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## Commentary: Meeting the Financial Needs of Children

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## COMMENTARY: MEETING THE FINANCIAL NEEDS OF CHILDREN

*David L. Chambers\**

Those who drafted the equitable distribution statutes adopted in New York and elsewhere wanted to help assure women and children an acceptable level of financial well-being after divorce. Marsha Garrison has shown that divorcing couples rarely possess enough resources to attain financial well-being even when they live together as a couple, let alone when they live in two separate households. She has also shown that, even in the cases of couples with substantial assets, the broad and general language of the equitable distribution statute did not lead (and could not have been expected to lead) to consistent distributions that assured economic well-being for divorcing women. She has shown in short that equitable distribution could never have lived up to the high hopes some people had for it.

Professor Garrison has performed the first major empirical study in any state comparing property divisions and alimony and child support orders before and after a state's adoption of equitable distribution. This massive and impressive inquiry has taken six years to complete. In this essay, I will make some brief comments about the values and demands of the empirical inquiry she undertook and then some slightly longer comments on the implications of her findings on child-support orders.

I know something about the demands of empirical research from painful experience. During the 1970s I worked on a similar large project studying child support in Michigan—not to understand, as Professor Garrison has, how much the orders were before or after some event, but rather to understand about collections, about who pays and who doesn't and why. Like Professor Garrison, I gathered information from courthouse records. When she tells you that she examined two thousand cases in three counties from two different periods of time, it may sound as if she just breezed into some public office, informed some po-

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lite and obsequious clerk that she planned to poke around in their files, took a few hours to scribble down the information she wanted and then wrote up the results. Not at all. Merely getting access to the files requires delicate diplomacy. Of course, court officials need to protect the privacy of the people whose files are to be examined, but often officials who talk the language of protecting privacy are really most interested in protecting themselves from exposure of their ineptness. If a researcher does gain access to the files, she discovers that many of the files are missing and that, in the files that aren't missing, much of the information she thought would be there is not. And what is there turns out to take vastly longer to code, to get into a computer, and to analyze than any average person would imagine. For Professor Garrison, this has not merely been a project. It's been a career. We should all be grateful to her for devoting such a large chunk of her professional life to this inquiry.

And to what end? Some people hear about these huge empirical projects and ask, with doubt in their voices, are they really needed? Do we gain new insights from them or do they just demonstrate what was intuitively obvious already? I believe that we typically learn a great deal from carefully designed studies, though I know others have doubts. When I completed my own work on child support, for example, I believed that I had shown that jailing parents for nonpayment of child support could make a difference in collecting payments. I remember relating my findings at a meeting of public employees whose job it was to collect support payments. At the end of the presentation, one gentleman who had been in the business a long time, came up to me and said quizzically, "Now let me see if I understand. You found that if you throw people in jail, they'll pay up some money to get out," and I said "yes," and he said, "and that if you throw a lot of people in jail, it may scare some other people into paying," and I said "yes," "and it cost you \$250,000 to find that out," and I said "yes" again and he shook his head sadly and said, "Well, you know, you should have talked to me. I could have saved you a whole lot of trouble and a whole lot of money."

Professor Garrison's findings are different. She's found a lot that is *not* intuitively obvious. She's shown in several ways why hopes for equitable distribution laws have not been fulfilled. Even if you had a hunch that the equitable distribution law

wasn't working as intended, it's important to build a solid factual underpinning for that hunch, the solid underpinning provided by her findings about property distribution, about alimony, and about child support.

With regard to property rules, for example, Professor Garrison has amply demonstrated a point most of us would have guessed if we'd thought about it but that needs repeatedly to be brought home: Most divorcing couples simply do not have a lot of property. For them it doesn't make any difference what the property distribution rules are. The inadequacy of available assets is, of course, routinely a problem in the divorces of couples with young children. Most couples with young children are in their twenties or thirties, and most of the little property they have is not liquid—a car and some furniture. That finding leads Professor Garrison to one of her central conclusions and recommendations: it is time to place the emphasis not on property distribution but on *income* and post-divorce sharing of income.

Professor Garrison recommends a different approach to alimony and child support that has several features. The most important of these is that it should mandate child support in an amount "that would equalize the post-divorce standard of living of the children and their custodial parent with the standard of living of the noncustodial parent." Keeping the custodial parent and children on an equal footing with an absent parent is a worthy goal. I want to show you how very far we are from reaching it.

