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EXCUSES

An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders

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A GUIDE TO THE READER

This report, like many such studies, is a compromise aimed at both a specialist and a general audience. The two audiences may wish to approach it differently. The specialist may start with the overview and recommendations section (coloured pages) and read the other chapters for background and elaboration. The non-specialist might read the brief subsections on the title, background of the study and data collection in the overview section, skim the remainder of that section (it is inevitably rather dense), and turn directly to Chapter 3. The case illustrations and descriptions provide the best and probably the most enjoyable route to comprehension of the issues.

The reader will note another dualism in this report. The issue of maintenance order default is raised both as a troubling social problem in its own right and as an especially clear indicator of wider problems in family policy. Discussion and recommendations are pitched at these two levels.

Because footnotes disturb some readers, for whom the origin of an assertion is less important than whether or not is seems sensible, no references are given in the text. Because other readers want to be able to check that an argument, however reasonable it may seem, has been properly drawn and justly credited, footnotes are presented by chapter at the end of the text. Readers who feel that certain technical terms require more explanation than they receive in passing in the text may find some assistance in a short glossary at the very end of the report.

Overview and Recommendations

About the Title

Excuses are central to the nature of the show cause hearings described in this study. Men are called before the court to explain why they appear to have fallen behind in their support payments and to show that they are not willfully defaulting on their maintenance obligations. The explanations they make and the excuses they offer - both good and bad ones - are set out in detail below. The subtitle of the report - 'an analysis of court interaction' - reflects the fact that this is not a one-sided recitation but an interchange between the man and the court. The court elicits excuses, evaluates them and gives them legal meaning - as legitimate or not, showing good intentions or contempt.

Beyond this, analysis of the excuses that arise on a case-by-case basis makes clear that the court, as an institution upholding our social values, is itself on very shaky ground on the issue of maintenance. The family court finds itself choosing among excuses for lack of a consistent social policy; it is being asked to enforce orders in the absence of any clear public consensus on the central question of what is the continuing responsibility of parents towards their dependent children after marriage breakup.

This study's conclusion, therefore, is that problems in enforcing maintenance obligations can be seen as symptomatic of a wider social concern about changes in the family and society. Clarification of these major issues must begin well before the situation, often a tangled mess, arrives in court for enforcement. And it must be based on more profound changes than the court can effect, acting as it does on cases as they arise. For those who must deal with the situation as they find it today, however, this research also suggests some short-term reform in enforcement that might reduce the number of excuses we have to make.

Background of the Study

In years past, divorce rates in Canada were low and quite stable and the issue of arrangements for continuing support of children, while worrisome for those involved, had little general visibility. The very dramatic rise since reform of the divorce law has brought the problem into prominence. In the last fifteen years, the national divorce rate has quadrupled while British Columbia's has remained the highest in Canada.

The picture-postcard family of mother, father and two point one children is now a statistical minority (if not yet an oddity) among household types; by contrast, the single parent family has become an important type. The merged family, a unit created through re-marriage of parents (who may bring children from previous marriages and may bear offspring of the current union) is also being seen as a distinct variant of increasing significance. These latter two household types each have important bearing on maintenance as a social concern.

Most single parent families are female-headed: mothers and their children. Because of women's disadvantaged earning capacity, these families are found disproportionately among the poor. In fact, over 20,000 such families are in receipt of social assistance in B.C. The issue of the non-custodial father's financial contributions to support of his family demands our attention.

Merged families raise a related social concern. Which family interests are to be given priority - the financial needs of the children in the first family or those of the second?

We know that provision for regular maintenance payments - made by the parent at separation, attached to a divorce decree, or ordered by the family court - is common. Just how common is not clear, however, as no statistics are kept on the number of existing orders. The extent of nonpayment is also unknown. This study is based on a sample of orders where payments are made through the family court, which monitors them for enforcement.

It would be expected that such a sample is not representative of the whole gamut of maintenance orders in force. The very poorest part of the population may be under-represented; where there is a chronic shortage of funds, if any maintenance award is made at all, there is little incentive on the part of the custodial parent to enforce it. It is even more likely that the comfortably-off are under-represented. Where there are substantial assets, there are generally less cumbersome methods of ensuring maintenance is paid (or assets suitably allocated) than by show cause proceedings.

The bulk of orders in this sample are for modest amounts. The great majority are under $200 per month. But even that mounts up to considerable sums. The average show cause hearing studied deals with about a year's worth of arrears - approximately $2,000 .

If this sample is not wholly representative, the arguments made and the problems they expose seem eminently generalizable. Indeed, the Law Reform Commission of Canada recently characterized the situation in these terms:

> Something is profoundly wrong with the body of law and practice that fails to attain its objects more than it succeeds. Failure is the universal characteristic of the traditional system for enforcing maintenance orders in Canada. With a few notable exceptions in recent years, apathy has been the companion of failure. [1]

It would be fair to comment that apathy has given way to concern and considerable effort to make enforcement of maintenance orders succeed.[2] The problem is by no means solved however. Indeed, some of its elements have barely been touched. This study examines a few of these relatively unexplored elements. Specifically, it aims at adding to our understanding of the strain between the legal and social aspects of maintenance enforcement by focusing on the interaction between defaulting fathers and the court. The joint sponsorship of the Ministry of the Attorney General of British Columbia and the Social Planning and Research department (SPAR) of the United Way of the Lower

Mainland reflects a common concern with this problem in that it affects many families and also overtaxes the resources and energies of the courts.

Four straightforward sorts of analysis are presented. Two are qualitative: a brief overview of the literature on maintenance default and enforcement; and a detailed description of interchanges between an officer of the Vancouver Family Court and a sample of defaulting parents based on observation of show cause hearings, the principal enforcement mechanism used. The other analyses are quantitative: characterizing the maintenance orders in question; and describing the usual path enforcement has taken in this court over the history of this sample of orders.

Data Collection

The case descriptions are based on courtwatching at the Vancouver Family Court in 1980. Specifically, the sample is composed of 68 alleged maintenance defaulters who appeared before the court referee in response to a summons to show cause during the Monday sittings from January 21st to March 31st 1980. The family court referee is a unique office specialized in maintenance enforcement in the Lower Mainland (for background see Appendix B). It is important to note, however, that as of the courtwatch period, the referee's powers (and court procedures) were essentially identical to those of family court (provincial) judges dealing with the same sort of cases. Moreover, the referee's court is an excellent source of data in that, prior to this period, its powers were less extensive and decisions were submitted as recommendations to the respective judges. Judicial confidence in the referee suggests that this court's decisions are reasonably consonant with general court thinking on maintenance enforcement.

The researchers sat in the back of the court and took notes on an outline sheet (see Appendix A). This form reflected the court procedures which cover the following points: a) going over the particulars; b) determining if the hearing should proceed or adjourn; c) hearing explanations regarding payment or nonpayment; d) eliciting and considering proposals for reconciling the matter; and e) ultimately reaching a decision. Analysis of this material is aimed at showing the legal and extralegal considerations that enter into the non-custodial parent's thinking about his maintenance obligations and the

legal and moral quandaries facing the enforcing court.

The quantitative analyses were based on information collected mainly from court files. The files on each of the cases observed in the courtwatch were examined and enforcement activities were noted (only the show cause-related activity is discussed here) as was relevant information on the parties (age, marital history, employment and financial status, and the like). The 66 files (two cases had been transferred to other courts and were lost to us) provide information on 269 show cause actions initiated in the Vancouver Family Court over the history of these orders, an average of four show cause actions per case. The quantitative information, limited as it is by sometimes fragmentary data and the difficulties of reducing enforcement histories of somewhat different kinds (e.g., some orders has been in force for years, some had originated outside B.C.) to a single model, gives another perspective on the difficulties of enforcement. In addition to providing some shorthand descriptions of the maintenance orders, the major quantitative analysis attempts a first time estimate for the stages in the show cause process: from initiation of court action, service of the summons, and court appearance (and any adjournments) to final disposition.

Literature Review

Maintenance enforcement, a topic which generated only slight research activity in past decades, is now being addressed in several ambitious studies, most notably in Michigan.[3] A number of other jurisdictions have produced less detailed studies or, as in the case of Alberta,[4] are in the process of completing extensive research programs. This brief review covers some of the findings which bear particularly on the issues at hand. Related literature is reviewed in previous discussion on maintenance enforcement;[5] we refer the interested reader to that companion article.

Three questions are discussed here: a) what is the nature of the social problem presented by inadequate enforcement; b) who defaults; and c) what policies and procedures make for better enforcement (and at what costs)?

The literature on enforcement tends to be oriented to problems of justice system failure or of policy conflict between legal and social welfare systems and thus often treats as implicit the social consequences of these problems.

Nevertheless, American studies show that the combination of a generally ineffective system of support enforcement along with the continuing tendency to grant child custody to the mother places the major childrearing obligation on women without adequate financial resources. By contrast, the disposable income of the non-custodial father tends to be greater than before separation or divorce. If the custodial mother must discount any maintenance income because of inability to enforce regular payment, sex-linked income differentials will likely keep the family in a relatively financially insecure position even if the mother is employed.

These same studies address the question of who defaults. Fathers who have left the area tend to contribute only minimally. Poorer fathers tend to pay proportionately more than their wealthier counterparts; however, no clear profile of the defaulter emerges. It appears that enforcement variables are more predictive of collection levels than any combination of characteristics of the father. Similar conclusions were drawn in a Denver study on the success of enforcing out-of-state orders.[6] Court experience there was that neither the size of the award nor the income or occupation of the father were predictors of payment.

The bulk of the literature reviewed here concerns the improvement of enforcement procedures and collections. Again, the analysis of the Michigan system provides the most sophisticated picture of the factors which lead to success. While the most striking of these is the court's willingness to apply the gaol sanction, it appears that the vigilance of the court expressed through an efficient default monitoring system is important as is the factor of a self-starting capacity of court staff to track down and serve or apprehend errant fathers. Studies reporting on jurisdictions which show none of these features, as in the Denver court for example, report generally poor results.

Running an effective enforcement program means incurring various kinds of costs, some of which may be high. The Michigan example (more specifically certain Michigan counties) can be criticized for too often sacrificing due process by its "get tough" policy. The wrong kind of defaulting fathers tend to be gaoled - those with chronic alcohol problems, the unemployed, those with welfare-dependent families and who are themselves economically marginal. Moreover, long gaol sentences (in Michigan, six months to a year) tend to be used even though it seems that shorter sentences are as effective in enhancing

payment rates. Other court options which may have a more desirable social impact on balance, such as attachment of wages, were not adequately explored by the courts to assess their potential.

Reports on the situation in B.C. generally confirm observations made elsewhere. The study of automatic monitoring procedures introduced in two regions[7] suggests that the introduction of these measures tends to improve collection rates at least marginally. The other aspects of an effective program are still problematic here. The range of options other than the threat of gaol- including attachment, an improved garnishment power, and the like - has increased but utilisation is still spotty. Problems of document service are also unsolved.

Similar points were made in a Vancouver Family Court study.[8] The need was also emphasised for a province-wide data system to respond to the problems of accurate record-keeping, quick response and monitoring a mobile population.

Background Statistics on the Maintenance Orders

Lifespan of the orders

The median order in this sample was made in 1975. Thirty-two percent cover the custodial mother as well as the children. Based on some estimates, child support orders were expected to remain in force for an average of nine years, although arrears accrued over that period and recoverable afterward might extend that average.

Amount of the original award

Original awards averaged $157 per month although most were lower; the median was $110. On average, awards covered two dependent children. Making some conservative assumptions, maintenance awards averaged about 3/4 of the comparable basic welfare rates.

Originating jurisdiction

Orders made under various acts - the Divorce Act, Family Relations Act, Children of Unmarried Parents Act, (or dealt with under Reciprocal Enforcement of Maintenance Order - REMO - provisions) - were being enforced in the referee's court. Extra-provincial orders which made up 23% of these cases, represented special enforcement difficulties. Orders made in supreme court (36% of this sample) were also difficult in cases where variation might have shortcircuited unnecessary enforcement efforts.

Award levels in this sample did not vary significantly by originating court, origin in B.C. or out of province, or type of order (court order, separation agreement, consent order).

Trends in award levels

Recasting awards in terms of average support levels per dependant suggested that there has been a rise in recent years and that this has been more pronounced in awards covering the custodial parent and children than in child support awards. Overall, for the last five years, the latter awards averaged $138 per month while the former averaged $335.

Another point this analysis suggests is that awards tended to be larger for larger families but each additional dependant received a smaller incremental increase. This is interesting in that awards are not specified in this manner but rather are stated as equal amounts per child.

Arrears

Median arrears stood at $1,950 and tended to rise over the life of the order. The size of arrears also varied significantly by type of order (court orders had higher arrears), by origin (extra-provincial orders tended towards higher arrears), and very significantly by originating court (supreme court orders had higher arrears). These relationships demonstrated that pressures put on the enforcement mechanisms of the family court were too much for court resources.

Variation: Court-sanctioned change in the terms of the order.

In cases where there has been a significant change in circumstances, variation might have saved a lot of enforcement effort. Nevertheless there were barriers of time and expense if the order was an extra-provincial one or originated in the supreme court. In fact, overall there was only one application to vary for every four efforts to enforce by show cause proceedings.

Applications to vary were dismissed in about 25% of cases. In another 37%, arrears averaging 60% of the average total were rescinded. Virtually equal numbers of applications resulted in an increase in the award level, a decrease, or no change in quantum. That is, while half the hearings resulted in a change in quantum, variation did not alter the size distribution of orders. Rather, orders tended to be varied when dependants were added (as when custody of a child reverted to the mother from another relative or the welfare authorities) or deleted (when a child turned 18 or left home and was financially independent).

Show Cause Statistics

An average of 4.2 show cause summonses were issued per case in the sample. Issuance of the summons followed a mean of 13 days after the request for court action - usually by the custodial mother-was made. Thirty-six percent of these initiatives failed because of inability to serve the alleged defaulting father with the summons. Where successful, the median length of time to effect service was 12 days; 90% were served within a month. The median time a respondent father had to prepare for his court appearance was 10 days.

Forty percent of the show cause actions which reached court were resolved at first appearance. This brought down the average number of adjournments to around one per show cause action and the median time between first and final court appearance to 27 days. Overall, then, the median time period from request for court action to disposition for cases which came before the court was just over two months, while a minority of these, perhaps 10%, dragged on for more than a year.

For the show cause cases we observed, 32% were dismissed or withdrawn, 24% resulted in consent agreements of some kind, and 44% ended with an order to pay

judgement. The average order to pay recovered 20% of the arrears in question.

Show Cause Hearings: Excuses

The show cause hearing is the most widely used enforcement tool in British Columbia and is often the main forum for exchange of information between the court and the parties. Thus, the hearing may be described as a sort of conversation or a miniature social and legal drama.

The court tries to impress upon the alleged defaulter his legal and moral obligations to maintain his family. The respondent father, on his part, seeks to explain or justify his actions and sometimes presses a personal counter-interpretation of the situation and his responsibilities on the court. Given the necessarily brief time span (appearances before the referee averaged about 10 minutes) and the sheer mechanics of collecting evidence on which to base a decision, it is not surprising that the hearing often does not resolve all the loose ends. Fathers in our sample have been before the court an average of three or four times to explain their situations. In a small number of cases, where men have been elusive, the court has initiated as many as fifteen show cause actions, many of them failing to produce a hearing because service was not effected.

Excuses made by respondents at the hearings vary from clear-cut legal defenses to important but extraneous issues, misunderstandings and misapprehensions, to attempts at evasion and obfuscation. The report deals with these, implicitly, along three dimensions: defenses which stand in law versus illegitimate ones; a related dimension of germaine issues versus tangential ones; and the dimension of intent which ranges from sincerity to deceit.

The court attempts to deal with issues in a particular order; each issue tends to elicit certain kinds of excuses. The first issues covered are essentially technical and allow little scope for excuses. Typically the court first goes over the particulars to determine that the man has been properly served with the summons (and the court has jurisdiction), that there is a valid order in a definite amount, that the stated arrears have been accurately calcul and so on. This also is meant to help orient the respondent to the issues in t hearing.

The stated sum of arrears is the first point which admitted of much dispute; a significant minority questioned the amount. When there was simply a difference of opinion as to payments, the respondent would be asked to compare his records (cancelled cheques, etc.) with the court cashier and mistakes (or misunderstandings about accounting methods or the terms of the order) by the respondent or the court were eventually sorted out. More significant for our purposes were cases where it was claimed the parties had made special (private) arrangements and had never confirmed them with the court or regularized them through variation of the order. While cost and accessibility (where variation had to be sought in another court) were significant considerations, a general reluctance to involve the court further or ignorance of legal options and responsibilities were also important.

These same considerations of cost, bother, reluctance, and ignorance also enter into the next issue generally addressed - the respondent's "position", i.e., whether he was ready to show cause or wanted to seek legal advice, to apply to vary in another court, or whatever. Many respondents did not understand their options or felt they were not worth pursuing. Some men appeared to be searching for indications of how serious the show cause hearing outcome might be. A large minority of respondents eventually asked for an adjournment.

With these issues out of the way, the central point in most hearings revolved around the central issue of why payments had not been made. Inability to pay is the simplest excuse and the only defence recognized in law; it was raised in three versions. The first was a general assertion that the order was beyond the defaulter's means. By itself this is a weak excuse as the court will advise the man of his right (and obligation) to apply to have the order varied.

The second version - one made in a majority of cases - is a statement of reduced income due to unemployment, injury, illness, seasonal layoff, job change, demotion, or business failure. In these cases, the court attempted to ascertain that the respondent could not pay now and had not been able to pay over the period when arrears were mounting.

There are some problematic aspects here, especially where the income drop is due to seasonal layoff or business failure. In the former case, annual income is the proper measure and saving for the off season (where possible) must be assumed, a notion not necessarily held by the respondents. Business failure is difficult because the court, for reasons of time as well as complexity, may not be able to assess statements of personal income.

The third version of the excuse of inability to pay is the most instructive; it is the argument that the man is overburdened by large debts. Debt per se is not a legitimate excuse because the obligation to pay maintenance has a high legal priority: the maintenance order holder, the custodial parent, is a "secured creditor" right behind the federal tax department. Although the court affirms this priority, indebtedness is an important argument in practice because it parallels and reinforces ambiguities in the court's positions on another aspect of the ability to pay, the question of legitimate expenses.

The court tended to avoid detailed accounting disputes (but see the income and expenses form, appendix C) and worked with a few simple premises: a) in practice, two households are more expensive to maintain than one so the standard of living must fall after separation if there is no additional income; b) sacrifice cannot be demanded of the father, only prudence or, at least, no conspicuous waste; c) that is, the respondent can expect to live at a reasonable level himself before he is expected to provide support for the divided family. The significance of this position, however worldly wise and reasonable, is that the "best interests of the children" are strongly prejudiced because the court accepts the notion (held also by the respondent) that separation has fundamentally changed the position of the children as dependants. After separation there are two households and two sets of expenses. In the intact household, the father's expenses on rent, food, utilities, and the like, also maintained his dependants; after separation, his income goes first to maintain himself. Maintenance payments thus come out of residual income.

Parallel ambivalence in the court's posture vis-à-vis indebtedness further erodes the dependent children's position. The court could be seen as affirming three general propositions: a) that respondents not beggar themselves to avoid their maintenance obligations; b) that support payments have first priority among debts; and c) that persons without the ability to manage their debts should be directed to counselling and legal relief. Nevertheless, some men countered successfully that it was in no one's interests to pauperize them or ruin their chances of future income by forcing them to liquidate their remaining assets. So long as the business code - which stresses that a man must meet his business obligations - takes social precedence over (and has more severe personal consequences than) private family responsibilities, the court should expect some resistance. Certain defaulters clearly see it as in their best interests to choose the less threatening road of neglecting family obligations. At present, maintenance enforcement hardly compares with general debt collection,

restricted credit, and so forth in its personal implications. The court's only option to restore the family to its preferred creditor position, if personal bankruptcy seems warranted, is to put the respondent in touch with financial counsellors.

In these matters, it is important to reiterate that fault should not be laid at the feet of the court. The court merely reflects the public confusion and unresolved conflict about the rights of children versus those of adults (not so incidentally their parents), over the position of the family (in its various forms), and the appropriateness of state initiatives related to public policy, especially social welfare.

