving low income residents of Buffalo and Erie County testified:

In a typical case, a woman left with children and no income applies to the [f]amily [c]ourt for an order of support, hoping to avoid applying for welfare. At the initial court hearing, despite requests and a clear showing of immediate need by the woman, the [f]amily [c]ourt declines to issue a temporary order of support, and instead refers the case for further hearings, which can take literally months before a final determination is made. The woman is left with no choice but to apply for public assistance to support herself and her children.²⁵²

(d) Adequacy of Awards

There appears to be little consistency in the way the amount of child-support awards is determined. Amounts awarded are frequently

249. Female and male survey respondents (F%/M%) reported that temporary child support is granted pending a hearing on the *pendente lite* motion:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NO ANSWER |
|--------|-------|-----------|--------|-----------|
| 11/15 | 45/52 | 26/23 | 6/4 | 10/5 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 40.

250. CHILD SUPPORT REPORT, *supra* note 230, at 39.

251. R.L. ASSOCIATES, *supra* note 23, app. B, at 76 (Survey Respondent No. 1723F).

252. *Rochester Hearings*, *supra* note 49, at 79 (testimony of Wynn Gerhard).

inadequate. Only twenty-eight percent of all survey respondents, fourteen percent of the women responding and thirty-six percent of the men responding, reported that child support awards "always" or "often" reflect a realistic understanding of local child-raising costs, particular children's needs and the custodial parent's earning capacity.²⁵³ Judges often appear to ignore statutorily prescribed factors such as the prior standard of living for the family, special needs of the children and the expenses and nonmonetary contributions of the custodial parent.²⁵⁴ Others are perceived to give disproportionate weight to what the father can comfortably afford. Testimony by the father as to his limited ability to pay tends to be accepted without substantiation while the mother must prove the expenses of the children. Moreover, there is a strong perception that the father is deemed entitled to retain for himself as much of his own income as possible.²⁵⁵ Child support awards are often insufficient to furnish even one-half of the actual cost of rearing a child.²⁵⁶ Consequently, the income of women and children is dramatically reduced from its level prior to divorce. Attorneys responding to the survey wrote:

253. Female and male survey respondents (F%/M%) reported that child support awards reflect a realistic understanding of the local costs of child raising, particular children's needs, and the earning capacity of the custodial parent:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 1/7 | 13/29 | 30/34 | 39/25 | 15/3 | 3/3 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 39.

254. See N.Y. DOM. REL. LAW § 236B(7) (McKinney Supp. 1985); N.Y. FAM. CT. ACT § 413 (McKinney 1983 & Supp. 1985).

255. Child support payments as a percentage of the average income of men have remained at about 13 percent since 1978. See CHILD SUPPORT, *supra* note 163, at 1-3. It is estimated that in two-parent families, child raising costs amount to 30 percent of family spending in one-child families, 40-45 percent of family spending in two-child families, and nearly 50 percent in three-child families. See P. ESPENSHADE, INVESTING IN CHILDREN: NEW ESTIMATE OF PARENTAL EXPENDITURES (1984).

256. In 1983, the mean amount received nationwide by all women owed child support payments, including those who received nothing, was \$1,780. See CHILD SUPPORT, *supra* note 163, at 2. If the full amount due had been paid to all women, the mean amount would have been \$2,520. See *id.* at 2-3. For women to whom court-ordered payments were due, the mean payment due was \$2,290, but the mean amount received was only \$1,330—58% of the amount due. See *id.* at 3.

Women with voluntary written agreements received 88% of the amount they were due. See *id.* The mean child support payment owed to these women was \$2,960. See *id.* The mean amount of child support received by women who received some payment was \$2,340 per family (*i.e.*, regardless of the number of children). See *id.* at 2. After adjusting for inflation, average child support payments in 1983 were 15% below the level reported in 1978. See *id.*

I can attest to the sexism prevalent in family law practice. Generally, a mother and two children are to live on the same amount of income as the father by himself.