Assume, if you will, the prototype American family of the twentieth century—a wife, a husband and two children, ages one and three. This sort of family still exists. The parents divorce. The children remain with the mother. Since their birth, she has been a full-time caretaker. Assume further that the husband (and thus the family as a whole in this case) has an adjusted gross income of \$40,000, which Professor Garrison reports is the median family income for the families in her study. Let's look at the child support that would be awarded in this case under various approaches.

As a starting point, how much child support would have been ordered in this case in New York at the time that Professor Garrison conducted her study? Within her sample, she found that combined alimony and child support averaged twenty percent of the gross income of the noncustodial parent when the

noncustodial parent earned \$40,000 or more. Twenty percent of \$40,000 is \$8,000. Thus in our example, the wife and two children would have to survive on \$8,000. The father would end up with \$32,000 minus taxes. The mother and children would live in poverty. The father would lose the housekeeping services his wife provided but would have an income that permitted him to live in comfort. In fact, he could afford to live at a higher standard of living on his remaining income than he did when he shared his earnings with his wife and children.

Professor Garrison was reporting on New York in 1984. What would today's child support schedule provide in New York? Responding to an act of Congress, New York has adopted a set of tables that fix appropriate child support orders. In our example of a family with two children, the schedule would call for ordering the noncustodial parent to pay twenty-five percent of his adjusted gross income for child support alone. Alimony would probably not be ordered in a marriage this short. Twenty-five percent of an income of \$40,000 would provide \$10,000 for the mother and two children and \$30,000 for the father. There would, it is obvious, still be a huge difference between their standards of living.

Now stop for a second. What *would* it take to put the mother and two children at the same standard of living with the father after divorce if the two households shared his income of \$40,000. It would take an order not of twenty-five percent of the father's income, but an order of at least sixty percent of his income. Thus, for the family with two children, support orders would have to be over twice as high a percentage of earnings as the orders are today. Even if the mother in our example earned \$10,000 a year herself (after expenses for child care), thus making the total family income \$50,000, the order would still need to be nearly half of the father's income to produce an equal standard of living in the two houses.

Why is it that the new, federally mandated, state schedules such as New York's have not set child support orders high enough to produce such equal standards of living for the separated households? Why not orders of fifty or sixty percent of the noncustodial parents' incomes? I think there are several reasons. One that is frequently stated is that child support is not intended to support the custodial parent. It is solely intended to support the children. Economists then try to separate out the

costs solely related to the children. But we all know that children cannot be assured a particular standard of living while living with a caretaker without taking into account the expenses of the caretaker, since the caretaker and children will obviously share the same pool of income.

Another asserted justification for lower orders is that if non-custodial parents are subjected to very high orders they are thought likely to flee or to make even greater efforts to evade the support orders than they do today. These predictions may be sound, although in the current era, which relies much more heavily on income withholding than in the past—taking the money due out of noncustodial parents' paychecks before they cash them—the claims that higher orders will produce higher default levels are unproven.

Finally, there is a third, more fundamental, reason for refusing to equalize standards of living. Deep down many of us still believe that the income really does belong to the income earner, that the person under an order of support *deserves* to keep the larger share. For most Americans, work in the labor force involves a lot of drudgery. On the other hand, so, of course, does raising children.

To be sure, there are drawbacks to setting orders much higher than they are today. Doubling orders would exacerbate a problem that already exists: if we set very high orders, do we need to adjust them later to take into account the *custodial* parents' income if over time that income rises substantially? If the custodial parent remarries, she and the children could, in an era with much higher orders, end up with a substantially higher standard of living than the support-paying absent parent. Modifying orders on her remarriage would help ensure that living standards remained equal. On the other hand, the prospect that orders will be modified might deter custodial parents from remarrying. By much the same token, setting very high orders could exert a huge impact on the noncustodial parents' life—on his financial capacity to remarry and on the standard of living he could maintain if he does remarry, especially if he starts a new family. Of course, we can assert glibly that the first family comes first, but that's a harsh position to take for the new child of the second marriage, who had no choice about her birth order. Adjusting support orders also carries with it the risk that angry noncustodial parents might start new families simply as an ex-

cuse to pay less to their earlier-born children.