A number of other excuses, tangential or even baldly illegitimate, are significant because they confront the court with other difficult social contradictions. Three such examples are noted.

First, the court consistently tried to bolster the legal obligation to pay maintenance with the moral sentiment that one should love and support one's children. Some men tried an interesting end run around their legal responsibilities by affirming their moral position. One such excuse was that maintenance money was not being used for the children's benefit but for the mother's. In fact, it is the woman as custodial parent who is the creditor but the court must regard accusations of her misusing funds as extraneous. If the situation were so blatant that it became apparent that she was neglecting the children, custody might be at issue (but maintenance only incidentally). It would seem that while maintenance is a specially earmarked expenditure for the father, it is essentially general revenue for the custodial mother. At any rate, the above excuse was not deemed a legitimate one by the court. A somewhat similar argument which the court also parried was that some men felt reluctant to pay off arrears still owing to their ex-spouses when the children were grown up and living independently.

A second significant extraneous excuse revolved around custody and access disputes, particularly the latter. Respondents attempted to tie withholding of maintenance to difficulties they had with visiting rights, claiming obstruction or ill-will on the part of the custodial mother. The court tried to explain that maintenance was not a quid pro quo arrangement; if serious about it, the fathers could seek relief through the court. Some men, however, clearly feel that since the non-custodial parent's role is reduced to a very few meaningful elements,

denial of a key emotional element like access excuses withdrawal of support; the needs of adults again versus the emotional and financial needs of the children.

The final example of this sort is the excuse that a man has a new family to support. While the court may remonstrate that the respondent knew he had continuing obligations to his first family which take legal priority, some respondents countered forcefully that the children in their current household, to whom they act as father in a more complete sense, have a natural first call on their resources. This involves the court in an apparent denial of the interests of one or another of the sets of children with the added fillip that a strong position might cause the father as provider to fail his second children as he has already failed his first.

The airing of these and other like excuses leads to a final set of issues in the typical show cause hearing - an attempt to have the respondent make a proposal as to how he intends to make good his obligations (assuming he is indeed in arrears and has some resources) and a final judgment: an order to pay, a consent agreement (i.e., one to which the mother agrees), some informal undertaking or the like.

In about 40 percent of the cases observed, there was at least the promise that some arrears would be paid and/or regular payments would commence. Most orders to pay covered only a fraction of the total owed; the referee sought to encourage payment and espoused a "half a loaf is better than none philosophy. In many cases, a fair amount of legal information was passed on and progress made in clarifying the often "messy" and complicated situations.

Recommendations for Policy Direction

If the above analysis is correct, and the problem of child support is particularly subject to strain as law and social practice realign, the court is placed in the difficult position of having to seek workable solutions where compromise serves no one's best interests. Well-intentioned but often ineffectual enforcement of generally inadequate maintenance orders does not truly meet the issue. In the long term, we have to work towards a family policy recognizing current social changes and trends. As a first alternative, however, and as the court's contribution to focusing public debate:

WE RECOMMEND that the enforcing court return to a more consistent application of the "interests of society" model which is at the centre of existing legislation.

THIS RECOMMENDATION IMPLIES:

1. That the court should reinforce two key propositions -
   a) that the primary responsiblity for the support of children lies with the parents, according to their means; and
   b) this responsibility should not be affected by the marital relationship ("common law", married, separated, or divorced) or by the custodial arrangement.

2. That the court should defend the financial needs of the children (and the custodial parent on their behalf) over other creditors. Moreover, first family dependents should be given strict priority as the "preferred creditors" over subsequently acquired dependents. That is, if a responsible parent intends to take on a second family, he must take into consideration his financial obligations to his first one.

3. That awards should be set and enforced in terms of gross income, not residual income after expenses and debt service. The court should not look at the accumulation of personal debt as an unnatural state of affairs. Court-assisted debt consolidation or recourse to personal bankruptcy (so long as the interests of the child support creditor are preserved) should be considered when necessary, i.e., where they represent desirable personal and social tools in upholding the primacy of the family.

4. That the gaol sanction for contempt of the court order be replaced as the major leverage in enforcement with other mechanisms - garnishment, attachment,

recource to bankruptcy - which attempt to motivate the maintenance debtor to rearrange his financial affairs.

5. That child support should be based, so far as possible, on the real costs of raising children, apportioned between the parents according to their means. To help the court in that determination, they should have available updated indices of minimal costs and, where possible, adjust them to reflect the accustomed standard of living enjoyed by that family. Ideally, orders should take into consideration the specific needs of the children, which may differ according to age and special circumstances.

6. That orders should be responsive to significant changes in the financial circumstances of the parties. Inflationary effects should be regarded as changed circumstances. (Orders might be written in terms of parental incomes relative to average income levels in the area and subsequently compared in terms of "constant dollars".) Unlike the other major points in this policy, which can be accommodated within existing legislation, changes would be needed to enable the enforcing family court to vary awards originally set in a higher court or in another jurisdiction.

Recommendations for Procedural Reform and Research Follow-up

Where policy decisions have an increasing impact on a problem over time, the cases monitored in this study suggest some procedural reforms which would have a beneficial impact in the interim and would also be consistent with policy initiatives. As well, a number of short-term research goals are outlined; studies to provide information on defined management problems in enforcement. These recommendations, which are illustrative rather than exhaustive, are summarized under some key headings:

Form of the Order.

1. Child support orders be payable only through the court and automatically monitored for enforcement unless the parents specify another suitable arrangement.

2. One or two standard payment dates, say the 1st or 15th of each month be adopted for all orders to aid in remembering to pay.

3. Payments should be payable monthly; this practice to be standardized. Suitable redrafting of the payment schedules to conform to local practice should take place when an award is registered for enforcement in a reciprocating jurisdiction.

4. In keeping with recent practice, orders should specify how support is apportioned among the various dependents.

5. Standardized information dossiers on the orders should be exchanged by reciprocating jurisdictions where an order is registered for enforcement. These should include the financial information available to the originating courts and the considerations taken into account in setting the award.

Recordkeeping

6. Records should contain all significant enforcement initiatives and be reviewed to check for terms of dispositions.

7. Where appropriate, records hould be computerized for easier access and transferability. (An important secondary benefit is improved management control.)

Document Service

8. Substitutional service should be more readily available as an option, when the usual method of serving the respondent personally (or posting the summons) has failed, especially when there is reason to suspect evasion.

9. Courts should require a sworn statement of home and work addresses and an undertaking to keep the court informed of changes from both parties at every court action.

Orders to Pay

10. Orders to pay should not be for token amounts of outstanding arrears unless this is meaningful to the parties.

11. Orders to pay should always have a default term specified so that the immediate enforcement consequences are clear.

Public Education

12. The nature and reason for court sanctions should be made clear to parties (especially respecting default provisions).

13. Information packages (in nontechnical language) outlining procedures, responsibilities and rights should be prepared for parties; i.e., "tailored" to address their particular circumstances.

Follow-up Research on Procedurcs

14. Policy on the service of documents needs to be clarified and the various options tested and assessed.

15. The use of bench warrants as a method of getting evasive fathers before the court should be evaluated.

16. Adjournments should be analyzed to discover any common characteristics of cases which are protracted.

17. The impact of various court arrangements such as the use of assigned prosecutors should be studied. [10]

18. Attitudes of both parties to the role of the court and their views about maintenance should be researched.

19. A cross-section of matrimonial lawyers should be canvassed on their perception of the factors entering into maintenance disputes and what sorts of arrangements have proved relatively enduring.

20. Reactions to research findings should be sought from the judiciary and enforcement staff and treated as input into the elaboration of study implications.

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Chapter 0 - Introduction

Rationale

The show cause hearing[1] is the primary tool used by B.C. Courts in the enforcement of (child support and "spousal")maintenance orders. As such, it is important to study the show cause hearing for the light it throws on related problems at two levels of concern: the pragmatic one of enforcement itself; and the social policy level concerned with the place of the family in contemporary society.

The dramatic rise of divorce rates in Canada, following legal reform of the Federal Divorce Act (1968), is only one indicator of the current scale of family rupture. That rise is dramatic enough: the national rate went up from 250 divorces per 100,000 married women in 1967 to about 980 divorces per 100,000 married women a decade later; i.e. almost quadrupling. The B.C. rate is one-third greater. If we bypass the broader social implications for a moment, at the pragmatic level, there is a very clear and increasing impact on the "social backup" institutions, in this case the courts (and more broadly, the justice system) and welfare.

It appears that default on maintenance obligations has been pervasive for a long time, in B.C. no less than elsewhere in the English-speaking world. An initial sub-study of the maintenance enforcement caseload of the Vancouver Family Court confirmed that the situation here was well within the reported range - that is, the large majority, about two-thirds of the cases, were in arrears. The mean value of arrears was calculated at $1,635, an apparent rise of 7% in less than a year.

Default on maintenance orders is of interest on the level of social policy because of what it suggests about the state of health of the family. Although the show cause hearing is a situation which is somewhat constrained by legal formalities, there are few other contexts which are so rich in terms of the insight they provide into public attitudes about the family and family law. In the Vancouver Family Court sample described below, alleged defaulters, most of them unrepresented and apparently uncoached, expressed their own perspectives on failing to support their children. In turn, they received more or less

explicit information from the court on their legal (and more broadly, social) responsibilities as parent and ex-spouses. This interchange, and its policy implications, form the main foci of the report.

In sum, the question addressed is: what can we learn about maintenance default by considering the exchanges of information and sentiments in show cause hearings? This paper takes one approach - a descriptive one - to answer that. Description is employed because many of those involved in setting policy - either directly, as politicians or justice officials, or indirectly, as members of an interested public - are unlikely to have more than passing knowledge of the show cause hearing. These small courtroom dramas deserve wider attention because they raise many unresolved social issues.

Methodology

The form used in recording information on the hearings can be found in Appendix A. The analysis draws on 11 days of observation in the Vancouver Family Court spread over three months. The researchers sat in on the weekly hearings of the referee, a court official specializing in hearing maintenance enforcement cases. We recorded about 100 appearances involving approximately 60 cases. Thus, not all cases were resolved in a single appearance; indeed, some were adjourned several times. We caught only the tail-end of some cases and a number were not resolved during our courtwatch period.

Some background information on the cases, particularly that dealing with previous enforcement efforts, was compiled by checking the court files. This information is set out in Chapter 2 below and detailed in tabular form in Appendix D.

Outline of the Report

This introduction is followed by a selected review of the literature and a chapter which summarizes some information on issues such as the size and life-span of awards, the average arrears accruing, and the extent to which original orders are varied (altered) to meet changes in the circumstances of the parties. This background material introduces several major enforcement problems including

The very limited power of the family court to deal with higher court and especially out-of-province orders and the related inability to deal with collateral issues such as the non-custodial parent's access to his children.

An analysis of the average time-lapse associated with specific show cause procedures provides a capsule sense of other bottlenecks. Notable among these are the difficulties in serving defaulters with a summons to appear in court and of tracing some who fail to appear in court.

The largest part of the report describes the various elements in a typical show cause hearing and then goes through them one by one. This outline includes:
a) eliciting and considering proposals for reconciling the matter; and
b) reaching a conclusion (or deferring one and adjourning to a future date).
This discussion is preceded by some information on the persons typically present at the hearing and the courtroom context.

The show cause hearing itself is illustrated to bring out the lines of argument made by the parties. While a large number of points are covered, the arguments are easy to keep track of because they are elements of a "story" the respondent builds up. Each line of argument can be incorporated into the story. This description concludes with a discussion of respondents' proposals for resolving the problem and how these are incorporated into the referee's dispositions.

Further discussion of these points, presenting a different emphasis, follows. The primary functions of the hearing, to collect arrears and foster more regular payment of maintenance, are separated from the "secondary" ones such as giving the parties an understanding of their legal obligations and rights and providing a forum for the play of values on post-divorce parental responsibilities. The analysis suggests that these two sets of goals are important sources of conflict and misunderstanding in maintenance enforcement.

The report concludes with a series of recommendations and observations designed to surface these misunderstandings and foster public debate aimed at clarifying the social issues. The need is clearly for stronger and better-defined policies in this troubled area of family law.

Chapter 1

A Review of Selected Literature

Maintenance order enforcement, a topic which had generated only a modest amount of research attention in earlier decades, became the focus of considerable study in the 1970's. For the first time, several detailed empirical studies were published[1] and many jurisdictions produced smaller studies or instituted research programs.[2] A selection of this work is reviewed here.

A long-standing theme was that default on maintenance was common and widespread.[3] Most family legislation now places the responsibility for support on both parents according to their means and the "maternal presumption" in custody is not so strong today as it was a generation ago. In practice, however, the great preponderance of awards are for the wife or ex-wife as custodian of the children. It is fathers who default, and mothers who must often raise the children in the face of financial insecurity. For many of the single mothers, disposable income lagged far behind that of the non-paying fathers.[4] Income assistance was often the only resort; even mothers in the work force, however, tend to be under financial pressure as average female earnings have been much lower than the male average.

The other side of the concern with pervasive default is that enforcement mechanisms to collect maintenance arrears are not up to the task.[5] The failings are partly on the social policy side, where parental responsibility and state interest in child support are not clearly delineated, and also on the side of procedures, manpower, and technology. In some sense, the very ineffectiveness of the current system protects it from the full force of the problem, as delays and costs in trying to enforce through the courts are found to contribute substantially to the reluctance of many single mothers to secure their rights to support.[6] Before continuing with some of the aspects of enforcement that have been singled out in the literature, it is useful to consider some underlying questions.

The high incidence of default raises the question of whether awards are set at an unreasonable level. The literature suggests that awards do not go very far towards meeting even the minimal costs of raising children. In one study,[7] the median figure in a B.C. sample hovered around $100 per month, which coincides with the incentive income allowed to single mothers on welfare. For such cases, it would be hypothesized that this allowable income ceiling depresses award levels (and also reduces the likelihood of attempting to collect on arrears, as repayments in excess of the $100 per month ceiling revert to the government).

Quanta are set in different ways in different jurisdictions: some judges have informal rules of thumb; some jurisdictions use reference schedules of costs of living and guidelines for computing available income to establish awards, subject to judicial discretion.[8] There is little evidence that jurisdictions using such guidelines reallocate parental income more equitably and some evidence suggests that guidelines tend not be be adhered to closely.[9] It thus appears that consistency of application of guidelines throughout a jurisdiction is difficult to achieve.[10] In any event, the investigative capacity of the court to crosscheck the parent's statements of financial circumstances is limited.

If the general sentiment is that award levels are hardly excessive, it has also been contended that many defaulters indeed have the ability to pay. In support of this, empirical studies have shown that low-income fathers paid proportionately more of their income in child maintenance than their wealthier counterparts.[11] Another study of defaulters (in this case, those with orders from another jurisdiction) indicated that their average award was lower than those typically awarded in that jurisdiction but their payment record was worse.[12] Defaulters come from a wide range of occupations and failure to pay was not clearly linked to low income. The observation that defaulters tend to come up with the money when faced with a gaol sanction has also been put forward to suppo the contention that the order could have been paid. A notable study in Michigan[1] suggests, however, that some defaulters, who have chronic financial management problems, manage to borrow money from relatives or friends to avoid gaol, and thu displace the responsibility for the support of their children onto other. Arguab many fathers who are able to pay avoid payment or pay erratically. There are how few empirical studies of why this is so.[14]

Enforcement strategies are based on several general assumptions though.[15] First, non-payment is used as a weapon of retaliation or a bargaining chip in the continuing battle between the ex-spouses. Here the court tries to sever the issues - often involving disputes over custody and access - and, through the offices of family court counsellors and the like, may attempt to mediate a better arrangement.[16] A second assumption is that default is a defiant reaction against the legitimacy of the order (and perhaps of the court's right to intervene in a personal matter). The enforcement strategy here is the application of contempt of court sanctions, most notably short gaol sentences for default of an order to pay or the use of a warrant to bring the man before the court. Third, default may be a rational allocation of resources, the defaulter calculating that cumbersome enforcement procedures will allow him to delay or evade payment and resources can be expended elsewhere. The enforcement approach in this regard is either to streamline and toughen up the enforcement response or to apply involuntary payment mechanisms such as garnishment of income or accounts, attachment of property, or applying pressure through requiring the posting of a performance bond, registering a lien on property, or the like. This model of man as a rational (if irresponsible) calculator of costs and punishments is congenial to the courts.

The mix of motives among defaulters is not established; however, enforcement programs have been evaluated to try to isolate features which improve payment rates. The most influential study of this sort, in Michigan, focused, in a preliminary analysis, on the most striking aspect of that jurisdiction's enforcement efforts; that is, the relatively heavy use of gaol sanctions (up to one year in any one instance).[17] Application of the gaol sanction was strongly correlated with increased collection rates. In the final analysis,[18] the finding was generaliz and modified to place priority on the establishment of an effective (and self-starti monitoring system without which the threat of gaol did not secure high rates of compliance.

This closer look at enforcement procedures revealed some aspects of decision-making by the state agency empowered to collect support (the Friend of the Court) and other officials. Fathers who were paying regularly were rarely gaoled for past

arrears, sheriffs in one county were not highly motivated to seek out defaulters from another county, and service of a show cause summons in one particular county often prompted payment prior to the hearing date. In general, it was concluded that enforcement variables were more influential in determining payment levels than were characteristics of fathers.

This study raised several areas of concern regarding enforcement tactics. Due process safeguards were generally not given a high priority, hearings were often disposed of in several minutes, rather lengthy gaol terms (six months to one year) were often set even though lighter sentences appeared to be as effective, and groupings of offenders most subject to gaol terms included those with chronic alcohol problems, the chronically unemployed, those with welfare-dependant families and offenders from lower socio-economic groupings. At times, a moralizing approach seemed to eclipse more rational approaches to maintenance conflicts. The study concluded that although gaoling appears to be effective in terms of recovering arrears, mandatory deduction of support from wages may be the more rational method of ensuring support payment, notwithstanding problems related to the invasion of privacy, the cumbersome nature of such a scheme, and so on.

A number of studies have considered the limitations of particular enforcement mechanism. The show cause hearing in itself is no guarantee of effecting collectio even if an order to pay is made against an adjudged defaulter; default on the new order may be as likely as default on the original one.[19]

There are various limitations to garnishment of wages, including the exemption of certain groupings including federal employees, armed forces personnel, and the l (These exemptions have been strongly criticized as contrary to the public interest.) In addition, the administrative burden on the employer to calculate and divert moni and weak statutory sanctions against those who fail to comply, or declare that the employee has left, been laid off, and so forth, represent practical barriers.[21] Moreover, wage assignments are not applicable for the self-employed, the transient, or the unemployed.[22]

Legal confusion in the area of maintenance enforcement also clouds the effort. There is some controversy over the preferred status of the maintenance order creditor.[23] Despite often lengthy delays in bringing a case before the court, some courts continue to limit their orders for repayment of arrears to one year's worth. Attempts to eliminate this so-called "one year rule" on the grounds that it has no true legal standing nevertheless face several precedents in case law in which the rule was applied.[24]

A more serious problem relates to reciprocal enforcement of maintenance obligations between jurisdictions. For one thing, not all jurisdictions have such bilateral agreements.[25] Where these exist, the reciprocating courts may use quite different approaches and have divergent expectations, each waiting for the appropriate document or supplementary information to be submitted or transferred, often with considerable delay. Clearly, a jurisdiction which is not effective in enforcing its own orders will not do any better with reciprocal ones.[26] A 1970 Canadian study catalogued long delays and noted that most reciprocal orders did not recover any money.[27] Limited success is still very much the subject of comment.[28]

A review study summarized many of the difficulties noted in the literature.[29] Gaol sanctions were seldom applied; low ceilings on garnishment sums in some jurisdictions served to thwart full recovery of arrears; and transients were hard to find. Others have suggested that courts have not been scrupulous enough in informing those who come before them of their rights and options and, because there is little monitoring by appeal courts, may conduct proceedings and make decisions on legally questionable principles.[30] Another rather pessimistic conclusion reached was that most (U.S.) state and federal enforcement programs reviewed were marginally cost-effective at best.[31]

Some recent studies in British Columbia

A study of automatic monitoring procedures related to maintenance default in two regions of British Columbia was recently made available.[32] The automatic monitoring program, implemented in 1978, appeared to confirm one axiom of the available literature: that maintenance payments increase when a more aggressive enforcement program is sponsored. The research added the caveat that returns may be slight in regions which have already established relatively high collection rates. It was not, however, altogether clear whether the most effective next step should be in the direction of more efficient procedures such as computerized or mechanized information-processing, or, as the report suggested, in establishing a larger complement of enforcement staff. Other noteworthy findings were that Sheriff Services staff indicated serious problems in effecting service of summonses and the anomaly that although garnishing wages and warrants of execution were believed to be effective in making fathers pay, they were not used extensively. Registration against property in the Land Registry was also rarely employed as an enforcement strategy.