*Thirty-two-year-old rural male*²⁵⁷

[I]t is extremely difficult to get adequate child support increases, college tuition, and fair property division. Many of my female clients are close to poverty within a few years of the divorce while the husbands, although not wealthy, are not struggling to make ends meet.

*Thirty-four-year-old rural female*²⁵⁸

Child support awards are . . . inadequate, being based on 'what amount will not cause a hardship on the father,' rather than the cost of raising a child.

*Twenty-eight-year-old urban female*²⁵⁹

Only recently has the [f]amily [c]ourt imposed realistic support awards taking into consideration the real costs of raising a child.

*Thirty-six-year-old rural male*²⁶⁰

The awards initially are insufficient support for a child. Judges desperately need guidelines as to how much support a child needs. . . . I am personally aghast at the child support awards. It means instant poverty and is an *outrage*. . . . Not one of twenty clients with children has been able to properly and adequately support her children and self without borrowing.

*Thirty-five-year-old New York City female*²⁶¹

Fran Mattera of FOCUS, whose paralegals are in Queens, Nassau and Suffolk County Family Courts on a daily basis testified: "[T]he support awards of \$10, \$20 and \$25 a week ordered by judges in [f]amily [c]ourt do not provide for even the essentials such as food, shelter, and sneakers."²⁶²

(e) Enforcement of Awards

Judges' unwillingness to require compliance or impose penalties for noncompliance was the problem about which the Child Support

257. R.L. ASSOCIATES, *supra* note 23, app. B, at 37 (Survey Respondent No. 0924M)

258. *Id.*, app. B, at 34 (Survey Respondent No. 0838F)

259. *Id.*, app. B, at 64 (Survey Respondent No. 1496F)

260. *Id.*, app. B, at 16 (Survey Respondent No. 0460M).

261. *Id.*, app. B, at 76 (Survey Respondent No. 1723F) (emphasis in original).

262. *New York City Hearings I, supra* note 27, at 133-34 (testimony of Fran Mattera).

Commission received the greatest number of complaints.²⁶³ The chair of the Western New York Coalition for Child Support testified that, in Erie County, enforcement is "virtually nonexistent."²⁶⁴ Secretary of State of New York Gail Shaffer reported that, "[t]he word on the street is that only fools pay child support because payment is simply not enforced. The message women receive is that child support is not an important matter and that they are not taken seriously and that they are wasting their time, money and energy."²⁶⁵

Respondents to the Attorneys' Survey also reported that many judges are not using the statutory enforcement mechanisms that were available to them before enactment of the New York State Support Enforcement Act of 1985. Seventy-four percent of women attorneys and sixty-five percent of men reported that "rarely" or "never" are sequestration and/or bonds ordered to secure future child support payments.²⁶⁶

Sixty-three percent of women and sixty percent of men reported that interest on arrears as provided by statute is "rarely" or "never"

263. See CHILD SUPPORT REPORT, *supra* note 230, at 73. Female and male survey respondents (F%/M%) reported that the courts effectively enforce child support awards:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 1/7 | 17/32 | 32/39 | 38/18 | 8/2 | 4/3 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 41. National Census Bureau data on child support awards and compliance reveals that since 1978, about three billion dollars in child support has been uncollected each year. See CHILD SUPPORT, *supra* note 163, at 3. According to the Census Bureau's latest report, in 1983, 57.7% of the 8,690,000 women in the United States with children under twenty-one whose father was absent from the household had child support agreements or awards. See *id.* at 1. Of the 4 million women to whom payments were owed in 1983, 50% received the full amount due, 26% received partial payment, and 24% received no payment. See *id.*

264. *Rochester Hearings*, *supra* note 49, at 41 (testimony of Lynn Vallone).

265. *Albany Hearings*, *supra* note 57, at 23 (testimony of Gail Shaffer) (quoting testimony from Feminization of Poverty hearing).