Let's look to the future. Will states ever devise systems of child support that truly meet children's needs? How would a truly adequate and effective child-support system work? It would include, of course, much higher orders. But that is not enough. Such a system also needs to include more effective ways of collecting the amounts ordered, even though the states have made remarkable strides in collection techniques in the recent past. I will close with a few speculations about what a more effective system of collection might look like. Under the old regime, still widely relied on despite new federal laws, a court sets child-support orders, orders noncustodial parents to make certain payments every week or every couple of weeks and expects them to write checks after getting their paychecks. The parent is supposed to mail the check to some court clerk's office that distributes it to the custodial parent. Contemplate for one horrible moment what would happen if the federal government tried to collect income taxes that way, asking us to mail in a check every week for that week's taxes. It is not hard to understand why the federal government shifted in 1940 to payroll deductions. It is also not hard to understand why much of the movement in the last decade has been toward taking child support out of parents' paychecks before they actually receive the paycheck. By 1994 the states, except in unusual cases, are supposed to require wage deductions for all new orders of support.

For all its worth, the payroll deduction system states are and will be using is still a clumsy business. In the first place, under the current system, the state has to find the employer of the noncustodial parent before it can issue an effective wage deduction order. If the parent changes employers and, as often happens, fails to notify the court or the clerk, the state has to identify the new place of employment and place another wage deduction order in effect.

Can a better system be developed? While I cannot prescribe a perfect system, I can certainly envision a more effective one, at least on paper. We would need to adopt a *national* system for collecting support to replace the state-based system we have today. The system would work in much the same way that withholding for federal income taxes works, though not quite. It cannot work quite the same way because, as to taxes, employers know that they have to withhold for every employee whereas

only some employees are under obligations to pay child support. So, under my imaginary scheme, the law would require employers to check through a national computer system to learn, for each employee, whether an order is in effect. The employer would then simply start withholding, sending the ordered amount to some federal agency that would be expected to turn around and forward it to the custodial parent.

Of course, I quiver as you do at the thought of a newly enlarged federal bureaucracy charged with handling these transactions. Nonetheless, in several European countries such a system has been in effect for many years, and in fact, some countries have gone one step further. In these countries, once an order of wage deduction is put into effect, the government starts making payments to the custodial parent without waiting for the money actually to come through the pipeline from the parent under the order of support. The government assumes the burden of collecting the money from the noncustodial parent. Our federal government may never be ready to take on that substantial a risk, but it would be a risk it might choose to assume if we as a nation were genuinely committed to the needs of children.

Now of course, even the improved system that I've sketched has huge gaps. The biggest gaps are for the self-employed, for whom a wage deduction system obviously cannot work, and for the unemployed and sporadically employed, for whom a better economy is the first indispensable requirement. Still, what I recommend would almost certainly be more effective than what we have today. Will we ever actually adopt such a system? I rather doubt it. My points both on the size of the child-support orders and on the collection system are mostly a way of demonstrating just how far we have to go in this country if children are to come first. Professor Garrison's splendid research has helped illuminate the scale of the problems still facing us.





## COMMENTARY

*G. Oliver Koppell\**

I would like to give my thoughts in response to Professor Garrison's work, and comment tangentially on some of the other commentators' points as well. First, I'm not sure that Professor Garrison's overall conclusion that equitable distribution is a failure is fair. It is fair to say that her study shows that the current system of distribution of property and support of ex-spouses and children isn't working very well. But such a conclusion does not necessarily mean that equitable distribution is a failure, especially considering that her study, interestingly enough, shows that equitable distribution is largely irrelevant to the issue of how parties live after divorce. That, perhaps, is the most surprising outcome. For the vast majority of men, women and children, the whole issue is essentially irrelevant because there is not enough property to really make a difference. What she also shows is that where there is enough property to make a difference, the results are not very consistent. I don't think Professor Garrison has been able to show—because I don't think any study *could* show—that in individual instances shifting away from a title-based system did not allow for more flexibility and therefore more fairness.

I suggest that there are many cases, maybe not statistically significant but certainly significant to the participants in those cases, where equitable distribution helped to achieve a better result than would a title-based system. And I don't think Professor Garrison would counsel going back to a title-based system to cure the problems of equitable distribution. I doubt there are many people around who would say we should go back to that system, even though, according to the research, under that system the results were not very different than the results *after* the system. Her study points out that equitable distribution does not solve basic fairness problems, and as a result of the enactment of equitable distribution we made other changes in the di-

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\* Chair, New York State Assembly Committee on the Judiciary.

orce law, particularly with respect to permanent alimony or maintenance, that not only didn't help the situation, but perhaps in many instances made it worse. On that point though, I might suggest that changes in societal attitudes about the capabilities and role of women had as much to do with what happened in the courts with respect to alimony and maintenance as the change in the law, and we might well have changed the law with respect to alimony or maintenance even if we hadn't enacted equitable distribution.