Prior to implementation of the automatic enforcement program, levels of default were demonstrably high with 80 percent of applicants surveyed not receiving their maintenance at some time. Of more direct interest to policy-making was the finding that 77 percent had attempted to enforce their order at some time but only 45 percent of the clients felt they had been successful in having the order enforced. Client satisfaction was not particularly high, with less than half describing the program as "very helpful".

An in-house study directly related to the authors' research was produced by the Administrator of the Vancouver Family Court with the assistance of staff.[33] This unpublished report serves as a useful point of comparison with the authors' results and a brief synopsis is presented prior to discussing the results of the empirical study.

Service problems were noted in that 36 percent of persons summonsed to show cause did not appear on the date set for first appearance. Delay was rather common; only six percent of first appearances resulted in a final disposition.

Show cause proceedings took 113 days from issuance of a summons to the date of a disposition. On average, approximately one-third of the arrears claimed under garnishing orders were paid out; however, no money was received in 43% of cases studied, and, on average, 77 days elapsed between commencement of the action and pay-out when no dispute was registered. Additional problems with garnishing orders included problems in establishing the defaulter's place of employment, a statutory time-lapse to permit service of a "Notice of Money Paid In," and so forth. In keeping with the study mentioned earlier,[34] registrations against land, warrants of execution, or attachment orders were not extensively used. The in-house study concluded that greater recovery of arrears would require more "teeth" in the enforcement process and underscored a number of statutory considerations which could contribute to court delay.

Summary

Problems associated with the determination and enforcement of support awards have recently attracted greater attention from many organizations, including government agencies. Support-related problems include relatively meagre awards (relative, that is, to the needs of the first family), extensive default on support obligations, and widely-reported difficulties of enforcement when default occurs. The available literature provides evidence of jurisdictions which attempt to solve these problems via guidelines to determine quanta, administrative agencies to locate defaulters and secure arrears, expanded powers of the state to locate defaulters, more sophisticated information-retrieval systems to monitor cases, greater reliance on garnishment, attachment, and the gaol sanction, improvement in reciprocal enforcement procedures, and increased pressure on jurisdictions to enhance their overall collection rates.

The literature questions the assumption that defaulters are in arrears due to inability to pay - the sole defence in show cause proceedings[35] and indeed there is evidence that many well-to-do spouses refuse to honour their maintenance obligations. It is nevertheless premature to make definitive statements about who

is most likely to default, or to uncritically accept theories of default and payment. The lack of adequate, comparative data on defaulting fathers is paralleled by limited information on mothers' reactions to separation and on the perceptions of both parties regarding negotiation and endorsement of maintenance orders.

The greatest attention of policy-makers and researchers currently seems to focus on ways of streamlining maintenance procedures, keeping in mind that time, resources, and funding are far from abundant. Dramatization of the ineffective aspects of related state procedures, concerns about cost-recovery, and pressure from consumer groups,[36] have contributed to official concerns over maintenance.

Chapter 2

Background Data on the Maintenance Awards[1]

2.01 The lifespan of the orders

Our sample consists of 68 cases which we were able to cross-check in the court files. The original orders were made as far back as 1955 in one case and as late as the end of 1979 in others. Nine percent were made before 1970, another 34% before 1975, and the remaining 57% from 1975 to date. The average order before the court for enforcement originated in 1974-75; i.e., it was about five years old.

Maintenance orders tend to fall into three categories. A handful - 4% - are for "spousal" maintenance only;[2] 31% cover the custodial parent (in all cases in our sample, the mother) and one or more children; and the bulk - 64% - are restricted to child-support. In this regard, the courtwatch sample closely parallels a cross-sectional sample we drew in 1978 in the same court. In that sample, the comparable proportions were 7% for spousal maintenance, 29% covering mother and children, and 64% for child support alone.

"Alimony" is therefore a very residual element in maintenance cases. While spousal maintenance awards may persist as long as there is need, many are rescinded when the dependent "spouse" remarries and the general trend is for awards to be for a relatively short duration, designed to enable the ex-spouse to make the transition to a self-supporting member of the work-force.

Child support obligations generally terminate at age 18 (16 for awards made under the Children of Unmarried Parents Act) or earlier if the child is living independently or has married. Given that the average age of the youngest child at the date of divorce can be estimated at nine years, one might expect orders to have an average life of nine years. This,however, neglects the fact that arrears accrued over the course of the order remain payable; thus, a child support case may remain active indefinitely.

2.02 The size of original awards and the dependants covered

The average original award was for $156.80 per month. The bulk were lower, however: half were for $110 or less per month. That is, 35% of the cases had all or part of the award for the spouse, bearing in mind that some of these were purely nominal - one dollar awards - to keep open the possibility of varying the amount should circumstances merit. This average award covered 2.3 dependants in all. The average for the 96% of the orders which had a child support component was two children covered. Since quanta were not always broken down as a set amount for the ex-spouse and so much per child per month, only a crude average could be calculated. This worked out to $67.94 per dependant per month.

An equally crude comparison was calculated, using the GAIN rates for 1975 (the originating year of the average award). A single adult was eligible for a basic rate of $160 per month, a single parent with two children for $320 per month; thus, in effect, $160 per month was for the two children.[3] The comparable benefit for combined spousal and child support averaged $212.80 per month, 36% greater than the average maintenance award.

2.03 Court of Original Jurisdiction

The originating court and jurisdiction have considerable implications for enforcement (and see sections below). In this courtwatch sample, 77% of awards originated in B.C. The remainder originated elsewhere, mainly in the Canadian provinces from which large migrant flows come to B.C. (e.g., Ontario, Alberta, Saskatchewan) and, in the few foreign cases, from the U.K. and the western U.S. The extra-provincial cases are enforced here under the Reciprocal Enforcement of Maintenance Orders (REMO) Act which reflects bilateral agreements between jurisdictions. Few people pretend to be expert in the matter. From an enforcement perspective, however, the practical difficulties of dealing effectively with a case in which the party is not easily accessible to the court tend to swamp most of the subtle differences. As a class, REMO's are difficult to enforce[4] and this problem is a prominent one.[5]

Even for awards originating in B.C., however, there are enforcement problems. The difficulties of dealing with a respondent living in some remote corner of the province can approximate those of REMO cases. There are also some differences in procedure amoung courts within the province; for example, some judges take the position that show cause or variations should be heard before the judge who made the original award and thus they may deny requests by the parties for transfer of case files to another court. There are also enforcement implications for orders which originate in the Supreme Court of B.C. (36% of the awards in this sample). The family court (a provincial court) is empowered to enforce Supreme Court orders registered with it in the same manner that it enforces its own ones The family court is not, however, empowered to vary the terms of orders originating from the supreme court level. The precise legal implications of these restrictions are matters of interpretation and different judges take more or less leeway.

The bulk of the orders under consideration here are court orders - 62%, (including many REMO's). 28% are consent orders; and 11% are separation agreements It has been hypothesized that separation agreements and consent orders, because they are arrived at by negotiation between the parties, are less likely to run into default. The differences between these types as to quanta are not statistically significant although the direction of the spread is interesting. Court orders average $143 per month, consent orders $173 per month, and separation agreements $193 per month. It is impossible, however, to determine from our data whether this reflects official presumptions about court-ordered awards, client characteristics, or a combination of two.

2.04 Trends in the Awards

Given the small number of orders under consideration - 68 made over a decade or more - we cannot expect any clear pattern to be evident. Moreover, we must be cautious about the inferences based on a retrospective sample since we simply do not know if there is a bias in those orders which tend to remain in the enforcement files. Nevertheless, despite the absence of a set formula applied by judges in setting awards, recasting the awards in terms of average support levels per

dependant indicates that awards do follow some general trends.

On average, the award per child rose 41% from the first half of the 1970's to the second half of that decade. Awards which were designated for the support of the mother as well as the children went up much more, an average of 96% per dependant. It appears that the bulk of this increase is for the maintenance of the mother. It is important to note that if inflation and the shrinking size of families were taken into account, these absolute increases in the award levels would be much reduced.

2.05 Arrears

For this sample, arrears averaged $3,235; nearly one-half of the fathers were $2,000 or more behind in their payments. For a sample of all enforcement cases monitored by the family court, the average arrears would be smaller because only about 60% of the cases are in default at any one time. On the other hand, a minority of cases fall very seriously in arrears; 10% of arrearages calculated by the enforcement staff in early 1980[6] were over $7,000 - one case was over $40,000 behind. The courtwatch sample was not quite so extreme; the largest arrearage in any of these cases was $18,000.

Arrears are a reflection of the relative difficulty of enforcing different kinds of orders. Because Supreme Court orders cannot be varied (or rescinded) in the family court, and because action in the higher court tends to require legal representation and a certain amount of expense, additional pressure is placed on the "cheap and easy" enforcement tools, most notably show cause hearings. Just as Supreme Court orders tend to be associated with greater arrears, out of province orders (REMO's), expressed in terms of months of payments missed, are clearly a problem area. They can only be varied in the originating locality. As we would expect, given the pressure on enforcement, and procedural delays, arrears tend to increase over the life of the order.

2.06 Variations

An application to vary is heard in court in much the same manner as is an original application for maintenance. It has to be brought in the court of original application for maintenance. Thus, there are barriers of time and expense if the order is an extra-provincial one and also if the order originated in the B.C. Supreme Court.

This point seems to be related to a major observation - applications to vary were not made as often as the situation of these show cause respondents would have suggested they might.

The original award was varied in 63% of these cases. The overall average was only 1.03 variations per case. Only 14% had been varied three or more times, and none more than five times. Awards made more than five years ago were no more likely to have been varied subsequently than more recent ones.

Twenty-three percent of applications to vary were dismissed or withdrawn. On the other hand, in 37% of the cases, arrears were cancelled or reduced. On average, a substantial sum of $1,980 was forgiven by the court. Virtually equal numbers of applications resulted in an increase in the award level, a decrease in quantum, or no change. Changes in award level seem to be strongly related to changes in the number of dependants covered. We do not have enough financial data to test the relative strength of this factor.

2.07 Show Cause Statistics

An average of 4.2 show cause summonses were issued per case in the sample. Issuance of the summons followed a mean of 13 days after the request for court action was made - in the first instance usually by the custodial mother. Thirty-six percent of these initiatives failed because of inability to serve the alleged defaulting father with the summons. Where successful, the median length of time to effect service was 12 days; 90% were served within a month. The median time a respondent father had to prepare for his court appearance was 10 days.

Forty percent of the show cause actions which reached court were resolved at first appearance. This brought down the average number of adjournments to around one per action and the median time between first and final court appearance to 27 days. Overall, then, the median time period from request for court action to disposition for cases which came before the court was just over two months, while a minority of these, perhaps 10%, dragged on for more than a year.

For the show cause proceedings that went forward to a disposition, 32% were dismissed or withdrawn, 24% resulted in consent agreements of some kind, and 44% ended with an order to pay judgement. The average order to pay recovered 20% of the arrears in question.

Chapter 3 The Courtwatch

Section I Background

3.01 The Court List

In the Vancouver Family Court, the referee has been sitting Mondays with a list entirely made up of maintenance order enforcement cases. The load varied from week to week. If the court list was long, it was broken into morning and afternoon sessions. Hearings began at around 9:30 a.m. and continued, with a coffee break in the middle for the court recorder and staff, until noon (or earlier if the list was exhausted). Afternoon sessions started at 2:00 and completed the list.

We courtwatched for eleven consecutive Mondays, nine of them only in the mornings, two at both morning and afternoon sessions. Those 11 sittings had 121 hearings scheduled; i.e., and average of 11 cases per hearing, and a range of from four to 17 cases. Some cases were already in process at the date we began our courtwatch and others had not yet been resolved at the date we ended. The following table summarizes the throughflow.

Table 3.01a Scheduled Hearings[1] by Appearance

	N	%	Average per list
No Service - struck off list	30	25.4	2.7
No Appearance - Bench warrant ordered	7	5.9	0.6
First Appearance	49	41.5	4.5
Subsequent Appearance	32	27.1	2.9
	118	100.0	10.7

Table 3.01b Schedule Hearings and Outcomes

	N	%	Average per list
Hearings which did not go forward	37[3]	31.4	3.4
Hearings which did not involve a disposition	40	33.9	3.6
Hearings which resulted in a disposition	41	34.7	3.7
	118	100.0	10.7

The number of hearings was cut by a quarter by failure to serve the respondent. A further small number of respondents had been summoned (or were scheduled for another appearance) but failed to appear and warrants were issued for their arrest. On the other hand, about half of the cases which went forward resulted in a final disposition.

3.02 Waiting Before the Hearing

For a morning sitting, respondents (the alleged defaulters who must "respond" to the charge) are summoned for 9:30 a.m. Although cases are numbered on the cour list, because of the variable length of time required for hearings, no more definite time is assigned. Cases are called in an order determined by who is there and ready as much as anything else. By request - as for example when a lawyer is involved and needs to get on to other courtwork - that case may be among the first called. In general, however, people have to be prepared to give up half a day to attend court.

The court list is posted on a bulletin board in the entrance hall but few people appear to check it. Rather, people go (or are directed) to the waiting rooms, really a large room partially divided down the middle. There are small

tables ringed with chairs and a selection of popular magazines on a larger table at one end. The partial division of the "double" waiting room is important. If opposing parties must spend the hours waiting, and relations between them are strained, it is more comfortable for each to sit in one of the waiting rooms and so put some social distance between them.

Ten or fifteen minutes before court-time, the sheriffs call out the names on their court lists and have people identify themselves. The sheriffs tell them what court they will be called to, and begin to organise the order in which cases will be called. When a party to a dispute identifies himself (herself), he may be asked whether the opposing party is present or expected to appear. This is hardly an unreasonable question but it is a sensitive one for some persons and elicits the occasional touchy reply.

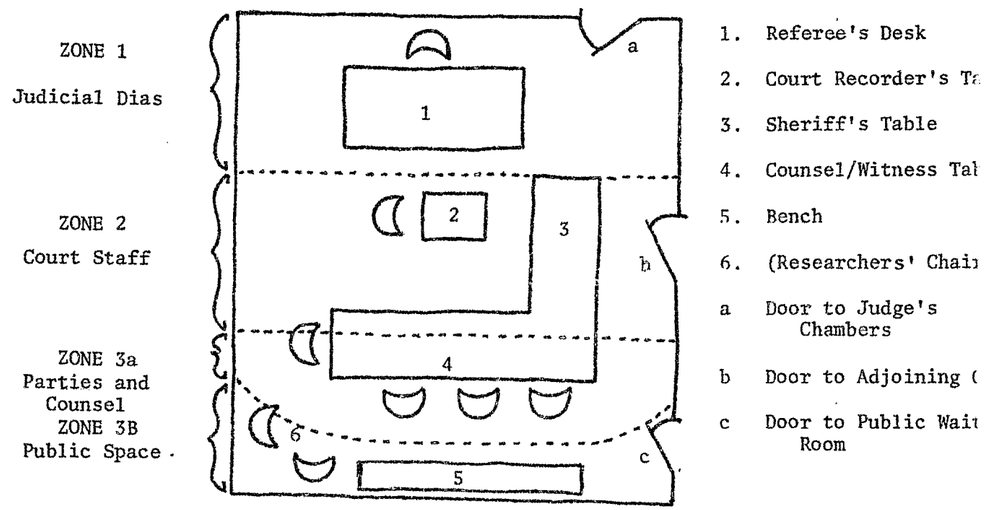
During the course of the morning, other business is transacted in the waiting rooms. People meet with their lawyers, ask questions of the sheriffs, confer with ex-spouses to try to come to consent agreements they can take before the court, and so on.

3.03 The Setting

The bulk of the show cause hearings we observed took place in court room three, one of four small courtrooms in the Vancouver Family Court on Yale Street. The courtrooms are paired, odd and even, each pair sharing a short entranceway off the ends of a large double waiting room.

Courtroom three, schematized on following page, can be thought as being divided into three slightly cramped areas: the raised judge's desk; an area for court personnel which is defined by an L-shaped table - the court recorder in the centre and the sheriff, acting as court clerk, on one side; and the 'public' area beyond that table, the area where the parties are seated on chairs or on a bench against the back wall.

FIGURE 1 COURTROOM LAYOUT



As we shall see, in many cases only the respondent is present. The petitione (that is, his ex-wife) may also appear. The parties to the action may be represen ed by a lawyer (or law student or other spokesperson) and accompanied by others - a friend, relative, new spouse, or translator if their English is poor. These latter people, the translator excepted, would ordinarily constitute the only "public" or spectators at such hearings; there is no separate public gallery. The researchers occupied the two chairs in the corner, a rather close observation post, 10 feet at most from the parties.[4]

3.04 Appearance in Court

Show cause hearings in the referee's court are relatively informal. Only occasionally are parties in court at the entry or exit of the referee, so the ceremony of "Order in Court! All rise!" does not set the scene for them. Rather, the parties enter a court already in session. The sheriff consults his list, suggests to the referee who he will call next, hands the case file to the referee, and goes to call the parties.

In 43% of the 83 appearances we coded, only the respondent was present; in six percent, both respondent and petitioner appeared; and in four per cent, the petitioner appeared but neither the respondent nor anyone representing him did. In one quarter of all appearances counsel for the respondent appeared. In 16% someone representing the petitioner appeared, but in only one case (two appearances) were both sides represented by counsel.

A variety of others attended, presumably to provide moral support. These included new spouses, friends, and relatives. As well, some others were there to take an active role; one father spoke for his young adult son, and three cases required translators. Overall, the respondent or someone speaking on his behalf were present at 88% of the appearances, the petitioner or someone representing the children's interests in 24% of appearances, but in only 12% were both sides represented. By way of summary, it is important to consider that 60% of all appearances involve only a single person, usually the respondent.

Having called in the parties, the sheriff also seated them. If counsel were involved, the lawyer would seat himself (herself) and also the client, either next to himself on the seats facing the referee or on the bench behind. If a respondent were alone, he was generally seated in a chair but some preferred the bench or stood until the referee invited them to sit. Petitioner's counsel would take one of the chairs, but the petitioner was seated on the bench. When both petitioner and respondent were present, they were generally seated more or less at opposite ends of the bench. The bench was as far back in the court as one could get. Thus others - friends, relatives and the like - were always relegated to this back rung, serving as the "public gallery".

The deputy sheriff formally announced the case by its court list number and the names of the parties involved, noting whether the respondent and petitioner were appearing. The referee greeted the parties. If counsel or an agent appeared, they introduced themselves for the record as in any court appearance.

3.05 Court Time

The show cause hearing in the referee's court is a summary proceeding designed to reach a quick conclusion. If that is not possible because further preparation, oral evidence, or documentation are necessary, the case is adjourned. The referee does take the time to go over the central issues, to exchange information, and give some direction. The pace, however, is quite different from that in a registrar's hearing in supreme court for example, where similar issues might be argued in detail. For the courtwatch sample, the mean "court time" (time actually before the referee) was 9.3 minutes, with a median of only just over six minutes. The longest hearing we attended took 47 minutes.

Mean length of time in an appearance is a fairly straightforward reflection of the nature of the proceedings. The table below outlines the relationship.