266. Female and male survey respondents reported (F%/M%) that sequestration and/or bonds are ordered to secure future child support payments:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| -/* | 1/5 | 11/21 | 51/51 | 23/14 | 14/8 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 44. The hyphen (-) means no responses. See *id.* The asterisk (*) means less than half of one percent. See *id.*

awarded.²⁶⁷ Eighty-two percent of women and sixty-seven percent of men reported that respondents who deliberately fail to abide by court orders for child support are “rarely” or “never” jailed for civil contempt.²⁶⁸

The New York Domestic Relations Law and the Family Court Act direct that upon a showing that the respondent has defaulted on a child support order, the court is to enter a judgment for the arrears with costs and disbursements unless the respondent shows good cause for failure to apply for relief from the order before the arrears accrued.²⁶⁹ The Child Support Commission found that this provision is being interpreted to allow a motion for downward modification and reduction arrears “simply because the respondent alleges an inability to have made the required payments, even though no formal application for modification is made.”²⁷⁰

267. Female and male survey respondents reported (F%/M%) that interest on arrears is awarded as provided by statute:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 3/4 | 6/10 | 19/19 | 37/42 | 26/18 | 9/6 |

Id., app. A, at 43.

268. Female and male survey respondents reported (F%/M%) that respondents who deliberately fail to abide by court orders for child support are jailed for civil contempt:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| */* | 4/9 | 6/16 | 35/42 | 47/25 | 8/7 |

Id., app. A, at 46. The asterisk (*) means less than half of one percent. *See id.* The rarity of jail as a sanction for child support default in Brooklyn Supreme Court was illustrated by Kings County Supreme Court Justice William Rigler, who reported that when he directed that a man be taken to jail, the court personnel did not know what to do. *See New York City Hearings II, supra* note 50, at 110-11 (testimony of William Rigler). By the time they found the sheriff and had him come over, the father's new wife had arrived and paid the \$10,000 he was in arrears at that time. *See id.*

Refusing to impose a jail sentence for willful failure to pay child support not only fails to sanction the defaulter but deprives the community of a powerful incentive to pay. Studies of the impact of different enforcement practices reveal that counties with high jail rates also have high compliance rates. *See D. CHAMBERS, MAKING FATHERS PAY 317 (1979)*. A rigorous study of twenty-eight Michigan counties found that as the number of jailings went up, so did compliance. *See id.* The six counties with jailing rates of seven or more per 10,000 persons in the county had 75% compliance rates. *See id.*

269. *See N.Y. DOM. REL. LAW § 244 (McKinney 1977 & Supp. 1985); N.Y. FAM. CT. ACT § 460 (McKinney 1983 & Supp. 1985)*.

270. CHILD SUPPORT REPORT, *supra* note 230, at 60.

Among respondents to the Attorneys' Survey, sixty-eight percent of women and fifty-six percent of men reported that the courts "sometimes" or "often" reduce or forgive arrears accrued prior to the making of a downward modification motion.²⁷¹ The Child Support Commission pointed out that this action works a hardship on the petitioner and encourages respondents to withhold payments, knowing that the accumulated arrears may be reduced prior to judgment and the costs, disbursements and interest will probably not be assessed.²⁷²

The Child Support Commission offered the following two examples as typical of judges' refusal to use available enforcement mechanisms:

A respondent had been brought before the court many times for noncompliance with a court order—once on a bench warrant—and had accumulated a large arrears. Many of the enforcement techniques had been threatened, but not used. When [it] asked what had happened the last time the case was in court, the commission was told by the judge that the case had been adjourned "to give the respondent an opportunity to voluntarily comply."²⁷³

The judge had determined that the respondent was almost \$12,000 in arrears, after appearing before the court several times for failing to comply with a court order for child support. It was determined that the respondent was in willful noncompliance, and he was ordered to a jail term—suspended on the condition he make up the arrears by a particular date and keep payments current. On the date set, the respondent was found in default, and there was a new determination that the failure to comply was willful. The respondent was, however, merely ordered to make current payments; no penalty was imposed.²⁷⁴

Myrna Felder, a New York City practitioner, and Stanley A. Rosen, an Albany practitioner, testified that adjournments are freely given and that court delay results in judgments coming months, even

271. Female and male survey respondents (F%/M%) reported that courts reduce/forgive arrears accrued prior to the making of a motion for downward modification of support:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| */* | 24/11 | 44/45 | 15/30 | 3/6 | 13/7 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 43. The asterisk (*) means less than half of one percent. *See id.*

272. *See* CHILD SUPPORT REPORT, *supra* note 230, at 60.