So going back to the question of whether we should or should not have passed the equitable distribution law or that part of the law which dealt with abolishing title, I don't think the report suggests that passing the law was a bad idea. Rather, we should recognize that by adopting equitable distribution we didn't solve many problems some people thought would be solved. If Professor Garrison's research had been available in 1979, those disappointed with the equitable distribution law would have known to begin with that it wouldn't have solved the problems, because the money just wasn't there. Unfortunately, we in the legislature didn't take the time to determine how few people equitable distribution would affect. Now, looking at the effect of the equitable distribution law, the question arises where should we go from here, where should we go as a legislature?

First of all, let me say that some of us in the legislature, even before Professor Garrison's study, have understood that there are problems with the system that equitable distribution has not been able to solve and that therefore still need to be changed. First of all, certainly, many of us from the very beginning believed that the distribution of property should be equal, not equitable, or at least there should be a presumption of equality. I know that was my position way back when and the position of many others. Equitable was essentially the result of a compromise with those members who opposed any change. It was my view that we should have a more predictable standard: that the standard should be a presumption of equal. Even today, I'm not sure we shouldn't move further toward the California model, which is based on community property.

Many of us from the very beginning believed, and I still believe, that we ought to have at least a presumption of equal. I don't mind tinkering with the presumption in the ways that Professor Garrison suggests, in terms of providing more than equal

where that's appropriate, especially in low-income families or low-asset families, and in dealing with the issue of occupancy and control of the marital residence. Many of us also recognize that we should further modify the law, although it is true that since 1984, when Professor Garrison's study was done, there has been a modification of the law reminding judges that they can exercise their power to award permanent maintenance when necessary. We should go further. In legislation that I've proposed, we would have the judge look at the standard of living established during the marriage, and we would create a presumption of permanent maintenance or alimony in the case of the long-term marriage.

I also agree with Professor Garrison on the need for adequate counsel for the parties. Professor Garrison indicated that adequate counsel is one important predictor of a favorable outcome to the lower-income or lower-asset spouse (in most cases, the wife). Again, in legislation I've proposed, we would provide for a clearer mandate on judges to award counsel fees during the course of litigation and we would provide standards for the award of counsel fees that would look at the amounts paid by the "monied" spouse for counsel, when determining how much should be ordered to be paid by that spouse for the non-monied spouse's attorney. So, I think that her study suggests that the direction I and others in the legislature who have joined me are going is the proper one, if we are to correct some of the other problems suggested by the study.

Last, as discussed by Professors Garrison and Kay, is the question of whether a no-fault standard of divorce makes any difference in determining the financial outcome of the breakup of the marriage. Professor Garrison's studies, in which she points out that the vast majority of states in the United States are now no-fault states, do not indicate that the financial outcome results in New York are significantly different than the results reached in other states. So, the fact that we have a fault-based system in New York has not had the impact of awarding the economically weaker spouse higher amounts of property. There remains, however, a perception that fault-based systems help the weaker spouse, and this has engendered resistance to my proposals that it is time to eliminate fault as a necessary element in divorces where there is no consent. You can, of course, have a divorce on a no-fault basis in New York with consent. Professor Garrison's

study, and similar studies in other states, indicate that the fault requirement is not particularly protective for women, at least as a general matter. So, in the end I think that the study contributes to our understanding of what happens to people as a result of divorce. I think the study supports moving from a standard of equitable to a standard of equal. I think the study supports further modification of the standards judges should use when determining the award of maintenance or alimony. Maybe that can be done through case law, maybe it doesn't require a statutory change, but I would be happy to support such a statutory change. I think the study recognizes the importance of providing counsel to the parties. This issue is not limited to having the monied spouse pay for all attorneys' fees, but also involves the difficult problem of providing counsel when there is no money on either side, which is very often the case. Here, we have unfortunately gone backwards in the last few years by reducing legal aid to people who need or want a divorce. I also think that the study does not support those who are opposed to adding an irreconcilable differences standard to New York's grounds for divorce. Such are my thoughts.