Table 3.02 Court Time by Outcome

Outcome:	Dismissed	Adjourned	Struck off List	Consent Agreement	Order to Pay	Overall
Court time in Minutes						
1 - 5	7	22	2	2	5	38
6 - 10	4	12	3	3	2	24
11 + over	1	5	0	5	11	22
total	12	39	5	10	18	84
Average court time	5.6	6.4	7.0	14.0	16.4	9.3

(chi sq. = 24.1011 with 8 d.f., significant at .055)

In general, the referee could quickly determine if the case was straightforward: two-thirds of the appearances fall into the categories of dismissed, struck off the list, or adjourned. Thus, in cases where there was a clear-cut valid excuse for non-payment, resolution came quickly. Cases were dismissed after an average of 5.6 minutes. Situations where the respondent needed more time, wanted to consult a lawyer, or whatever, were also expeditiously handled; adjournments were granted after 6.4 minutes on average. In the handful of cases where the respondent had not been served with a summons and the case was struck off the list but we recorded an "appearance" because the petitioner or her representative was there, anticipating action, it took only a short time - seven minutes on average - for the referee to explain the situation.

A substantially longer hearing resulted when negotiation was required.[6] Thus, for appearances which ended in an agreement by consent (usually a proposal as to how to repay arrears made by the respondent and accepted by the petitioner), the average hearing lasted 14.1 minutes. When the referee had to determine the terms of an order to pay towards arrears, court time averaged 16.4 minutes.

Section II The Hearing

3.06 Overview

The show cause procedure was schematized for purposed of easier recording and analysis.[7] The presentation here follows this outline:

1. On the first appearance, the referee normally went over the particulars specified in the summons to show cause (section 3.97).

2. Special attention was usually paid to the amount of alleged arrears. The respondent might acknowledge the figure or challenge it (section 3.09).

3. The respondent was queried as to whether he was prepared to show cause or if he wanted an adjournment to get legal advice, prepare documentation, take related action (notably to make application to vary), or the like.

4. If the hearing continued (or when it resumed at another date), the respondent would present an argument, either formally showing cause or informally going through his explanations. In this he might be guided by his counsel (if any) or the referee as to what was pertinent. The basic documentation required was summarized in an outline by the referee[8] (sections 3.10 - 3.12). Some respondents who had not completed the outline were asked to do so and the hearing was stood down temporarily.

5. The referee might solicit or the respondent might offer one or more proposals for satisfying the order. The referee would provide guidance as to what sort of proposal might be incorporated into an order to pay, would require the consent of the petitioner, or would be accepted as an informal undertaking (section 3.13).

6. Finally the referee would then make a disposition and go over its terms (sections 3.14 - 3.15).

This sequence of steps could be shortcircuited at any point if it became clear that an adjournment were necessary. Depending on the circumstances, subsequent hearings would pick up the line of argument or begin with a report on the action taken in the interim, e.g., progress in securing documents, in taking related action in another court, or whatever. Resolution of the situation by the parties themselves or by the respondent paying the arrears would also truncate the hearing.

3.07 Reviewing the Particulars

At the first appearance before the referee (56% of the appearances we observed fall into this category), the referee reviewed the particulars with the respondent, especially if he was not represented by counsel. The referee confirmed that the man was served with a summons and then went over its main points. These cover the respondent's full name, the date, place, and court at which the maintenance order in force was made (sometimes with a notation as to the act under which the order was made or what sort of order it was), the amount and terms of the order[9]; the recipients (his ex-wife and/or the number of "infant" children),[10] and the arrears alleged as of a specific date.[11]

The question of arrears is frequently at issue; the other points are not usually regarded as problematical. Nevertheless, in a handful of cases, the respondent corrected the particulars. One objected that his name had been spelled incorrectly over the years. Another complained that the order was for four childr and that was a mistake: he had only three and wasn't sure if one of those was his.

3.08 The Respondent's Position

After going over the particulars, the referee generally asked the respondent "his position".[12] If the man appeared not to understand, the referee rephrased his question in terms of whether the respondent was prepared to deal with the issue the and there or wanted to seek legal advice. Table 3.03 outlines the responses.

Table 3.03 Position by First and Subsequent Appearance

	First Appearance	Subsequent Appearance	
Prepared to show cause	16	10	26
Wants to consult counsel, prepare documentation	5	2	7
Wants to seek variation	13	9	22
Reporting on parallel action in another court	-	8	8
Lawyer needs rescheduling	6	2	8
Needs an interpreter	1	-	1
No position recorded	7	4	11
	48	35	83

The table reflects "final" positions in that, in 11 hearings, the respondent changed his position, in the bulk of cases from feeling prepared to show cause to wanting to make an application to vary. Positions taken at first appearances differed significantly from those taken in subsequent hearings but only because, in 20% of the latter, a variation application had been made in another court. Overall, in 40% of the hearings, the respondent began by stating he was prepared to show cause and in 35% he decided to seek a variation (or reported on progress in that matter).

While most respondents who felt ready to go ahead did so, having to state a position seemed to cause some to reconsider, to wonder if the situation was more serious than they had believed. Their search for indications of the gravity of their situation paralleled a more significant interaction detailed below (p.39), when certain respondents tried to decide if it was worth the expense of applying to vary their orders in the supreme court.

3.09 Challenging the Arrears

The referee generally asked respondents appearing for the first time if they agreed with the amount of arrears alleged in the summons.[13] On this occasion, 37% affirmed them, 45% claimed (sometimes indirectly) that they were partly or wholly inaccurate, and an interesting group of 8% were unsure. One of the latter responded: "Something like that, I'm not counting. Six thousand, eh? Maybe, it doesn't matter anyway."

In fact, one might suppose that few respondents are likely to have kept exact tallies of arrears.[14] In one case, for example, the arrears alleged were a very large sum specified to the last cent, representing just over 46 months of missed payments. If this situation would defeat all but those with accounting proclivities, a larger fraction of the respondents might be characterized as not keeping very good track of how the money goes. We will take up this point again in the discussion below. Here we focus on the 45% who contested the arrears. This constitutes a first line of defense. Challenges fall into several categories which are illustrated in turn.

A. The first was not a defense at all but an upward correction of the arrears.

> Faced with alleged arrears of nearly $10,000, one respondent stated matter-of-factly that he thought the actual amount was rather more. This turned out not to be material.

B. In a small number of cases, the respondents affirmed the accuracy of the arrears as stated but noted that they had paid them after the affidavit of arrears was prepared or since receipt of the summons.

> A respondent produced a receipt from the court cashier and the case was dismissed.

C. A number of cases involved men who were fairly regular payers but were allegedly a month or two behind. They challenged the accounting.

> One respondent produced cancelled cheques for the supposed missed payments. The case was dismissed.

> Another, faced with the statement that the cashier had no record of a cheque he claimed was sent, affirmed again that it had been and was probably lost in the mail. He agreed to the referee's suggestion to stop payment on the cheque and write a new one.

Some minor but unfortunate problems arose when respondents didn't understand how the accounting was done - notably, that an order payable by the last of the month meant precisely that.

> One respondent said he hadn't been able to pay by the end of the previous month but instead had paid the first banking day of this month. The cashier finally was able to explain to him that this month's payments were first credited towards satisfying the order and thus he had fallen an additional month in arrears.

> Another respondent was unable to agree with the accounting even after lengthy consultation with the enforcement staff and testimony by the cashier. It turned out that part of the problem was that he claimed never to have understood the original order (nor to have received a copy of it) and so had missed the first payment because he thought it fell due the beginning of one month, not the end of the one previous. That error was compounded because he found it too onerous to pay the total monthly sum at once and thus paid it in installments every 2 weeks when he got his pay cheques. Thus, some months he paid twice, other times 3 times; sometimes apparently falling another half month in arrears, sometimes catching up.

That this latter respondent felt psychologically incapable of setting up a bank account with a standing order to pay the total monthly payment at the end of each month was an object lesson on the lack of control in money matters some respondents displayed. This point is taken up again below in the discussion on debt.

D. Much larger alleged arrearages were characteristic of cases where the payments did not go through the court. Monitoring problems were sometimes aggravated by payments made in ways other than those stipulated. Some paid partly in kind or in money's-worth. The money's-worth argument arose on a few occasions - i.e., purchasing large appliances for an estranged spouse and our impression was that these respondents were in fundamental disagreement that such "set-off" could not be granted.

> A respondent argued he had always paid voluntarily at one and a half times the agreed amount per month. Payments were never to his ex-wife though, but directly to his children, who were now both independent adults. This arrangement was ostensibly at their insistence since his ex-wife had a drinking problem and couldn't handle money. However, even she would confirm this arrangement.
>
> Even though he paid only half the monthly order directly, a respondent argued that he made many indirect payments - a bicycle, clothing for school, etc., which amounted to some hundreds of dollars more per year than he was supposed to pay.
>
> The respondent carried a briefcase with notes and calculations. He noted he had paid directly to his ex-spouse and also paid her health insurance. The referee discounted the latter as being an arrangement outside the order and, in any case, payment was to be through the court. The respondent said he had always paid directly and read a list of payments which showed that while he had paid sporadically, when his income permitted, he accumulated enough in those months to be in a slight surplus situation still. The referee asked how he explained his ex-wife's complaint that he was in arrears. He responded in some exasperation that that was the way his ex-wife thought: that the money that was in excess was extra and it was in the past; this month nothing was coming in.

In this case, too, the respondent never seems to have considered circumventing this problem by setting up a special bank account to keep the surplus and make regular payments.

E. A related grouping of cases contained instances where special (private) arrangements existed but the parties never actually applied to vary the order.

> One respondent made a private agreement with his ex-wife, when he was out of work, to pay her a reduced sum out of his unemployment insurance. She appeared at the hearing to confirm this arrangement.
>
> Another respondent stated that his ex-wife had written to him some years ago saying she didn't want his money. He had shown the letter to an enforcement officer at the time and there might be a record of it because they stopped enforcement. Unfortunately, he had since lost the letter. Recently, his ex-wife wrote the court and asked them to enforce the order.
>
> A third challenged the arrears because he was contesting the custody of one of his children (who had in fact been living with him for some time).

F. Finally, there was a suspect category of cases where respondents seemed to have made unilateral changes of a cumbersome and obfuscatory sort.

> One respondent, faced with a rather grim lawyer representing his ex-spouse, argued that arrears could not be calculated at all at this point because the order was still in dispute in the supreme court. He admitted that the registrar had made an order against him but said that he had been given a further opportunity to speak to the order when the default date was reached and had taken advantage of this. He acknowledged the registrar himself had been surprised by this arrangement. However, the respondent did not see anything as settled yet. Currently he was trying to negotiate an alternative consent agreement with his ex-spouse but she wouldn't talk to him.

Overall, these cases (with the exception of the first and last examples) involved respondents who regarded themselves as observing the spirit if not always the letter of the orders. They did not see the importance of keeping the court informed or of regularising special arrangements through variation. Basic misinformation about their maintenance obligations, as well as the court's role in recording and governing payments, was in evidence. This problem recurred in other arguments and will be taken up again below.

3.10 Lines of Argument - Accepted by the Court

A. Inability to Pay

Assuming there were arrears, the general line of defense in a show cause hearing was that the respondent simply had no funds to pay the order. If we discount those respondents who immediately asked for an adjournment (or merely reported on progress in another court and needed a further adjournment), arguments were appropriate in 49 cases. In 35 cases (71%) explanations of this sort were tendered (and, as we shall see below, some parallel but illegitimate arguments were made in a few others).

Arguments about inability to pay could be divided into 3 categories: general assertions that the order was simply too high: submissions that income had been significantly reduced (and expenses could hardly be met): and statements about the unfavourable balance between large debts and paltry assets. Five of the respondents made all three of these.

Ai. Order too high

The simple assertion that the order was too high cannot be regarded as a strong one. It was made in 12 of the 35 cases (34%) but in nine of those it was superceded by substantive arguments. The interest lies in that handful of cases where this statement implied not that the order was too high given the respondent's present circumstances, but rather that it was too high in some absolute sense, that the man had been overgenerous in the past or had not understood the financial implications of maintaining two households.

> The respondent explained that his wife had requested the separation. He had agreed, had given her custody of the children and paid maintenance. They went to court several times to vary the award. The last time, however, her lawyer had argued that the family should not have been asked to live far beneath their accustomed standard. The respondent opined that it didn't seem to make any difference that they had been living well above their means and that was one of the problems which had led to the breakup. The order was substantially increased, he was left with virtually nothing for himself, and had eventually stopped paying.

Aii. Reduced income

The most common reason given for inability to pay - made in 59% of these cases - was that one or more circumstances had led to markedly reduced income.

Table 3.04

Reasons for Reduced Income

	Primary Reason	Additional Reason	
Laid off, unable to find work	8	1	9
Only part-time or seasonal work	5	1	6
Changed jobs recently	2	-	2
Injured, sick, mentally ill	11	5	16
Business failed	3	3	6
	29	10	39

In exploring these assertions, the referee often tried to ascertain how long the period of reduced income had lasted and what prospects existed for improvement. This was not only a pragmatic enquiry but also a moral one. The respondent was implicitly asked to show that he could not pay now and had genuinely been unable to pay over the period when arrears were mounting. Many did account for fairly long periods on reduced incomes as the table following shows. The mean was 17 months (and the median a year) on little or no income.

Table 3.05

Number of Months on Reduced Income

3 or less	4 to 6	7 to 12	13 to 24	25 or more	no figure given	
4	4	2	4	5	10	29

The illustrations which follow show the mixture of pragmatic and moral aspects. The referee counselled respondents repeatedly (and often attached as an informal condition of dismissal) that they must keep the enforcement staff informed of their circumstances to show that they were thinking of their responsibilities. On their part, many respondents tried to affirm their willingness to work and that payments were missed only because their circumstances were so strained.

> The respondent, a general labourer in his fifties, could do only light work because of back and knee injuries. The referee recognised him from an appearance a few months before and asked if he were still on welfare. He was. Wasn't he to write to the court monthly to avoid these hearings? Yes, he had done that but became lax recently when his mother took sick. He was very worried as she had to leave their home and enter an extended care home. He would try to remember to write.
>
> The respondent, a small businessman, noted he was paid up (to the following month in fact) since his bank account had just been garnished. The case was dismissed but the man went on to explain that he would surely fall in arrears again since his creditors were seizing his business at the end of the month. The referee urged him not to anticipate problems; he might find a job, mightn't he? The respondent thought it would be difficult and was advised to keep the court informed to try to forestall trouble.
>
> The respondent, a carpenter, had been on welfare for two months. He had been laid off earlier but hadn't worked long enough to collect unemployment insurance. In response to the summons, he had sent a post-dated cheque towards the arrears and hoped to honour it even if he had to borrow money from his parents. As it was, he had to borrow money for gas just to get to court. He emphasised that he had put his name in everywhere and hoped to get a job in the bush which would pay enough to get him out of debt. At the time of his divorce he had not been able to work for a year and had suffered a series of nervous breakdowns. The referee told him to keep the court informed to save everyone a lot of wasted energy.
>
> The respondent, a landscape gardener who had operated on his own, injured his back moving a rock and was out sick for much of last year. His injury forced him to sell his business (and his truck) to another gardener for $5,000 and by the time he was able to work again, he picked up only some light work at the end of the fall season. Then we was without income until Christmas when he worked briefly as a dishwasher. He emphasised a great desire to work and that he had been willing to work 10 hours a day, 7 days a week during the holidays when no one wanted to. Now there was nothing until the nurseries took him on in the spring so he's had to stop paying maintenance. On top of that, he'd married again the beginning of this year and his new wife was only working part-time.

The other side of the defense of reduced income was the assertion that expenses could not be shaved further. Expenditures were generally more difficult to document than income. The referee avoided very detailed accounting and worked with a few simple premises which we might set out as follows: in practice, two households are more expensive to maintain than one, so, unless there is additional income, people cannot expect to maintain substantially the same standard of living after marital dissolution. Sacrifice cannot be demanded, however; the legal test is prudence or, at least, no conspicuous excess. Accordingly, while both non-custodial and custodial parents should expect to make financial adjustments, and bearing in mind that the interests of the children must be maintained, the respondent can expect to live at a reasonable level before he is expected to support the divided family. We pick up the implications of these premises in the concluding discussion.

If the respondent had more than minimal income, the referee checked claimed expenditures (or had the respondent's counsel go over them as part of the respondent's testimony). The referee was usually able to judge quite quickly if these were reasonable in the above terms. The following illustration demonstrates the point, although more attention was paid to the details of expenditures than usual.[15]

> The respondent had aggravated an old injury in a car crash some months previously. He was out of work on doctor's orders and taking rehabilitation therapy. His only income was the twice-monthly payment from I.C.B.C. He explained very blandly that his expenses included rent on the motel unit he occupied by the week, meals in restaurants at $20 a day, a couple of packs of cigarettes, car payments of $270 per month, and gas and car expenses of $15 per week. The referee queried the car expenditures; what did the man need a car for at this time? To go to the clinic. The referee noted there was public transport. Moreover, the respondent appeared to be spending $600 per month on meals but wasn't able to find a small fraction of that to support his children. The respondent, who seeemed surprised that this sum was regarded as unreasonable, thought he might be able to borrow some money from friends to pay the order. Discussion turned to this.

Aiii. Large debts and few assets

Thirteen respondents emphasised that debt burden was a significant factor in their inability to pay. Seven of these noted that they were entirely without realisable assets and were being supported by kin, spouses, or girlfriends.

In several senses, it is entirely appropriate to enquire about debts and assets as integral elements of an examination of income and expenditures. Assets can generate income or have maintenance payments charged against them; debts might reduce a respondent's ability to borrow to pay arrears (or generate income) and debt service is another expense. In addition, a respondent's handling of debts can be an important indication of his intentions. Again, several premises can be inferred from the referee's statements: that respondents must not beggar themselves to avoid their maintenance obligations; that support payments legally have first prioity among debts (dependants covered by the maintenance order are preferred creditors just as the state is with respect to tax assessments); that persons without the ability to manage their debts should be directed to counselling (and notably to the court referee);[16] and that persons genuinely without assets (and little income) should be advised to consider applying to vary their orders.

These premises also mixed pragmatism with a moral posture. But just as the problems of disentangling debts and assets often proved more complicated than those of income and expenses, so also the mix of pragmatism and morality was more difficult. Respondents could (and did) argue that it was in no one's interests to pauperize them or ruin their chances of future income by liquidating their remaining assets. More important, they did not seem to accept (and did not go very far towards even humouring the court when it expressed) the proposition that maintenance payments must be given priority over other debts.

> The respondent had not received a referee's form (outline of his financial position) but noted he simply had no income. He had consulted his lawyer who advised him to tell his own story because he couldn't afford legal representation anyway. In brief, he was bankrupt, had not even been able to give his current wife anything for the last six months. The referee stood the case down for him to fill out the form.
>
> When the hearing resumed, he stated that the small chain of stores he had operated had gone bankrupt and that he was about to file for personal bankruptcy because otherwise his creditors - to whom he owed nearly $100,000 - would force him to. All the family assets were in his second wife's name; the house always was as it was bought at the time of his divorce and he had been afraid his ex-wife was out to get whatever she could. In any case, his second wife worked and supported him. He was trying to start up a small business and get on his feet again.

Another case, that of the respondent who argued arrears could not be calculated at all,[17] presented a considerably more convoluted story along similar lines.

> This respondent had not been able to complete the referee's form because his situation differed from the ordinary householder; all his assets were in a holding company. He had run several businesses, one a partnership, but because of economic downturn and a personal problem - heavy drinking brought on by the trauma of his separation - the wholly-owned businesses turned sour. He had fought to keep them afloat and in the process lost six years of salary and his substantial shareholder's loan when they went bankrupt. In the process, he hadn't been able to devote himself to the partnership and it had returned no income in the last three to four years. It could be liquidated with his partner's approval but would net the respondent only $10,000 and he hoped that wouldn't be ordered as he intended to build it up. He had solved his drinking problem; hadn't touched liquor for two years. He always worked hard all his life and had made and lost a fortune; he was confident he could turn it around again.
>
> He was living with a common-law wife who supported him out of her salary. She owned the house. It was true that he had guaranteed her mortgage but that was a fiction. Bankers preferrred a male guarantor even if the woman qualified on the basis of her own income. He hadn't actually had to put up any security; he just answered some vague questions about his businesses, which were operating at the time, and the banker seemed quite satisfied.

Other respondents were not as deeply in debt. Their priorities were of interest, especially considering the legal principle that recipients of maintenance orders enjoy a preferred crediter status.