273. *Id.* at 75.

274. *Id.*

years, after the initiation of proceedings.²⁷⁵ Seventy-three percent of women and sixty percent of men responding to the Attorneys' Survey reported that repeated adjournments are "often" or "sometimes" granted to the noncustodial parent.²⁷⁶

Judge Richard Huttner, Administrative Judge of the New York City Family Court who served as a member of the New York State Commission on Child Support, described what he found to be the "usual scenario" of delays women face when seeking enforcement of child support awards:

A woman takes a day off from her job and usually loses the day's pay to come to court. After waiting the better part of the day, she is given an interview with probation services. She is told that she must return in a week and that her husband will be sent a letter advising him also to attend a settlement conference where hopefully the husband and wife will agree to an order of support.

Usually on this date, the wife appears, losing another day's pay, and the husband is a no-show. Now the woman is marched to our petition room where a petition for support is prepared, and is given a summons with instructions on how to have it served. The date to come back to court is four weeks. On that date she must appear, losing another day's pay, and [thirty] percent of the time the husband still does not show despite having been served with a summons.

The judge at this time takes an inquest. Or he can take an inquest, rather, and grant a support order and issue a payroll deduction order, garnish the husband's salary and bringing the matter to closure, but some, in fact, most of my colleagues, will choose to notify the husband that a warrant will be issued unless he shows up the next time. The next time the gentleman may show up and the woman is there again for the fourth time at a loss of four days pay.

Our gentleman, seeing that the lady means business, asks for an adjournment in order to hire an attorney and he gets it. The next

275. See *New York City Hearings I*, *supra* note 27, at 249-52 (testimony of Myrna Felder); *Albany Hearings*, *supra* note 57, at 175-77 (testimony of Stanley Rosen).

276. Female and male survey respondents (F%/M%) reported that repeated adjournments are granted to the noncustodial parent in child support proceedings:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| 9/2 | 41/21 | 32/39 | 11/32 | 1/3 | 6/3 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 41.

time, time No. 5 and five days lost pay for the woman, and possibly a lost job, all the time she has been losing from work, the man's attorney finally shows up and what does he do? He does what seems to me as a trial judge that all attorneys do, he asks for an adjournment.

By the time the woman has a day in court, months without support have passed.²⁷⁷

(f) Visitation

Several public hearing witnesses asserted that the reason for fathers' high default rate on child support is mothers' interference with visitation and the courts' failure to enforce visitation rights, a point on which the representatives of father's rights organizations felt keenly.²⁷⁸ A survey respondent wrote:

There has been a serious and ongoing problem in Monroe County with respect to enforcement of the noncustodial parent's right to exercise visitation. While child support awards are always enforced by the courts, visitation orders rarely if ever are. This instills a perception, which for all intent[s] and purpose[s] is correct, that the courts are sexist with respect to their treatment of parents' rights and obligations for their children. This, in turn, prompts noncustodial parents, who in [ninety-five percent] of all cases are men, to disregard child support orders.

*Thirty-five-year-old rural male*²⁷⁹

The feelings of many women were summarized by Lynn Vallone of the Buffalo Coalition for Child Support:

We continue to send our children on court ordered visits with nonpaying fathers, yet upon returning to court for child support enforcement, a cross petition very frequently accuses mothers of denying visits. The visitation issue becomes a predominant issue. Child support is initially ignored, and there is a presumption of denied visits before any evidence is presented²⁸⁰

Attorney General Robert Abrams described a case brought to his attention by his office's Civil Rights Bureau in which a man \$22,000

277. *New York City Hearings II*, *supra* note 50, at 129-31 (testimony of Richard Huttner).

278. *E.g.*, *Rochester Hearings*, *supra* note 49, at 111 (testimony of Richard Sansone); *id.* at 127 (testimony of John Rossler).