> The respondent who argued that the order had been increased to the point where he earned nothing for himself[18] eventually stopped paying, quit his job, and left town. He stressed, however, that he had not run out on anyone. Before leaving, he had spent all his money paying various creditors the $6,000 he owed them.
>
> Another respondent, an electrical contractor, had been out of work due to various injuries for almost a year and was attending a rehabilitation clinic for the past few months. He received $1,100 per month in compensation but had other debts which he felt took precedence over maintenance. He simply had to pay his chiropractor, whose services were not covered by medical insurance but were crucial for his long-term recovery. No one hired a cripple in his business. The other debt was rent on his small shop and storage area. Without this, he would lose his tools and not have work to go back to. His house was lost to the bank and he would have to negotiate his other debts. The referee discussed the procedure for applying to vary.

If we understood these interactions correctly, it appears that these respondents felt that it was more difficult for a man to maintain himself in our society if he continually put off his creditors to maintain his family than if he took the opposite tack.[19] This seemed to be more than mere calculation of the relative sanctions available to the custodial parent versus the credit card company or others.[20] The court itself may inadvertently have given mixed messages. Court enquiry about periodic repayment of debts other than maintenance arrears (and other priority creditors) may have confirmed respondents in their assessment of these as equally legitimate. This line of analysis actually applies to court reaction to a number of defenses, however, and we leave it for the concluding discussion (section 4.02).

B. Children no longer dependent

The last of the legitimate defenses that arose in our courtwatch was the assertion that payments on the order should have ceased because the children were of age, were out of school, had married or were self-supporting. Eight of the respondents made this argument.

> One respondent noted that both his children had finished school; one was 17, the other nearly 19. He had made payments on the order and on another order towards substantial arrears that had built up but once they were self-supporting, he had stopped. He wanted to apply to vary (in this case to rescind) these two orders.
>
> Another respondent, speaking on behalf of his ex-wife, noted that she had been as suprised as he when he had received a summons to show cause. They had completely forgotten that the application to enforce had not been withdrawn and the British court in which it was made must have routinely processed it. One child was now married and the other was out on his own. So he had a letter from his ex-wife to the British court asking them to cease enforcement.

This argument could be seen as a particular kind of challenge to the arrears and it raised similar issues. Specifically, respondents had not realised that it was necessary to apply to vary (or rescind) the order or even to let the court know about their own arrangements. On the other hand, a particular issue surfaced in some cases which merits separate discussion. Some respondents were resistant to the notion that accumulated arrears should still be payable to the custodial parent once children were grown. By their way of thinking, if any debt could be considered to exist, it should not be to the spouse's benefit. The same sentiment arose in other related contexts and we will take this up further below (see 3.12).

3.11 The Application to Vary

The legitimate lines of argument discussed above generally turn around a change in circumstances. In such cases, the legal remedy is to avoid

enforcement difficulties through variation of the order. As noted in the statistical background above, however, application to vary (to cut arrears or reset the quantum) was not made as often as might have been expected. Within the family court, where the machinery for doing so is easily available, there would seem to be a strong incentive for the respondent to bring an application to vary when faced with a summons to show cause. Discounting the nuisance value (a risk factor in any event), there would be scope for an immediate readjustment of the order to match his circumstances if he proved his case. Similarly, the custodial parent would have a motive to oppose the application to vary the order downwards by counterapplying to have it increased or applying to have it enforced. Where there was no opposition of view, the ex-spouse could of course enter a consent agreement for court approval.

When the application has to be taken in another court, however, there are obvious disincentives. These include the need to obtain counsel and perhaps some travel costs, and the like. These disincentives had a significant impact.

Another lesson which came out of these cases was the apparent reluctance of some parties to take their case before the courts, preferring instead private (or implied) arrangements. Part of this was due to genuine ignorance of options and legal procedures.[21]

> The respondent, a longshoreman, had been disabled for over a year but had mostly kept up payments (although not paid towards reduction of substantial arrears). He argued amiably that if there were a debtor's prison, he would be in it. His income on compensation was $1,100 per month against $1,860 per month owed to creditors, including the maintenance payments. He simply had no more resources. The referee asked if he had seen the debtor's assistance branch. No, he didn't think it would do any good, "the stone was squeezed dry". The referee felt that was all the more reason to get debtor assistance but noted that even personal bankruptcy would not affect the man's debt to his family. He would need to apply to vary. The respondent asked how this was done and was sent to consult a family court counsellor following adjournment.

> Another respondent, after a previous court appearance which had resulted in an order against him, had approached his ex-wife to seek her consent to forego some arrears (these stood at over $15,000 at the time). She had refused and he considered the option closed. The referee told him he could simply apply to vary in the supreme court himself. Apparently surprised, the man asked how he could do this if his ex-wife refused? The referee explained briefly and adjourned the hearing so the man could consult a lawyer.

For some respondents who had considered applying to vary their supreme court orders, the financial burden loomed large.[22]

> The respondent (who had insisted that his arrears were in fact higher than stated - see p.28. noted that he had seriously considered applying to vary in supreme court but, after consulting two lawyers, found he couldn't afford it. Both had told him it would cost $1,000 just to "walk in the door". The referee expressed skepticism but the respondent was firm, he had been told the same thing by both. The referee suggested the lawyer referral service, an inexpensive way of getting further advice.
>
> Another respondent (whose argument about debt was the first outlined above on p.37) argued that he could not afford to apply to vary in supreme court. A lawyer had advised him it would cost at least $5,000. The referee thought this was a high estimate.

In other cases, expense was only one factor amoung several that discouraged action.

> One respondent wanted to apply to vary in the supreme court and asked for a 10-month adjournment to do so because there were also"other things on his plate". The referee said this was much too long. The man explained that his "three year term for a second mistake" - i.e., his uncontested divorce based on a three year separation from his second wife - was coming up as well as a court case to end a dispute (about a business of his) which had been dragging through the courts for five years. He wanted to see how he stood after these before tackling the maintenance again.

The referee suggested that he might want to seek legal advice and take quick action in supreme court to get at least this first maintenance case settled. A discussion ensued in which the respondent argued that he had sought legal advice continuously since 1977 and had no more money for lawyers, that several lawyers had told him a variation hearing in supreme court would cost over $1,000 and he simply could not contemplate that expenditure. The referee told him he could not delay action any longer and, in the circumstances, the respondent could not afford not to go to the supreme court. The only alternative was for the referee to immediately enforce the order. He gave the respondent a two week adjournment to seek further advice.

Another respondent, suffering from serious medical problems which had kept him out of work, insisted he was willing to pay the order, indeed had paid some of the arrears that morning. The referee said that he didn't want to discourage the man from paying but, in view of his circumstances, was he aware he could apply to vary and ask that some arrears be forgiven? Yes, but at the urging of his children, the respondent was applying to gain sole custody and didn't want this to create a possible obstacle.

A final illustration shows that even in cases marked by the best of goodwill, the courts retained an important role in clarifying the situation and directing parties to legal information.

The ex-wife appeared; the respondent was in hospital and could not appear. She explained that once she started getting the old age pension, she telephoned a court worker and asked if she was expected to apply to rescind the maintenance order. The worker advised her not to do so, asking if she didn't need a bit of money since she had been living on so little for so long. However, her policy was to only ask for what was fair and equitable; she had always consented to cancellation of arrears in the past, for example. She only expected what her ex-husband could afford to give. Now she was here in response to his application to vary. The family court always helped her; she thought it should help him, especially since he was sick. The referee informed her about her options - to have the order cancelled or stop enforcement - and sent her to the court clerk for further assistance.

3.12 Lines of Argument Rejected by the Court

Eighty-four percent of the cases (41 of 49) where there was an opportunity to do so, raised one or more of the legitimate lines of argument discussed above. In addition however, 19 cases (39%), including three who had not made any of the legitimate arguments, raised parallel considerations which they considered germane. While the court rejected these, they were very instructive for our purposes. They fleshed out the views of these non-custodial fathers on a number of maintenance-related issues.

C. A second family to support

The explanation that the respondent had other dependants to support - a second wife, common-law-spouse, or new children - was difficult in that it cut both ways. Respondents mentioned such dependants[23] in eight cases - 16% of the total - in the expectation that, at least on a practical level, the court must give this some consideration. Especially where there were new children, it did not appear to make sense to these respondents that they would be expected to see their new children do without in order to fulfill obligations to their first family. On the other hand, in these and three or four other cases where statements of expenses were unclear, the referee sought to impress on the respondents the notion that maintenance was an obligation which they were not free to simply ignore.

It should be noted that none of the respondents advanced this defense forcefully. It was almost a passing remark as in the case of the injured gardener above (p. 34). This argument might have assumed greater importance but for the fact that the referee seized the initiative. The referee sought information on dependants when there was any hint in the financial statement that money was ging to a second family. Some respondents made sure the referee knew they were being supported by their new spouses. If not, the referee articulated the court's view on priorities.

> The respondent argued that his common-law wife could not work becuase she had recently borne him a child. The referee countered that the effect of this was to shift the burden for his first family from him to the B.C. taxpayer.
>
> The referee explained to another respondent, who was making a proposal to pay off arrears at a rate of 1% a month, that the expense of a second family was not a defense. He could remarry but not to the detriment of his orginal family: "The sacrifice had to be borne."

Faced with this line of questioning about their expenses, some respondents backtracked.

> The respondent who had stopped paying maintenance and had paid off all his other debts and left town (see p.38), agreed he was currently living with a woman, paying the mortgage on her house, and helping support her children. Since he didn't have to buy furniture or pay for other things, he maintained it was still cheaper than living by himself although food costs were admittedly high.
>
> Another respondent, a truck driver, had worked only sporadically for the last five years. He said he sometimes lived alone, sometimes, like the present, with a lady friend. The referee asked if she paid rent? No, but she might buy groceries. In effect, then, wasn't he contributing towards her support? The respondent was coy: he hadn't said there was only one woman.

D. Quid pro quo - Denial of access

The explanation that a respondent had not paid maintenance because he was denied access to his children was a delicate point.[24] The referee had to explain both that the respondent could enforce access rights and also that this issue was separate from maintenance. In law, maintenance cannot be withheld as a retaliatory or negotiatory measure.

Respondents advanced this argument in 5 cases. The referee tried to gauge

whether this was a serious complaint or merely a convenient excuse. In some cases, it appeared to be the latter.

> One respondent, arguing that he had been denied access, admitted quite candidly that he had seen his children only twice in the 10 years since the divorce.
>
> Another respondent, who had not bothered keeping track of his arrears (see p.28), noted that he had stopped paying years ago because his wife would not let him see the children. The referee stated that this was a separate issure, that in any event the award was small. Wasn't he concerned how they were getting along? Yes, but he hadn't been able to see them in years. He would not go to the old house; he supposed they were making out, his ex-wife could look after herself. She was probably living with someone.
>
> The referee tried to explain to him that he must keep the issues separate and could certainly apply to enforce his visitation rights. The man said he did not like to have to enforce anything; if it wasn't proferred freely, he wouldn't have it. He blamed the family court. Some years ago, he'd asked them to do something about this and all they had done was advise him to write to his ex-wife himself.

In a few cases, the referee was successful in separating the issues of access and maintenance.

> The respondent and petitioner both appeared. The man explained that he hadn't been working regularly but that wasn't why he hadn't paid. It was because his ex-wife denied him access. She denied this but agreed that the two of them seemed to fight every time he made a visit. The referee explained maintenance and access must be seen as separate; the respondent had a right to see his children but, whether or not he did, the children still needed food and clothing. The respondent loved his children, did he not? Further discussion aimed at a mutually acceptable arangement and the case was stood down to give the parties a chance to talk it over.

In a final example, the issue of access was only part of a larger problem of blocked communication which defeated the intent of the order.

> The respondent complained that his ex-wife would not allow him to see his child. She would neither let him near the house nor arrange to send the child out to him. The referee tried to explain that he could enforce his right but that this was a separate issue. However, the man clearly didn't follow this. He said that she rebuffed his relatives when they tried to approach her and also refused to accept the appliance he had bought her as part of the court order.[25] The referee agreed to subpoena the woman to try to clarify matters.

E. No need, no use paying

Ten respondents argued there was no need to pay as their ex-wives had alternate sources of income or more assets than they. Four of these men also blamed their ex-wives for poor financial management or outright parasitism. These arguments were usually adjuncts to others, explanations for some of the respondents' debt for example.

> One respondent, the injured landscape gardener (p.43), explained a large debt he owed his mother. He had borrowed the money to pay off Visa and a department store charge account because he hated to be pestered to pay. Those bills were for furniture and home appliances, which his ex-wife kept. He had left her everything.
>
> The respondent, who had argued he couldn't afford to apply to vary the order (p.41), emphasised that the matrimonial home went to her and that he'd paid all his ex-wife's debts. The referee rejoined that they couldn't eat the house.

In a few cases, this argument was matter-of-fact.

> The respondent countered the referee's objections that he was supporting his common-law wife and new child but not making maintenance payments (p.44) with the argument that his ex-wife was also living with someone else she planned to marry, and was collecting welfare to boot.

More commonly, however, the ill-feeling was right at the surface. One particular illustration was used by a number of respondents - that of the ex-wife vacationing on their money. Issues of access and custody also entered here.

> The respondent, who had challenged the arrears on the grounds that one of his children was infact living with him (p.39), stated caustically that it was too bad if his wife complained about her financial situation. It hadn't stopped her visiting relatives in the old country last year.
>
> Another respondent noted the order was for his wife's benefit alone now since his children had long since left home. His daughter was married to a doctor, his son earned a good income. Still he would pay were he able to, even though it was quite unnecessary. His wife was working. He continued in a more exasperated tone - he simply couldn't understand this. He knows his wife vacationed in Hawaii last winter, she lived in fairly low rent accommodation, she earned an income. Why did he have to pay "to the end of his days"?
>
> A respondent, explaining why he had never made a maintenance payment, exclaimed that it was very embarrassing to come to court and "wash his dirty linen in public". He used to have custody of the child on weekends while his ex-wife had him week-days. Then his ex-wife took the money from the separation, travelled around the world, and on her return sued successfully for sole custody of his son. The courts had shown great prejuduce against him.

At the very least, this line of argument showed the respondent's ambivalence, his feeling that things had not worked out equitably.

> The respondent who had been unable to deal with the court's system of accounting (p.29, last illustration), also expressed annoyance at the agreement to which he had consented. He felt his ex-wife's reasons for needing more money had been "sprung at him" at the time and was annoyed that she handled her affairs very badly. It seemed to him that no consideration was paid to that fact but of course he had agreed to the variation. He wanted to apply to vary and have her called to testify as well. However, he asked the referee if his ex-wife had to be subpoenaed, served by a sheriff - it would be embarrassing for her. It had bothered him that the children were termed "infants" on the summons - they were both teenagers. Surely there was another way of doing all this; it was 1980 after all.

> Another respondent, a butcher, owed various banks some $60,000 after a series of business failures. He also owed his wife several thousand dollars in arrears on maintenance payments for their now adult children. He was willing to pay but noted dryly that no one gave him a chance when his business failed; when his marriage failed, his wife got the house. That should have been the end of it.

F. Ex-spouse was hoarding arrears.

One line of argument which we did not code separately was the defense that the ex-spouse was "hoarding" arrears. That is to say, that she had not really needed the payments but, seeing that the debt had mounted to a substantial sum, was tempted to go after it (as much to hurt him financially as to enrich herself). Some of the illustrations - for example, the respondent who noted his wife had agreed not to enforce but then suddenly changed her mind (p.31, 2nd illustration) - would support this sort of argument. Similar arguments could flow out of assertions that the ex-spouse was a parasite, out for whatever she could get. However, this defense in its full-blown form is a technical argument and, perhaps becuase few respondents were represented by counsel, it arose only once in this sample (see below, p. 51). But more important, this line of argument suggests that the petitioner was not interested in enforcement for a period of time while the arrears mounted. In that the average respondent was appearing at his third or fourth show cause hearing, there was not generally much scope to make this point. Indeed, the tenor of the previous sections shows that respondents were much more likely to think of themselves as continually harassed.

3.13 The Proposal - A Working Goal

Much of the interaction between referee and respondent, and particularly the interpretation the referee provided when faced with questionable or illegitimate explanations, seemed to be aimed at encouraging the respondent to make a proposal, a gesture towards accepting his responsibility for maintenance. Often the referee invited a proposal explicitly. In the end, 24 respondents (49% of the applicable cases) made one.

The referee stressed again and again that, whatever the respondent's circumstances, he should always be thinking of his family's needs. One question appeared to elicit proposals with some success: wasn't the respondent able to spare even a dollar or two for his children? This question seemed to be quite unexpected in this form. Indeed, it was calculatingly ingenuous. Relatively few respondents made partial payments[26] and these were usually in some simple fraction of the monthly total. Respondents thus appeared to think in terms of either being able to make the payments or not. Partial payments, whatever their moral (and practical) importance, did not protect them from enforcement. Thus, while some respondents stated categorically that there was never even a dollar to spare, others saw an opening for negotiation and were encouraged to make a proposal.

Proposals were incorporated into all types of dispositions - as understandings in cases which were dismissed, as consent agreements[27] (with the approval of the petitioner), and as terms or conditions of orders to pay. In the process these proposals might be substantially reworked to conform with legal requirements but the referee made the attempt to translate at least elements of them into the disposition. A certain amount of this legal ground is covered in the illustration below.

Proposals were mostly along a single continuum. At one end were simple requests for time (4 cases). The respondent would pay soon.

> The respondent, who had a new family to support (p. 44) first illustration), was prepared to pay his maintenance order and make up the arrears if he were given a little time, say five or six weeks. He was working now and "doing very well too". The referee made an order to pay on that basis, setting the default date six weeks away. The respondent said agreeably that he appreciated this "last chance to catch up" and asked if he needed to come back to court. The referee told him he needn't unless he hadn't paid by the required date.

Closely allied to the appeal for time were conditional proposals (9 cases). The least specific of these was a respondent's undertaking to pay when and what he could. Unless his situation were plainly hopeless, the referee would try to push the respondent to make a more concrete plan. The next level of specificity was that payments would resume when income picked up. If there were no clear prospect of this, such a proposal was in effect of little use to the court. One theme emerging here was the proposal of borrowing money from friends, in effect displacing the responsibility for child support (temporarily at least).

> The respondent, an unemployed cook supported by his girlfriend, argued it had been nearly impossible for him to find work in his or any other field for the last few years because of his age and poor English. However, he still hoped to pay more toward his maintenance order - a REMO - once he found a job. The referee noted he was substantially in arrears and had an order dealing with arrears to pay.[29] It became clear the respondent had never understood that. He had thought the order towards arrears, made at the same monthly rate as the original award, either merely confirmed or replaced the latter. In any case, he hadn't been able even to keep up with his payments; the award had been made in better times when he had a small restaurant. Could he afford to begin paying even half? Not on his own but perhaps he could convince his girlfriend to lend him that amount every month (and see p.53). The referee explained that he had to enforce the order, that the feasibility of applying to vary it in the original jurisdiction should be explored, and made a nominal order to pay, telling the respondent that he should keep in mind that any amount, however small, he could pay towards the order was better than nothing.
>
> The respondent, who had been questioned closely about the large sum he spent on restaurant meals (p.35), was then asked if he couldn't contribute something towards the support of his child. Not immediately, he replied, but given a little time he might be able to borrow some money from friends. The referee agreed he should consider borrowing if necessary and made an order to pay half the arrears within five months' time, in default of which, 15 days.

If the respondent was in a seasonal occupation and had clear expectations of improved income, the proposal to repay once work started had a stronger ring to it.

> Both parties appeared. The respondent stated he had been out of work for six months and his only income was $131 per week from unemployment insurance. That was barely enough to live on even though he lived at home with his parents now. The referee asked if he couldn't manage to spare even the odd five dollar bill? No, but his work was seasonal and would pick up in the spring. He proposed to catch up then. The referee accepted that undertaking and adjourned the case until the end of July to monitor compliance. The petitioner complained this was too long to wait. The family lived on welfare and some medical insurance payments; she didn't know how they had made do even this long. He would be working before July. The referee rephrased the understanding. He expected the respondent would begin making payments as soon as he was working and would be all caught up by the July hearing date or there would be "severe repercussions". He cautioned the petitioner, though, not to expect "blood from a stone".

Further along the continuum were rather specific proposals which set out rates of payment.

> One respondent proposed to take up again where he had left off seven months before when he had fallen ill. At that time, his proposal had been to pay at $100 a month, $20 of that towards substantial arrears of $4,000.[29] This arrangement had been accepted by his ex-wife. The referee agreed that the same arrangement could be applied but also explained that the order could be varied, although that would entail an action in the original jurisdiction in Ontario.

Because the referee did not regard periodic payments as part of a properly-drawn order to pay[30] (only single payments payable by a fixed date and specifying a default to give the order full force), he reworked proposals for monthly repayments (unless, as above, these could be made as consent agreements).

Counsel for one respondent stated that he had examined his client's affairs and now felt there was no scope for a successful application to vary even though the respondent did not earn much. The respondent did acknowledge his responsibilities to his child and proposed to pay $50 per month until he got a better job. He was looking for a new job in any case as he worked as a taxi driver but had recently been charged with drunken driving and might lose his license. The referee felt the man found himself in this position by his own doing and, in view of the fact that he had never made a single payment over the life of the order, required him to pay $400.

The respondent's lawyer hoped that no one got themselves into these sort of fixes voluntarily and asked that his client be given some time to pay this amount. Six months was set as the default date. The lawyer suggested again that it would be better, in view of his client's record of nonpayment which the referee had noted, to orient the man towards payment by writing the order as a relatively small sum to be paid monthly rather than as a lump sum due sometime in the future. The referee agreed with the logic and said the respondent should perhaps think of the order in this way. However, since the statute spoke in terms of one payment and a fixed default date, that was the form the order would take. Counsel said he would encourage the respondent to begin making regular payments so the deadline would not catch him unprepared.

Two proposals were outside the continuum we have sketched. They centred on the respondent's desire to circumvent his ex-spouse and pay directly to the children. In one case (p.46A, 3rd illustration), the children were young and the issue was complicated by a custody dispute. The respondent's proposal that he be permitted to set up a trust fund for the children was rejected as beyond the order. In the second, a strange case in which the respondent's counsel won a dismissal on the technical grounds that the reciprocal order in force had in fact been improperly drawn[31], resulted in a proposal, in effect gratuitous, which the referee was therefore willing to accept.[32] The children the respondent wanted to pay were adults and the money was to be sent to them.

As an aside, the same case incorporated an element from the defense of hoarding (see p.47 above) into the "proposal". That is, the lawyer set the

amount of the proposed payment to the children at 12 months' arrears, invoking the "one year rule". This notion, that only one year of missed payments was enforceable (to combat hoarding) was a legal relic from ecclesiastical courts which somehow became adopted as a rule of thumb in maintenance disputes.[33] Since this was an ex gratia payment, however, and not a consent agreement, the issue was not central.

3.14 Dispositions - An Overview

We classified 41 cases as going to some final disposition.[34] In that the various kinds of dispositions have already been illustrated (notably in the preceding section on proposals), we merely review them here (also see 2.07).

Thirteen cases were dismissed or withdrawn. Seven of the dismissals had conditions attached; i.e. that the respondent would keep the court informed as to his financial position, or that some informal undertaking to make payments or to take quick action to vary would be honoured.

Ten cases resulted in consent agreements, five of which were informal. Four of the latter were in fact adjourned to allow the court to oversee compliance. The consent agreements included a lump sum payment, one in which the maintenance order was rescinded and arrears were cancelled, and another which did not alter the order but forgave some arrears. The remainder called for monthly payments (averaging $95) towards arrears.

Eighteen cases resulted in orders to pay, two of them ex parte (in the absence of the respondent or his counsel). These orders averaged $717 towards arrears, with a median of $450. A number were termed "nominal" by the referee. These generally were made in extra-provincial orders (REMO's) where the respondent did not seem to have much income but the referee was obliged to enforce the case since he is not empowered to dismiss it.[35] Overall, the average order to pay, if obeyed, would recover 20% of the arrears in these eighteen cases.

We have already noted that the referee attached default penalties to orders he made to give them more "teeth" (and see below, pp. 53-55). These penalties averaged 10 days in gaol and ranged from three to twenty-one days depending on the size of the order and the sense the referee had of the extra incentive a respondent required.

3.15 The Order to Pay - the Balance of Forces in the Referee's Court

The order to pay pits the strength of the court against the respondent in a very direct fashion. This is one reason the referee made efforts to elicit proposals in many cases and where possible incorporated them into court dispositions. Notionally, the court is the embodiment of social interest attempting to help respondent and petitioner fulfill their respective roles in maintaining the family after separation. In this guise, the referee tried to strike a balance, not pressing unreasonably hard on the respondent, but also firmly meeting any threat of purposeful irresponsibility. Two arguments in particular pointed up the difficulty of that balance.

The first argument was yet another aspect of the problem of the second family (and see above, p.43). While the referee was quick to make the point that the respondent's second family should not prosper at the expense of the first, he backed off from involving the current spouse (or girlfriend) who was supporting an insolvent respondent in the payment of his maintenance order. Whatever the legal argument, this was one moral obligation the referee felt marriage did not contemplate.

> One respondent, an unemployed cook (see p.49), testified he was supported by his girlfriend. He proposed borrowing money from her to make his maintenance payments. This was not taken further because it was apparently deemed inappropriate to make an order based on the resources of a third party.

> The respondent, who saw bankruptcy as his only alternative (see p.37, 1st illustration), explained that his new wife was supporting him. The referee, in stressing the man's continuing responsibility for his first family, agreed that the second wife should not be expected to pay his maintanance; it would place a strain on their relationship.

A second point, the question of default, raised the issue of how the court showed its power or, more correctly, upheld its dignity. The default penalty attached to an order to pay, aside from its intended incentive effect, punished the man for contempt of the court's order. Some respondents saw this as gaoling for debt. Their outrage only increased when the referee explained that gaol was not in any sense an alternative to payment since the obligation to pay the order survived the default. At this point, the court was being forced to abandon its attempt at judicious balance and arguably no longer acted in tandem with the petitioner to try to ensure payment of maintenance.

> A respondent, ordered to pay $500 within two months or in default 10 days, asked "10 days of what?" "Gaol", the referee replied. The respondent literally pounded the table and shouted he couldn't afford to pay. The courts had no pity; he had always paid faithfully. He had been haunted by this order, it depressed him for years. After all, his wife had left <u>him</u>. The referee again reviewed his option to apply to vary and pointed out that if he had never missed a payment, it was for a sum he set himself and not the amount of the award. There was no choice in a REMO but to order the respondent to pay. The man warned that they could send him to gaol, society would not be any better for it.
>
> The respondent, who had quit his job and left town because he felt the maintenance payments left him too little (see p.44, 3rd illustration), reluctantly agreed he had to apply to vary that order. However, he was vehement about the fact that the situation had been intolerable. He liked working; he had worked all his life. But as he had to work for nothing, he might as well not.
>
> The referee outlined his options again and ordered him to pay half his arrears within two months and in default 21 days. The respondent asked if that meant gaol: The referee explained that going to gaol would

not alter his obligation to pay. The man considered this and retorted that "if I went to gaol, I'd be living the same way as if I paid."

These respondents are raising a point as to whether the court is acting in the public interest by invoking the gaol sanction. For those who are apprehended and placed in custody, some will serve the term without the opportunity to earn income and at public expense. They come out knowing they have been punished, but not necessarily clearer about their responsibilities towards family or court.

Chapter 4 Summary and Discussion

The show cause hearings described above did recover a certain amount of money in maintenance arrears and also oriented some respondents towards paying their orders. Beyond that, the knowledge that the court took enforcement action might have had a general deterrent effect on the larger population of persons with maintenance obligations. In the larger sense, these hearings accomplished other (secondary and sometimes latent) goals which bear emphasis. Two of these were central to our analysis.

First, the hearings had an important informational aspect. While brief - averaging under 10 minutes in this sample - hearings often provided parties with some basic legal information and direction for getting further help on options, such as debt counselling, and so on. Second, the show cause hearings provided a forum for the formal rehearsal of social values. The respondent had to explain his situation in legally acceptable terms. More than that, his excuses had to pass tests for social responsibility and in the process, certain of his beliefs, notably those bearing on the family, continuing parental roles, and the like, were exposed and sometimes opposed. The implications of these two secondary activities are not easily assessed. However, by way of summary, we describe the hearings illustrated above in terms of the major points they raise in each of these areas.

4.01 Information Exchange and the Information-Giving Role

As our illustrations have shown, the respondent goes to court to tell his story, to make excuses, and to give explanations; all of these are everyday conversational skills which laypersons perform fairly well. But their stories are "edited" and given legal point in interaction with the court. Since many of the parties were not represented by legal counsel, and the referee had to adopt a directive role[1] - "teaching" the parties as they went along what information was needed, what sorts of arguments were germane and which were illegitimate, what legal options they had and what procedures

should be followed - many of the procedural aspects of the show cause hearing could be considered in information-exchange terms.

The information-giving role of the court is, in part, an outcome of values implicit in our common-law tradition. These include the beliefs that the parties have a right to know what they are accused of, what the legal consequences of their actions might be, what legal remedies they have, and so on. The other part, however, is purely pragmatic. Thus, when the referee informs a respondent claiming an inability to pay that he can apply to vary the order in conformity with his altered circumstances, several inferences are possible. He may be showing sympathy towards the respondent; he may want to be sure that the man understands his legal rights; he may hope that a better-tailored order will yield an optimal payoff for the man's dependents; but quite certainly he is interested in saving everyone, not least the court, the trouble of enforcing an order to no purpose. Providing information, and especially directing parties to appropriate assistance, is a rational management function of the court.

The show cause hearing is arguably not the best learning context - obviously, it is not designed for that purpose. Parties may be anxious, perhaps disoriented. On the other hand, in that motivation to learn is high when a person sees the utility of the information provided, the parties could be described as very receptive at the hearings.

Within the general outline of the proceedings, a number of common concerns surfaced. Some of these touch on the hearing itself while others betray misunderstandings and gaps that arose much earlier in the process. The main ones are listed below:

1. Many of the parties needed information on the jurisdictional competence of the court. Once before the court, they wanted their divorce-related problems resolved, all of them. That the parties might have to take even closely-related problems (like applications to vary or custody matters) back to another court, often in another province or country, required considerable explanation. While it is true that there has been

consitiutional debate on the issue for some time, the various sides of the question are hardly common currency among the public affected.

2. Closely parallel to this concern, some parties expected that the hearings would provide an opportunity to reopen issues they felt had never been properly resolved. When faced with the information that the court could not go behind the orders it was enforcing to reinterpret them (or even to see where the person had gone awry), further questions inevitably surfaced.

3. These included: what rights and obligations were enforceable at all - in this or another venue? Which were legally linked and which had to be dealt with independently? Custody and access problems especially are examples of this sort. However, other family law issues are implicated as well. Division of assets, use of the matrimonial home, injunctions restraining one party from seeing the other, and the like, arise as collateral issues in arguing ability to pay, the balance of needs and resources, indeed most of the lines of argument described above. People needed direction on how to separate out the issues and where they should go to redress their complaints if they wished to do so.

4. Stepping back a bit, even apparently simple issues were problematic. Respondents wanted to understand what sort of hearing they were involved in, particularly how serious their position was, what sanctions they faced, what merits there were in seeking legal representation. The referee gave respondents an opportunity to seek counsel; in fact, in cases where he thought it advisable, he steered people around to this several times until they took the hint and asked for an appropriate adjournment. Obviously, though, many respondents do not start out with a clear idea of the import of the proceedings.

5. Some respondents did not understand the enforcement role of the court and why it was acting on behalf of their ex-spouse. Moreover, since she was the petitioner, why wasn't she required to appear to answer the respondent's

points and questions? Occasionally, adjournments were merited to enable the petitioner to appear to clarify issues.

6. If one option open to the parties was to apply to vary the order, why was this necessary? Couldn't it be handled informally?

7. In a related issue which often went back still further, some respondents needed information on how the orders were to be paid. This was more than a question of the amount, the due date, whether through the court (but addressed to the petitioner), and so forth. More basically, why did special (or personal) arrangements - direct payments, payments in kind, in services, adjustments for periods when the children were visiting, gifts, and all the other variants whch turned up - need court sanction? As well, even the straighforward notions that payments were meant to be regular and received by the due dates caused problems for some. Some needed referral to debt counselling or financial advice. Our illustrations suggest there are even a small number of "well-intentioned spendthrifts" among respondents who need to learn how to set up a personally pilfer-proof account to remit their maintenance payments. The tax-deductible nature of maintenance payments registered through the court also seemed to be a revelation to some of the respondents.

8. Referring to the hearing once more, if an order were made against him, what was the implication of the attached default? Some respondents claimed not to have understood they were liable to arrest without another hearing. They were surprised and outraged to find themselves in gaol. They did not see themselves as common criminals, after all. Some appeared shocked that they could be gaoled at all for failure to pay. The idea that gaol was not an alternative to payment (but that they would be released as soon as they paid their order) is arguably a difficult one.

9. How do orders to pay arrears relate to the maintenance order itself? Often neither party seemed to be clear as to whether the order superseded the regular maintenance payments, which order would be credited if

the whole sum was not forthcoming, or which order the default punishment attached to? More than that, when an order to pay did not cover the whole of the arrears, what happened to the rest? Could it be recovered later?

These clusters of questions can place a heavy informational burden on the hearing process. After all, the primary function of the interaction is to facilitate a quick flow of information in the opposite direction - the respondent getting his story across to the referee. The information role is not especially well-suited to such interactors, especially when the caseload places pressures of time on the staff. From another perspective, though, the questions are often central to the issues, because they expose problems of misunderstanding, misdirection or obstructionism which block resolution. If elevating the information-giving element of the show cause hearing seems to run contrary to the court's view of its proper role and, expecially, of the effective management of its time, larger considerations, not least the high recidivism rate among maintenance defaulters, suggest its importance.

4.02 The Play of Values on Family Life

The other perspective that we have tried to take on these hearings is that, technical legal issues aside, they were little morality plays in the best sense of that term. The court was charged with upholding certain social values in support of family responsibility and the centrality of the family and reacted to the parties in those terms. The assumption was that these values were "givens", about which reasonable persons would not quarrel. Thus, even if it were true that some parents did not love their children, nor wish to act in their best interests, nor act responsibly towards each other, and so on, none of this would wash in court. The model of the "reasonable person" in the family court context centered on responsibility, a very simple (if often quite strict) test that people understood even if they did not understand all the niceties of law.

In our observation, one question which provoked movement towards a proposed resolution was whether the respondent ever had a few spare dollars

for his children. This moved the argument from the legalistic plane - the respondent could not reasonable pay an order for such and such an amount- to the plane of intentions.

Some respondents hold a strong belief in the concept of fault.[2] To their mind, there may be residual bad feeling after the breakup of a family and it may be unreasonable to expect "to aid and abet the enemy" by paying maintenance. Even the ex-wife's role as petitioner, collecting payments on behalf of the children, is suspect and the court is seen as wrong in siding with her. Payments should go to the children in trust or she should be held accountable for the money. From this perspective, it is also illogical that the ex-wife can collect on maintenance arrears when the children have left home. The court rejects much of this argument, although the last point seems to be an uncomfortable one in that the family court may see recovery of arrears in these circumstances as too close to plain debt collection.

Another sentiment is that, if maintenance is an obligation, there must be compensating rights. The court is sympathetic to the notion that the non-custodial parent's rights of access are important, but tries to separate that issue from maintenance and rejects any simple quid pro quo argument.

Some respondents, however, imply that the argument goes further. They hold that, for non-custodial parents, obligations are based on ties of sentiment. If separation and divorce caused these to be stretched or severed, it is unreasonable to expect continued sacrifice. For a man who is estranged from his old family and forms a new one (because it is "natural" in this society to live in a family unit), his sentiments urge him to support them, even to the detriment of the first.

The court seems unhappy with the trade-offs in this situation. Fundamentally, it rejects this argument as a matter of public policy. It is not involved in the new family decisions of the respondent; in sanctioning him if he acts irresponsibly, however, the court is implicated in his new family circumstances almost as much as they are in the old. In doing its job, one

set of innocent parties or another suffers. The court staunchly defends public policy, but is largely an impotent gesture, as we argue further below.

A less extreme argument is the pragmatic one that two households cannot be run as cheaply as one. Therefore, both parties must accept a drop in their standard of living[3]. Respondents should act responsibly but not be martyrs. As a practical matter, the court concurs entirely. But in considering the respondent's ability to pay, it does not have a really even-handed test. There is a good deal of evidence that the impact on income (maintenance payments considered) is generally much more extreme for the custodial parent than the non-custodial parent. Typically, the mother and children suffer a greater drop in standard of living - measured in income terms - than the father[4]. There was not much scope in the show cause hearings for elaborations of an argument along these lines. Where it surfaced, the respondent would be directed to the option of applying to vary.

One offshoot of this pragmatic line of argument was the respondent's contention that, since the order was for a relatively small amount, and his ability to pay perhaps even smaller, the whole affair had no practical impact on the welfare of the children. Though nearly everyone could use the extra few dollars, in these terms, it was no use pretending that the respondent's contribution was an important one[5].

As we have noted, the court totally rejected this view. In fact, the referee argued the contrary. Paradoxically, the court's strong position may give some comfort to those respondents. That is, the referee often suggested that the award was really quite meager (as many were) and did not reflect the ever-increasing costs of raising children. If the respondent was forced to agree, it was easy for him to turn that around to support his view that the little he could (or was willing) to pay was inconsequential.

A particularly hard-nosed argument is the one illustrated in relation to debt. Some respondents firmly hold the idea that one simply cannot put

obligations to the family first because, in the real world of business, this value is not honoured. Thus, it is financially crippling to put off other creditors and pay maintenance. In this regard, the referee is equally hard-nosed. He urges people to get their affairs in hand by seeking debt counselling; consolidation of debts or personal bankruptcy can make provision for maintenance payments and actually improve the respondent's financial standing.

All of the above combine in a final point, the fundamentally altered position of the family following marital break-up. The court more or less systematically counters respondents' arguments against acceptance of continuing parental responsibility. However, in some crucial ways, the court backtracks. The central anomaly is in the mix of pragmatism and idealism that turns the notion of "ability to pay" on its head. The respondent's family is a preferred creditor and, in theory, it has first call on his income. In practice, however, this is not what happens, nor is it what the court maintains in the show cause hearing. That is because now that there are two households, there are two kinds of expenses. Where, in a single household, the respondent's expenses of rent, food, utilities, and the like directly (i.e. necessarily) maintained his dependants also, in a separated household, his income goes first to maintain himself. Family values in our society state that in an intact family, the children's needs, at least their most basic ones, get first call on income. Failure to act in this way constitutes child neglect. Maintenance payments, however, come out of residual income. The fight the court makes is to push up maintenance to that status from last place. In this fact is reflected all of the counter-arguments discussed here.

4.03 Some Recent Policy Decisions and Targeted Problems

The problems described in the preceeding discussion are at a number of levels, from fundamental policy, to procedures, to tactics and to materials. Because of the relative care with which changes can be made and explored at the level of everyday practices, the court naturally addresses problems first in that way. At present, the courts (and, more broadly, the back-up institutions which are called into play at separation or divorce) are sensitive to

enforcement problems. Thus, a number of the specifics as laid out in the description above have already been superseded. For example, a series of policy decisions have been taken in family court which should result in a stronger enforcement stance vis-à-vis one problem group of defaulters.

Two of these policy initiatives were already in place during the courtwatch period and were alluded to. The first was a decision to always count a payment towards the satisfaction of the regular maintenance due and only then count the residue against arrears. This short-circuts any attempt to avoid the default penalty attached to an order to pay towards arrears by paying that sum and not the regular monthly payments. The second is an initiative taken by the referee that the man keep the court informed of his circumstances as an informal rider to a dismissal and so avoid unnecessary enforcement efforts. Placing the onus on the man to maintain contact with the court is helpful in several ways; not least among these, it is a good indicator of a respondent's intentions.

Two initiatives taken subsequent to the courtwatch period also aim at men who seem to require a lot of goading or whose intentions are suspect. One is a decision to make more systematic use of a provision in the provincial legislation (the Family Relations Act, Section 15) which allows the court, in cases where there is reason to suspect the respondent intends to evade his obligations, to require that a performance bond be posted. Failure to pay the maintenance forfeits the bond money, which is used to satisfy the order. A related decision is aimed at persons who are suspected of "working the system" by tending to pay up arrears at the last moment, often the morning of the show cause hearing. Such respondents will be notified (by memo attached to their summons) that they are still required to attend court, and will be asked in the show cause hearing why they failed to pay the maintenance in the manner stated in the order; that is, monthly, but could pay when confronted with imminent court action.