279. R.L. ASSOCIATES, *supra* note 23, app. B, at 22 (Survey Respondent No. 0575M).

280. *Rochester Hearings*, *supra* note 49, at 35-36 (testimony of Lynn Vallone).

in arrears on child support brought a petition in family court alleging denial of visitation. The judge threatened the wife with contempt, assuming without discussion that she had deterred the children from visitation. The judge took no steps to enforce the child support.²⁸¹ Among respondents to the Attorneys' Survey, almost half of women (forty-six percent) and men (forty-eight percent) reported that child support enforcement is sometimes denied because of alleged visitation problems.²⁸² A survey respondent wrote:

The absolute best defense in a support enforcement action is defendant's claim of visitation interference and request for change of custody—including when the father/defendant has been living out of the area, by his choice, for years.

*Thirty-six-year-old female (no region given)*²⁸³

Courts' failure to enforce visitation is perhaps a function of some judges' failure to understand why some fathers want to be involved parents.²⁸⁴ Whatever the motivations of the courts, it appears that they are not carrying out their enforcement functions adequately with respect to either child support or visitation.

The New York State Child Support Commission found that while "visitation interference" is frequently raised as a defense to a petition for child support compliance, it is less frequently raised or pursued in an independent action. The commission also found that raising this defense often resulted in a delay in the support proceedings as well as a stay of the support order, and that failure of visitation by the father is far more frequent than visitation interference by the mother.²⁸⁵ The commission urged that visitation and child support be treated as separate matters so that children do not suffer as a result of parental disagreements.²⁸⁶

281. See *Albany Hearings*, *supra* note 57, at 13 (testimony of Robert Abrams).

282. Female and male survey respondents (F%/M%) reported that enforcement of child support is denied because of alleged visitation problems:

| ALWAYS | OFTEN | SOMETIMES | RARELY | NEVER | NO ANSWER |
|--------|-------|-----------|--------|-------|-----------|
| */* | 19/7 | 46/48 | 26/35 | 3/5 | 6/4 |

R.L. ASSOCIATES, *supra* note 23, app. A, at 42. The asterisk (*) means less than half of one percent. See *id.*

283. *Id.*, app. B, at 26 (Survey Respondent No. 0680F).

284. See *generally infra* notes 299-301 and accompanying text.

285. The Commission also pointed out that mothers sometimes deny visitation because of fear of physical abuse. See CHILD SUPPORT REPORT, *supra* note 230, at 86.

286. See *id.* at 85-86. Under the new, expedited support procedures in family

(g) Family Court Resources

The lack of resources for family court personnel was repeatedly cited as a major obstacle to the timely resolution of support cases and as emblematic of the system's attitude toward women. Assemblywoman May Newburger, Chairperson of the Assembly Task Force on Women's Issues, stated:

I think that we have relegated women to the back seat of the judicial bus for too long in terms of dealing with their issues with parity . . . and nothing reflects this bias more than the situation of the [f]amily [c]ourt in our court system. This is a court that should be the lynch-pin court in terms of these kinds of cases. It is the most neglected, most understaffed . . . most underattended court in our system.²⁸⁷

Carol Lefcourt, Esq., Counsel to the New York State Division for Women, observed that although there were over 73,000 paternity and support petitions and over 100,000 modification and support petitions filed in the New York State Family Court in 1983, and although family court judges handle approximately 1,000 cases for every 300 cases handled by a supreme court judge, family court receives a far lower allocation of resources than does the supreme court and "[w]ith depressive juvenile administration, PINS [Persons In Need of Supervision and] foster care, little time and effort is reportedly spent on support cases."²⁸⁸ At the Task Force's regional meeting in Kingston, Ulster County Family Court Judge Karen Peters also noted disparities in case loads and resources of the supreme and family courts. Legislator Harriet Cornell told of the crippling personnel shortage in Rockland County Family Court despite vastly increased case loads and a judge and lawyer who described that court to her as the "stepchild of the court system" and "[t]he last to get what is needed and the first to [have it] take[n] away."²⁸⁹

SUMMARY OF FINDINGS

1. Gross inadequacies, nationwide, in the ordering and enforcement of child support led Congress to enact the Child Support Enforcement Amendments of 1984. In response to the Act's requirement that states conform their law to the new federal

court, the custodial parent's alleged failure to permit visitation cannot be raised before a hearing examiner. See N.Y. FAM. CT. ACT § 439(b) (McKinney 1983).

287. *Albany Hearings*, *supra* note 57, at 71 (testimony of May Newburger).

288. *New York City Hearings I*, *supra* note 27, at 225-26 (testimony of Carol Lefcourt).

289. *Albany Hearings*, *supra* note 57, at 45 (testimony of Harriet Cornell).

- requirements, the New York 1985 Support Enforcement Amendments were enacted.
2. The Task Force received compelling evidence of human suffering resulting from the judicial system's failure to administer child support laws adequately.
 3. The new law seeks to address enforcement problems by establishing expedited procedures for immediate or temporary support orders and providing for income execution, income deduction and state-tax refund intercepts.
 4. Attitudes and practices in New York's judicial system that compelled federal intervention raise profound concerns as to how effectively the new law will be administered. Although New York law provided numerous enforcement mechanisms prior to federal intervention, many judges failed to utilize them effectively.
 5. Among the most prevalent problems are the following:
 - a. Awards frequently are inadequate and appear to be based on what the father can comfortably afford rather than the standard of living of the children and their special needs.
 - b. Women's attempts at enforcing support are frequently viewed by judges as vindictive.
 - c. Judges are perceived to be more concerned about preserving the father's credit rating than effectively enforcing awards.
 - d. Women have inadequate resources to retain counsel to assist in collecting awards.
 - e. Child support arrears are frequently reduced or forgiven without adequate justification.
 - f. In enforcement proceedings, repeatedly granted adjournments to nonpaying parents often compromise the custodial parent's employment because of the necessity of numerous appearances in court.
 - g. Visitation problems are improperly considered by the courts as justification for not enforcing child support.
 - h. Resources allocated to the family court are perceived to be unfairly low when compared to the resources of other courts.

RECOMMENDATIONS

FOR COURT ADMINISTRATION:

1. Take necessary steps to assure that judges and hearing examiners are familiar with:
 - a. Current, accurate information respecting the costs of child raising, the costs and availability of child care and other statistical and social data essential to making realistic child support awards.

- b. The economic consequences of divorce from the standpoint of ensuring that parents' financial contributions to child support are proportional to each party's earnings.
 - c. All available enforcement mechanisms under new and existing laws and the importance of utilizing them to the fullest extent of the law.
 - d. The concept of "good cause" in section 460 of the Family Court Act and section 244 of the Domestic Relations Law respecting the reduction of arrears.
2. Collect and publish data to enable effective monitoring of child support enforcement cases.

FOR THE LEGISLATURE:

Enact legislation that:

1. Provides counsel for indigent custodial parents in child support enforcement proceedings.
2. Provides that in any proceeding in which a judgment for support arrears is sought, the grounds constituting "good cause" for permitting untimely requests for modification of the support order be enumerated and strictly limited and that such modifications may be granted only upon a specific finding by the court on the record as to which specific ground has been demonstrated.
3. Provides that child support awards can only be modified prospectively.
4. Establishes a new formula for child support that takes into account the many considerations elaborated in the report of the New York Child Support Commission.
5. Makes penal sanctions for nonsupport of children more readily available as a deterrent measure.

FOR BAR ASSOCIATIONS:

Family law sections and committees should take an active role in ensuring that the new child support enforcement legislation is working effectively and in developing a fair and uniform formula for child support awards in the state.

FOR LAW SCHOOLS:

Family law courses should include information about the award and enforcement of child support similar to that recommended for judges and the hardship to children and custodial parents when child support awards are insufficient and unenforced.

C. The Courts' Consideration of Gender in Custody Determinations

Determinations of child custody are among the most perplexing and difficult aspects of the judicial function. Custody is an area of