In certain notable respects, the court has no scope for initiative, because the problem lies outside its competence. One such example is the disincentive for mothers on welfare to press for enforcement. Maintenance payments fall

under the earned income incentive allowed Guaranteed Available Income for Need (GAIN) recipients. One hundred dollars a month is allowed on top of GAIN; any additional income results in a dollar-for-dollar reduction in the GAIN payments. If the courts were to recover accrued arrears, much (or all) of the money would go to the province even if the woman had not benefited from the incentive income allowance (through part-time employment, for example) during the period of missed payments. Likewise, the court is unable to alter provisions of orders registered as a REMO in this jurisdiction. If the respondent is unable to unwilling to return to the original court, the British Columbia court is obliged to take some action, even in the absence of potentially important information on the case as a whole.

4.04 Procedural Change and Research Follow-up

This analysis of enforcement process suggests a number of procedural reforms and initiatives that might contributeto improved compliance. These were touched on in the discussion and they are summarized under some key headings.

Form of the Order

1. Child support orders be payable only through the court and automatically monitored for enforcement unless the parents specify another suitable arrangement.
2. One or two standard payment dates, say the first of fifteenth of each month, be adopted for all orders to aid in remembering to pay.
3. Payments should be payable monthly; this practice to be standardized. Suitable redrafting of the payment schedules to conform to local practice should take place when an award is registered for enforcement in a reciprocating jurisdiction.
4. In keeping with recent practice, orders should specify how support is apportioned among the various dependants.

5. Standardized information dossiers on the orders should be exchanged by reciprocating jurisdictions where an order is registered for enforcement. These should include the financial information available to the originating courts and the considerations taken into account in setting the award.

Recordkeeping

6. Records should contain all significant enforcement initiatives and be reviewed to check for terms of dispositions.
7. Where appropriate, records should be computerized for easier access and transferability. (an important secondary benefit is improved management control.)

Document Service

8. Substitutional service should be more readily available as an option, when the usual method of serving the respondent personally (or posting the summons) has failed, especially when there is reason to suspect evasion.
9. Courts should require a sworn statement of home and work addresses and an undertaking to keep the court informed of changes from both parties at every court action.

Orders to Pay

10. Orders to pay should not be for token amounts of outstanding arrears unless this is meaningful to the parties.
11. Orders to pay should always have a default term specified so that the immediate enforcement consequences are clear.

Public Education

12. The nature and reason for court sanctions should be made clear to parties (especially respecting default provisions).

Public Education (cont'd)

13. Information packages (in nontechnical language) outlining procedures, responsibilities and rights should be prepared for parties, i.e., "tailored" to address their particular circumstances.

Follow-up Research on Procedures

14. Policy on the service of documents needs to be clarified and the various options tested and assessed.

15. The use of bench warrants as a method of getting evasive fathers before the court should be evaluated.

16. Adjournments should be analyzed to discover any common characteristics of cases which are protracted.

17. The impact of various court arrangements such as the use of assigned prosecutors should be studied.

18. Attitudes of both parties to the role of the court and their views about maintenance should be researched.

19. A cross-section of matrimonial lawyers should be canvassed on their perception of the factors entering into maintenance disputes and what sorts of arrangements have proved relatively enduring.

20. Reactions to research findings should be sought from the judiciary and enforcement staff and treated as input into the elaboration of study implications.

4.05 Towards Policy Definition

This discussion of maintenance enforcement places the court at the centre of the problem. At the individual level, the court attempts, with only modest success, to disentangle problems which may represent the result of years of interpersonal conflict or confusion by grappling with one aspect of the larger tangle - maintenance default. At the societal level, the court tries to defend the public interest and hallowed social values in the face of perceived massive social change, contradictory norms and values, and the lack of any comprehensive family policy.

This situation is not peculiar to the issue of maintenance enforcement. The courts, as institutions of conflict resolution, are often faced with problems stemming from the failure of other aspects of our social conventions. In this instance, however, it may be that the court, in improving its enforcement policies, is in an excellent position to push towards more fundamental resolution of the social issues. Within the justice system, for example, it would be desirable to force the issue from enforcement back to the clarification of the goals and purposes of maintenance and how such awards are to be set. Beyond the justice system itself, a strong position on maintenance enforcement might highlight unresolved areas of social policy.

In general, the larger issues of policy have not yet received the sort of attention that has made for progress in specific enforecement problem areas. As the enforcing court's contribution to focussing public debate, therefore, we recommend a return to the consistent application of the "interests of society" model, which is at the centre of existing legislation. This model, quite simply, is that it is best for society that parental responsibility be treated very seriously.

1. At the core of this legal philosophy are two propositions that the courts should reinforce. These are: a) that the primary responsibility for the support of children lies with the parents, according to their means; and b) this responsibility should not be affected by the marital relationship ("common law", married, separated, or divorced) or by the custodial arrangement.

2. This philosophy implies that the court should defend the financial needs of the children (and the custodial parent on their behalf) over other creditors. Moreover, first family dependants should be diven strict priority as "preferred creditors" over subsequently acquired dependants. That is, if a responsible parent intends to take on a second family, he must take into consideration his financial obligations to his first one.

CONTINUED

1 OF 2

3. Awards should be set and enforced in terms of gross income, not residual income after expenses and debt service. The court should not look at the accumulation of personal debt as an unnatural state of affairs. Court-assisted debt consolidation or recourse to personal bankruptcy (so long as the interests of the child support creditor are preserved) should be considered when necessary, i.e., where they represent desirable personal and social tools in upholding the primacy of the family.

   This would replace the gaol sanction for contempt of the court order as the major lever in enforcement with other mechanisms - garnishment, attachment, recourse to bankruptcy - which attempt to motivate the maintenance debtor to rearrange his financial affairs.

4. Insofar as possible, child support orders should be based on the real costs of raising children, apportioned between the parents according to their means. To help the court in that determination, they should have available updated indices of minimal costs and, where possible, adjust them to reflect the accustomed standard of living enjoyed by that family. Ideally, orders should take into consideration the specific needs of the children, which may differ according to age and special circumstances.

5. To keep this policy fair and workable, the orders should be responsive to significant changes in the financial circumstances of the parties. Unlike the other major points in this policy, which can be accommodated within existing legislation, changes would be needed to enable the enforcing family court to vary awards originally set in a higher court or in another jurisdiction.

   Inflationary effects should be regarded as changed circumstances. (Orders might be written in terms of parental incomes relative to average income levels in the area and subsequently compared in terms of constant dollars.)

APPENDIX A

COURTWATCH OUTLINE FORM

COURT: ( ) Yale St. ( ) _____ Date: Time:
BEFORE: ( ) REFEREE ( ) _____

CASE NAME: _____ v. _____ Court List No:

address: ( ) Vancouver ( ) _____; ( ) Van. ( ) _____
appearing: ( ) respondent ( ) petitioner
( ) lawyer _____ ( ) lawyer _____
( ) other _____ ( ) other _____
( ) called three times → ( ) no service → ( ) struck off list
( ) bench warrant ordered
( ) other _____

type of order: ( ) separation agreement ( ) Supreme Court ( ) Vancouver
( ) consent order IN ( ) Family Court IN ( ) other _____
( ) court order dated _____

terms of order: $ _____ FOR ( ) wife ( ) _____ child/ren aged _____

arrears alleged: $ _____ as of _____.
( ) not challenged
( ) challenged _____

respondent's position: ( ) wants to consult counsel
( ) needs to prepare documentation
( ) wants to seek redress in Supreme Court → adjourned to: _____
( ) will show cause
( ) reporting re: _____ previous appearance _____
( ) other _____

argument: ( ) re: payments ( ) paid directly ( ) paid in kind
( ) other _____
( ) re: employment employer _____ occupation _____
( ) full-time since _____; reason
( ) part-time since _____; reason
( ) unemployed since _____; reason
( ) re: income
( ) re: expenditures ( ) new family ( ) wife earns _____
( ) _____ child/ren
( ) re: debts major creditors:
( ) re: wife's employment employer _____ occupation _____
( ) re: wife's income _____ ( ) wife remarried or support
( ) re: children of age ( ) self-supporting
( ) re: no access to children
( ) other

outcomes: ( ) order to pay $ _____ by _____ or in default _____
( ) consent agreement $ _____ by _____
( ) dismissed
( ) arrears of $ _____ forgiven
( ) adjourned to _____; reason _____
( ) advised to return when circumstances changed
( ) other _____

NOTES AND OBSERVATIONS (over):

APPENDIX B THE FAMILY COURT REFEREE PROGRAMME

The Family Court Referee, in the person of His Worship, Mr. D. Stevenson, is a court official who sits in rotation in a circuit of family and provincial courts in the Lower Mainland, dealing with a court list of maintenance enforcement cases. By the period of our courtwatch in 1980, his powers were essentially identical (in this restricted area of enforcement) with those of a family court judge.

Mr. Stevenson brought his own ideas, considerable experience in the family court and a close reading of the law to those cases. Therefore, his court was a tailor-made location for our courtwatch, as the problems thrown up there would likely be characteristic of the whole area.

In 1979, the circuit of sittings was developed and the extent of the referee's powers was under active review. The model in use at that time was more like that of the registrar in the Supreme Court. Maintenance enforcement cases (and in the registrar's case, applications to vary) would be argued before him and his decision would come down in the form of recommendations (in practice routinely accepted) to be ratified by the judge handling the case. A specialized office, it was aimed at freeing judicial energies for other matters, while, at the same time, providing quicker adjudication and greater consistency.

The Family Court referee concept had grown out of an earlier project in 1975-76[1]. The idea had been borrowed from Ontario where small claims credit referees had for many years offered debtor assistance to people before the courts in a number of counties. The Ontario experience influenced the assessment of an initial project in Vancouver Small Claims Court in 1975, which offered a mediation service for debtors and their (usually corporate) creditors. The Ontario model was tested in pilot projects in Vancouver, Kamloops, Terrace, and Campbell River in 1975-76 and then, in expanded form, in Victoria. It was in this latter pilot that the referee concept was applied to Family Court matters.

The Victoria project was targeted at reducing a backlog of about 500 maintenance enforcement cases. The referee had the time to go over debts and expenditures, to determine ability to pay, and to try to negotiate consent agreements. Initially, the referee would take on cases prior to the initial show cause hearing in the hopes a recommended solution could be presented to the judge by the hearing date. Eventually, the Victoria program devolved into the model analogous to the Supreme Court registrar - cases which seemed to warrant such investigation and mediation were referred to the referee by the judges for a report and possible recommendations. The Victoria program appeared to cut down on subsequent default and thus saved further enforcement effort.

The Lower Mainland is thus heir to both aspects of this experiment. There is a Provincial Court Referee who specialized in debtor assistance and the Family Court Referee whose quasi-judicial powers have evolved further from the Victoria project in the manner noted above.

APPENDIX C FINANCIAL STATEMENT - REFEREE'S FORM

In the Provincial Court of British Columbia:

Held at
IN THE MATTER OF ENFORCEMENT OF MAINTENANCE ORDERS

TO: The person named in the attached summons or notice to appear ——

You will be given the opportunity to present evidence concerning your financial circumstances. To assist that purpose, the following statement should be compl and made available to the court on the date of hearing as set forth in the summ or notice.

FINANCIAL STATEMENT

OF: (NAME) _____
(ADDRESS) _____
(DATE) _____ (SIGNATURE) _____

INCOME

Salary and/or commissions.	$_____	per month net	($_____ per month gross)
Total income of Spouse....	$_____	per month net	($_____ per month gross)
Unemployment Insurance ...	$_____	per month net	($_____ per month gross)
Workers' Compensation	$_____	per month	
Maintenance/Alimony	$_____	per month	
Family Allowance	$_____	per month	
Pension(s)	$_____	per month	
Investments/Interest	$_____	per month	
Social Assistance	$_____	per month	
Other	$_____	per month	

TOTAL per month (NET)..... $ ____

ASSETS (present worth)

Real Estate (equity)	$_____	(market value $_____)
Motor Vehicle(s)	$_____	(Year _____ Make _____)
Funds on hand/on deposit..	$_____	
Furniture & appliances ...	$_____	
Stocks/bonds/other	$_____	

TOTAL Value ..... $ ____

EXPENSES

Rent (type of accommodation _____)	$_____	per mo
Heating and/or electricity	$_____	per mo
Telephone	$_____	per mo
H O Mortgage(s)	$_____	per mo
O W Taxes (including water & local improvements)	$_____	per mo
M N Utilities (heating and electricity)	$_____	per mo
E E Insurance	$_____	per mo
R Upkeep/Other	$_____	per mo
Food (for __ adult(s) __ child/ren)	$_____	per mo
Clothing (for __ adult(s) __ child/ren)	$_____	per mo
Motor-Vehicle(s) (Licence-insurance-fuel-service)	$_____	per mo
Transportation (Public)	$_____	per mo
Health Care (Medical-dental-prescriptions)	$_____	per mo
Maintenance/Alimony	$_____	per mo
Child care or baby-sitting	$_____	per mo
Life Insurance	$_____	per mo
Dry cleaning/Laundry	$_____	per mo
Entertainment & Subscriptions	$_____	per mo
Personal/Other	$_____	per mo

TOTAL per month $_____

LIST OF CREDITORS

(Excluding real estate mortgage holders)

1. CREDITOR: _____
   Balance of account outstanding $_____ (Repayable: $_____ per month)
   Last payment in the amount of $_____ made during the month of _____ 1
   REASON FOR BORROWING:

   _____

(2 through 6)...

7. CREDITOR: _____
   Balance of account outstanding $_____ (Repayable: $_____ per month)
   Last payment in the amount of $_____ made during the month of _____ 1
   REASON FOR BORROWING:

   _____

SUMMARY

TOTAL NET INCOME PER MONTH	$
LESS: Total Expenses per month	$
Total payment to creditors per month	$
BALANCE:	$
DEFICENCY:	$

APPENDIX D TABLES AND ADDITIONAL COMMENTARY

1. Lifespan of the orders

This estimate is made using the average age of the mother at the birth of her 1.83 child (the average number of children born to a divorcing mother), which comes out to approximately 26 years; the average age of a woman at divorce is 35 years. These are 1978 statistics. (From STATSCAN, bulletin 84-204, table 11; and bulletin 84-205, tables 1, 16, and 17).

2. Court of original jurisdiction

As to quantum, the extra-provincial awards are not significantly different (in this sample) from those made in B.C. The latter average $159.59 per month and the REMO's $147.33. Nor are Supreme and Family Court awards significantly different. Family Court awards average $165.48 and Supreme Court $141.62 per month.

3. Trends in the awards

Table D1 Award Level per Dependant by Year of Original Order (for Child Support Awards only)

Yr. of original order	to 1974				1975-79				OVERALL
# children covered	1	2	3 or 4	Total	1	2	3 or 4	Total	
Award per child (in dollars per month)									
$1 - 50	0	5	7	12	2	5	1	8	20
$51 - 100	5	0	2	7	5	4	3	12	19
$101 and over	0	0	0	0	3	2	0	5	5
Total	5	5	9	19	10	11	4	25	44
Average award for child	$79	$42	$45	$49	$91	$77	$67	$77	$69
Average award	$79	$84	$153	$118	$81	$153	$217	$138	$129

Table D2 Award Level per Dependant by Year of Original Order ('Spouse' and Child Maintenance)

Yr. of original order	to 1974 Mother and				1975-79				OVERALL
# dependants covered	1	2	3 or 4	Total	1	2	3 or 4	Total	
Award per dependant (in dollars per month)									
$1 - 50	0	0	1	1	0	0	0	0	1
$51 - 100	0	2	1	3	1	0	0	1	4
$101 and over	2	3	1	6	2	3	2	7	13
Total	2	5	3	10	3	3	2	8	18
Average award per dependent	$68	$82	$25	$57	$142	$97	$107	$112	$80
Average award	$136	$246	$108	$182	$283	$291	$481	$335	$250

The orders covering dependent children only are tabulated separately from those covering spouse and children. This division was used for several reasons. Many orders covering spouse and children did not specify what portion of the award was for each. It is artificial, however, to apportion the award equally among spouses and dependent children because, nominal awards aside, a spouse generally is awarded larger sums than a child in those orders in which there is a designated breakdown. Therefore, a third table makes a crude estimate of the average amount that might be attributed to the spouse alone.

Table D3 First Estimate of Award Levels for Spouse by Year of Original Order

	To 1974	1975 - 79	Overall
Average award for mothers and children	$182	$335	$250
Average award per child x average number of children	$49 x 2.2	$77 x 2.0	$69 x 2.1
Estimated award for spouse	$ 74	$191	$104

Maintenance orders, unlike schedules of welfare rates, for example, are usually set out as equal amounts of money for each dependant child. If the breakdown of the award is specified, it is expressed as a set sum per month for each child. In practice, however, the average size of the total award increases with the size of the family, but by smaller amounts for each additional child.

4. Arrears

Table D4 Arrears by Type of Order

Arrears / Type of Order	$1 - 1,000	$1,001 - 3,500	$3,501+		Average Arrears
Separation	1	5	1	7	$2,234
Consent	7	5	4	16	$1,931
Court Order (& REMO)	11	10	19	40	$3,768
	19	20	24	63	$3,120

The relationship is not strong, but court orders have significantly higher arrears than separation agreements or consent orders[1]. The relationship is strengthened if we retabulate by number of months of missed payments (Chi sq.-11.3710 with 4 d.f.; significant at .01).

Table D5 Arrears in Months by Type of Order

Number of months behind	0 - 12	13 - 36	37+	
Type of Order				
Separation	2	5	0	7
Consent	10	3	3	16
Court Order (& REMO)	14	10	16	40
	26	18	19	63

Table D6 Arrears by Originating Court

Arrears	$1 - 1,000	$1,001 - $3,500	$3,501+		Average Arrears
Originating Court					
Supreme	4	6	15	25	$4,911
Family	16	14	9	39	$2,047
	20	20	24	64	$3,184

5. Variation

Table D7 Change in Award Level by Change in Dependants Covered

	Person added	No change	Person deleted	
Quantum increased	5	17	0	22
No change	0	20	2	22
Quantum decreased	1	9	11	21
	6	46	13	65

(chi.sq. = 27.3477 with 4 d.f.; significant at .001)

Persons added included cases where the mother is awarded support because of a change in circumstances, or where a child that had been in someone else's care-father's, relatives', or foster parents' - returns to live with the mother. Deletion occurs when the woman remarries, a child becomes self-supporting or is of age, or a child is adopted by the mother's new spouse and responsibility to maintain ends on the father's part.

Table D8 Award Level per Dependent by Variation

	Original Award	First Variation	Second Variation	Subsequent Variations
Average Number of dependents	2.31	2.33	1.99	1.90
Average Award per dependent	$67	$67	$73	$83

When children come of age and are deleted from the order, the court may tend to take the opportunity to improve the award level for the remaining dependents. Related to this is an apparent trend towards greater awards per dependent in recent years, even though the overall distribution has not shifted significantly.

Table D9 Award Level per Dependant by Year of Variation

	1970-75	1976-77	1978-79	1980	
Award per Dependent (in $ per month)					
$1 - 50	7	8	4	5	24
$51 - 100	5	7	8	7	27
$101 and over	1	1	4	6	12
	13	16	16	18	63
Average per person	$58	$60	$72	$99	

(chi.sq. = 7.4973 with 6 d.f.; not significant)

Footnotes

Overview

1. Law Reform Commission of Canada, Family Law: Enforcement of Maintenance Orders, Ottawa, 1976, p. 47.

2. For a number of Canadian references see R.N. Komar, "The Show-Cause Enforcement of Maintenance Orders" (1978), 1 Can. J. Family Law at 511, and B. Burtch, C. Pitcher-LaPrairie and A. Wachtel, "Issues in the Determination and Enforcement of Child Support Orders" (1980), 3 Can. J. Family Law at 5, footnotes 5 and 40. For the most recent B.C. initiatives see:
D. Windross, Family Court Enforcement Manual, Court Services, A-G Dept., October 1978; M. Sorensen, An Evaluation of the Automatic Enforcement of Maintenance Orders Pilot Project, Court Services, A-G Dept., March 1980; and E. Hall, "Enforcement of Maintenance Orders", Vancouver Family Court study paper, Feb. 1980.

3. See J. Cassetty, Child Support and Public Policy, Lexington, Heath, 1978; and D.L. Chambers, Making Fathers Pay: The Enforcement of Child Support, Chicago, University of Chicago Press, 1979.

4. Institute of Law Research and Reform, "Matrimonial Support", working paper #27,Edmonton, University of Alberta, 1978; and "Matrimonial Support Failures Reasons, Profile and Perceptions of Individuals Involved - A Proposal", 1977

5. Burtch et al., 1980; note 2 supra.

6. L.M. Yee, "What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver Family Court", 1979, 57 Denver Law Journal at 21.

7. Sorensen, 1980; note 2 supra.

8. Hall, 1980; note 2 supra.

9. M. MacDonald and R. Komar, "Access Rights to Children and Maintenance Obligations: A Quid Pro Quo?" (1979), 2 Can. J. Family Law at 299.

10. The Vancouver Family Court currently provides for representation of the petitioner's interests in show cause hearings. Similar arrangements exist in other courts on the referee's circuit.

Chapter 0 - Introduction

1. A parent (in our sample invariably the father), who is alleged not to be paying support as set out in the maintenance order, is summoned before the court to "show cause" why he should not be held to the order. He is the respondent.
If he does not have a valid excuse, the court can make an order for him to pay a sum towards the arrears, giving him a deadline for payment, and strengthen the order by attaching a threatened term of up to 30 days in gaol for default on that order.

Chapter 1 - A Review of Selected Literature

1. See note I-3 supra.

2. See notes I-4 and I-6 supra.

3. See notes I-1 and I-2 supra.

4. Chambers, 1979; note 1 supra.

5. Law Reform Commission of Canada, 1976; note 3 supra.

6. Cassetty, 1978; note 1 supra.

7. See note V-26 infra.

8. P. Eden, Estimating Child and Spousal Support - Economic Guidelines for Judges and Attorneys, San Mateo, CA., 1977.

9. See note I-6 supra.

10. J.W. Schmehl, "Calculation of Child Support in Pennsylvania" (1977)81 Dickinson Law Review, 793-814; K.W. White and R.T. Stone, "A Study of Alimony and Child Support Rulings with Some Recommendations" (1976) 10 Family Law Quarterly, 75-96.

11. See note 6 supra.

12. See note 9 supra.

13. See note 4 supra.

14. M.F. Bennet, "The Child Support Provisions: Comments on the New Federal Law" (1975) 9 Family Law Quarterly, 491-526. On the issue of income diverted to a second family, see G. Coleman, "Summary Maintenance Hearings: Factors to be Considered" (1978) 1 Can. J. Fam. Law, 183

15. Burtch et.al., 1980; note I-2 supra.

Chapter 1 - (cont'd)

16. B. Amren and F. MacLeod, 1979 The B.C. Unified Family Court Pilot Project - 1974 to 1977 - A Description and Evaluation, Victoria, Ministry of the Attorney-General.

17. D. Chambers, "Men Who Know They Are Watched - Some Benefits and Cost of Jailing for Non-Payment of Support" (1977)75 Michigan Law Review

18. See note 4 supra.

19. Yee, 1979; see note I-6 supra.

20. B.T. Corrigan, "Garnishment of Federal Income for Child Support and Alimony Obligations in Texas" (1978), 41 Texas Bar Journal, 245-252

21. M.A. Heedy, "Remedies - Domestic Relations: Garnishment for Child Support" (1978), 56 North Carolina Law Review, 169-179

22. See note 4 supra.

23. See Gallivan v. Gallivan, a decision of the Ontario Provincial Court, 1 Can. J. Fam. Law, 300-302. Also see Law Reform Commission of B.C., Report on Creditor's Relief Legislation, Vancouver, Report 42, 110-111.

24. Komar, 1978; see note I-2 supra. Also see Manitoba Law Reform Commission, Report on the One Year Rule for Enforcement of Arrears in Maintenance, Winnipeg, January 1980.

25. See Drapeau v. Drapeau, 1 Can. J. Fam. Law, 162

26. See note 19 supra.

27. M. Master, Report on Research on Canadian Family Law: Part 1 - The Support Obligation, Winnipeg, 1970

28. Editorial, "For Runaway Fathers", The Globe and Mail, Toronto, June 13, 1979

29. See note 6 supra.

30. See note 4 supra.; also see Family Court Monitoring Project, Second Report, N.Y. Fund for Modern Courts Inc., February 1978.

31. See note 6 supra.; see also R. Eisler, Dissolution: No-Fault Divorce, Marriage, and the Future of Women, New York, McGraw-Hill, 1977

32. Sorensen, 1980; see note I-2 supra.

33. Hall, 1980; see note I-2 supra.

34. See note 32 supra.

35. Komar, 1978; note 24 supra.

36. Eisler, 1977; note 31 supra.

Chapter 2 - Background Data

1. Companion tables and additional discussion are in Appendix D.

2. These include what was formerly known as 'alimony' (i.e. maintenance for the separated spouse prior to actual divorce) and continuing maintenance for the ex-spouse. As a convenience, we will term them "spousa

3. Calculated from H. Lieber, The Adequacy of Basic Income Assistance Benefits in the Greater Vancouver Area, Vancouver, United Way of the Lower Mainland, November 1978, Appendix 1C, Table 9.

4. Hall, 1980; note I-2 supra.

5. A. Walmsley, "Tracing the Escape Routes of Errant Spouses; The Knotty Problem of Collecting Maintenance Payments", Macleans, March 5, 1981,52-53

6. See note 4 supra.

Chapter 3 - The Courtwatch

1. Hall, 1980, Appendix C, provides comparable figures for 17 court days from July 6 through October 22, 1979. These show a slightly longer average court list but also (and perhaps related) a greater rate of failure of service.

Table 3.01C Scheduled Hearings - Service

	N	%	Average per list
Total Scheduled	230	100.0	13.5
No service - struck off list	81	35.2	4.8
No appearance - bench warrant ordered	11	4.8	0.6

No further comparisons can be made with his data because the powers of the referee were restricted in that period largely to dismissal if cause were shown, making consent orders, or referring cases to judges for disposition.

2. We missed three hearings; therefore, the total we discuss is 118.

3. The cases we report on below include a few which, strictly speaking, did not go forward. As noted elsewhere, we reclassified seven of these as "appearances" because the petitioner or her counsel appeared, the respondent sent an explanatory excuse containing a proposal or a promise of action, or, as in one case, the respondent, although never served, heard that he was to appear and showed up in court.

4. Although we were openly taking notes (an unusual behavior for spectators in court), our presence was more or less studiously ignored by most parties. Counsel apparently put us down as law students, observing hearings for class. We have no impression of what, if anything, most parties themselves thought. Only one was heard to mention us, asking his lawyer who "those guys" were; his lawyer told him not to pay any attention.

5. We did not attend enough registrar's hearings to calculate a meaningful average length. However, the shortest hearing in registrar's court was longer than the longest hearing before the referee.

6. See note 13 below.

7. See Appendix A, the courtwatch record form.

8. See Appendix C, the referee's form.

9. In B.C., this is usually stated as so many dollars per month, payable by a certain day, the first or fifteenth being common.

10. Infant has a literal meaning here, rather than its common one. It means the children can not speak for themselves in court. As noted earlier, children did not appear at any of the hearings we observed.

11. The date is usually that on the affidavit of arrears, sworn by the petitioner, who is often instrumental in initiating enforcement action or in having such action withdrawn.

12. This occurred in 87% of the appearances. In second or third appearances, however, the referee might not ask this question directly as the response would be implicit. For example, the position of a person reporting on progress in another court, an agent for counsel requesting a rescheduled hearing, etc. imply a position.

13. We recorded responses to this question in 90% of first appearances (44 of 49). None of the aspects of the "typical" hearing we are presenting is invariable. For example, questions about arrears might be short-circuited by the respondent or his counsel opening with quite another excuse or query. As well, our failure to record a response to this as to any other query need not be discounted. However, in this case, missed responses would likely have been a tacit affirmation of the arrears; any explicit challenge to them would be very difficult to miss as the referee picked up on these. Therefore, we have confidence in the proportion of the cases in which the arrears were challenged.

14. They might, however, have receipts for payments made (assuming any) if they claimed these as an income tax deduction.

15. But see also the often detailed enquiry that the referee conducted on the topic of claims of second families and common-law arrangements (section 3.12C).

16. The court referee, whose offices are in Vancouver, provides assistance in reorganizing a debtor's affairs under consolidation of debts provisions or through personal bankruptcy (see Appendix B).

17. See above p. 31. The researcher's understanding of this case was that the issue appeared to be the respondent's default on a lump sum maintenance order of $7,500 which he had proposed (to the registrar) to pay off in monthly installments of $100 and proposed (to the referee) to satisfy with a single payment of $1,800 payable within two months. Counsel for the petitioner noted that there was a separate dispute over his failure to pay another $32,500 towards the matrimonial home as stipulated in the decree nisi.

18. See below page 49.

19. In a previous research project (Wachtel et.al., Public Images of the Law, research paper prepared for the Attorney-General of B.C. and the federal Department of the Solicitor-General, 1980), a finance company manager informed us that some loan officers did not count a man's maintenance payments as expenses in assessing him for a loan because most men could be counted on to default on these. We have not been able to confirm the validity of this observation, although other anecdotal information has since suggested that some loan officers assume men will not be paying regularly or in full.

20. The cases we heard argued before supreme court registrars provided interesting anecdotal material on the importance for both ex-spouses of maintaining their credit capacity with department stores and bank cards. The custodial parent particularly seemed to value the ability to draw on credit to deal with shortfalls in income (chronic as well as temporary!), including the uncertainties of sporadic maintenance payments.

21. We cannot eliminate the possibility of feigned ignorance in these matters. Readers will draw their own conclusions about the illustrations provided here. The point remains that the court's best policy is to test intention by offering the parties an informed choice.

22. As an aside, a few respondents also claimed they didn't have the resources to file for bankruptcy but gave no further details.

23. A few other cases raised the issue of respondents supported by or responsibl for the care of their elderly parents, but not as a defense per se. Being supported by parents, or being heavily in debt to them, was a sign of inability to pay, as parents seemed to be put forward as creditors of last resort. Living with parents, and thus possibly sharing expenses, was used neither as a line of enquiry nor a line of explanation in this sample. It merely came up in passing.

24. As an aside, there was one case in which the child was stated to be the cause of the divorce:

> The respondent, a trucker, argued that he was psychologically unable to pay the order, now or ever. He felt "the child had replaced him; he had been traded in". He had never wanted children, the baby had "snuck up on him". He was so galled by the situation he said he didn't care what happened. He certainly never wanted to see the child.

25. The referee noted the order under discussion was unusually complicated. It called for $400 forthwith, payable either in cash or in designated appliances, $25 per month towards the remaining arrears for six months, and $75 per month after that until all arrears had been paid. Most orders use dispositions that are less complicated for the parties as well as record-keeping personnel.

26. Wachtel et.al., "Provisional Analyses - Some Descriptive Data on Maintenance Awards Monitored by the Enforcement Section of the Vancouver Family Court", report prepared for the Images of Law Project, Ministry of the Attorney General of B.C., April 1979.

27. Informal consent agreements were set up as adjournments so the court could monitor compliance.

28. Chambers, 1979; note I-3 supra.

29. The referee noted further that such an order for periodic repayment of arrears without a specified default was virtually meaningless in enforcement terms. See page 53 on this point. As one of the man's children was over 18, it might have been argued that a greater proportion was going towards arrears. The order had not, however, been varied.

30. See F.R.A., section 67.

31. The lawyer noted, apparently almost with satisfaction, that his client had gone to gaol twice for default on orders to pay related to an invalid order. The inference was that he should have gotten a lawyer sooner.

32. The lawyer had apparently intended to offer this proposal as a final one-time payment in satisfaction of all arrears. This would have required the consent of the man's ex-wife and would have had to be argued before the originating court in England and the referee explained it. For some reason, the lawyer went ahead and made the proposal anyway. The case was of interest for our purposes because it was one of only two in our sample which proposed an amount other than the total arrears in settlement.

33. The referee explained he held the one year rule had no standing in law. The lawyer however had recent case law which appeared to use it. For more detail see Manitoba Law Reform Commission, 1980; note III-24.

34. But see below as this classification needs to be qualified; some informal consent agreements were in fact adjourned.

35. The referee quoted the B.C. Court of Appeal decision in Meek v. Enright on this matter. See 5 B.C. Law Review 11, and E. Colvin, "Family Maintenance: The Interaction of Federal and Provincial Law" (1979) 2 Can. J. Fam. Law.

Chapter 4 - Summary and Discussion

1. These illustrations reflect procedures specific to the Vancouver Family Court. In some other courts where the referee sits, there are crown counsel to direct the hearings, examine witnesses, and give some referral information. The particular format is not the central issue here. Rather, it is the sorts of information which are sought and proferred. In our observation, these are quire similar in the various court settings.

2. Fault is also a concept in divorce law but not in the same sense. It may enter in establishing grounds for divorce but is not central to the issue of setting maintenance awards. The advent of "no-fault" considerations in separation and divorce also indicates the diminished strength of morality as a legal factor.

3. Applications to vary heard by the supreme court registrars often centre on this argument. The show cause hearing cannot deal with it in the same way.

4. See the lengthy discussion in Chambers, 1979, note I-3 supra, for example. For the Canadian case, see M. Boyd "The Forgotten Minority: The Socio-Economic Status of Divorced and Separated Women"; she shows that divorced women in the labour force earned only 63% as much as divorced men in 1970.

5. The symbolic value of the payments was not taken up in these interactions. We assume this omission is significant in that the respondents do not think of maintenance in these terms.

Appendix B - The Family Court Referee Programme

1. See J.A. Clark and R.C. Worthington, The Court Referee Project Report, Victoria, Courts Planning, Ministry of the Attorney General, May 1977.

Appendix D - Tables and Additional Commentary for Chapter 2

1. See note III-16 supra.

GLOSSARY OF TERMS

AFFIDAVIT OF ARREARS

A sworn statement made by the woman who is petitioning the court for enforcement of her maintenance order. It attests to the amount of support owing and the summons is drawn up accordingly. That is, enforcement in the Vancouver Family Court is not "automatic", but requires this request by the payment creditor.

BENCH WARRANT

An order to arrest an individual and bring him before the court. Routinely drawn up when a respondent fails to appear in court when properly summonsed, in practice it is often cancelled if he gets in touch with the court and a new hearing is arranged.

CHILD SUPPORT

An agreed sum - ideally a specified monthly amount for each child designated - paid by the non-custodial parent towards the upkeep of the children. Under the B.C. Family Relations Act, the duty to support a child ends at age nineteen; under the Divorce Act, it ends at sixteen or when the child is independent and self-supporting (but it may be extended indefinitely if the child is still in school, is chronically ill, or whatever).

CUSTODIAL PARENT/ NON-CUSTODIAL PARENT

For our purposes, the custodial parent is the one with whom the children are living. In Canadian divorces, the mother usually has custody, especially where the children are small. Custody can go to the father, of course, if it is considered to be in the children's best interests. Or neither parent may have custody, the children being in the care of the state, a relative, or whoever. Various sorts of joint custody arrangements are also possible. In such cases, however, were child support payable, it would again be from one parent when the children were living with the other.

DECREE NISI

The divorce decree granted by a judge. It can incorporate various provisions-arrangements about property division, custody of the children, access, and also may deal with maintenance. If no appeal is launched, a decree absolute, finalizing the terms, is granted, usually after three months. It is the decree nisi, however, that is the working document for enforcement purposes.

DEFAULT PROVISION

One attached to an order to pay, stipulating that, if its terms have not been complied with by the given deadline, the defaulter is to be arrested and gaoled for a stated period of time (up to 30 days) for comtempt of the order.

DEFAULT PROVISION (cont'd)

The gaol sentence is cut short as soon as a person complies with the order and pays up. It is important to note, however, that if he remains in default and serves the gaol period, the amount owing still stands.

GARNISHMENT OF WAGES

An enforcement mechanism by which the court instructs the maintenance debtor's exmployer to deduct from wages (leaving at least some minimum aside as take-home pay) towards the maintenance obligation or towards arrears.

HE

Often is assumed to be a technical term of convenience in legal drafting, denoting the general person and avoiding the need to continually write "he or she". It is also true in law that both parents have an obligation to support their children and, given that more fathers are getting custody of their children than was once the case, there are a small number of instances where mothers are paying child support. While bearing these facts in mind, we use "he" in this report to refer to the payor (or debtor) because all the cases we saw involved men in this role. Furthermore, it is important to the logic of some of the excuses discussed that it is the father, the man, who makes them. Social assumptions about what is 'natural' behaviour for fathers still differ significantly from our expectations of mothers.

MAINTENANCE

The general term we use for court-sanctioned arrangements for payments to help support the family after breakup. For several reasons, it is useful to distinguish between payments for the children (child support) and those to the wife or ex-spouse ('spousal' maintenance). Some would further distinguish alimony (sums for the support of the wife after separation) from 'spousal' maintenance (sums for the support of the ex-spouse after divorce). Maintenance can be awarded as a lump-sum but the great majority of the cases we consider here involve periodic payments, in this province specified as monthly amounts.

ORDER TO PAY

An enforcement mechanism stemming from the finding at a show cause hearing that the respondent is indeed in default. Two kinds of orders to pay are common. The first stipulates a one-time payment of a sum of arrears payable by a certain date (and often a default provision). The second is an order for periodic repayments of arrears, usually stated as monthly sums, on top of the existing maintenance order, to be paid until a stated total has been repaid (and sometimes stipulating a default provision for any single

ORDER TO PAY (cont'd)	nonpayment). An important point to note is that, in general, an order to pay does not replace the existing maintenance order but is in force in parallel with it. Thus a person may be required to make payments on several orders.
PETITIONER	The person asking the court for enforcement of a maintenance order. In our examples, a custodial mother on behalf of herself or her children.
QUANTUM	The monthly amount payable; the award level.
FAMILY COURT REFEREE	An officer of the family (provincial) court empowered to deal with the enforcement of maintenance orders. This specialized office is a project of the courts in the Vancouver area; for background information see appendix B.
RESPONDENT	The person required to respond to an allegation that he is in arrears and has willfully disregarded his obligations under the maintenance order. In our examples, a non-custodial father.
SEPARATION AGREEMENT	A private contract between separating spouses which arranges their affairs; one of its provisions may cover maintenance.
SERVICE	The presentation of a summons. For these show cause hearings, service was in the charge of the sheriff's office and respondents were to be served personally. Some courts have stipulated service by mail. There has always been a large minority of summons that are hard to serve. If ordinary methods fail, and especially if there is reason to believe a man is evading service, substitutional service may be authorized by the court. This can mean leaving the summons with any adult at the respondent's known place of residence; another method is to tack it to the front door where it must come to the respondent's attention.
SHOW CAUSE	A hearing in which the maintenance debtor (in these instances, the non-custodial father) is called before the court to "show cause" why he should not be considered willfully in contempt of the support order. Ordinarily, only the man summonsed, the respondent, is required to be present; it is up to him to answer to the court. The petitione the person asking for enforcement, need not appear as her basic statement is covered in the affidavit of arrears.
SUMMONS	A court document, specifying the date and the matter

SUMMONS (cont'd)	in question, requiring the recipient to appear at court. In these cases, the summons was accompanied by a note explaining that the respondent may be entitled to legal aid and also by the referee's financial statement (see appendix C) with a request that it be filled out and brought to the hearing.
APPLICATION TO VARY	Where the circumstances that underlay the existing maintenance order have altered, either of the parties can apply to the court to have the order varied to suit the current situation. In practice, it is more likely that the custodial parent will apply to have the amount payable increased while the non-custodial parent will ask to have the order reduced or arrears forgiven. When children come of age, application can be made to have them deleted from the support order; similarly, one can apply to have an order rescinded.
WARRANT OF COMMITTAL	An order to arrest and gaol a man who defaults on an order to pay which has a stipulated default provision.

END