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Access to Legal Remedies: The Crisis in Family Law

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I. INTRODUCTION

Lack of access to the courts to resolve domestic disputes is a national problem which deserves the attention of both family law scholars and practitioners. Family law scholars have exhaustively critiqued both the substantive and procedural law governing dissolution proceedings. This analysis of rules and standards, however, is rarely conducted with the explicit goal of maximizing access to the courts for people of low and moderate income. Over the last five years, several states have performed "legal needs" studies which have demonstrated that large segments of low and middle income families are effectively denied access to the courts to resolve child custody, support, and related domestic problems. When family members cannot obtain legal assistance to address their legal rights and obligations, the negative effects of family dissolution are exacerbated.

While the literature reflects a general awareness that family law proceedings are increasingly expensive and complex, the scope of the problem has not been fully explored. Parties attempting to resolve multi-issue domestic relation matters in court without representation, the numbers of children affected, and the income levels of those in need of legal aid are all issues which must be considered when exploring family law reform.

This paper begins by assessing the dimensions of the problem through an explanation of the existing domestic legal needs studies. Such studies have been conducted in the District of Columbia, Minnesota, Washington, Maryland and several municipal jurisdictions throughout the country.[1] This paper

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1 Domestic problems for these studies were generally defined as: divorce, child support, custody, visitation, paternity, alimony, and domestic violence.

also presents a case study of a typical multi-issue domestic case to provide a context within which to explore procedural and other innovations aimed at both reducing formal requirements on simple domestic cases and replacing discretionary standards with structured, predictable rules. Procedural reforms identified in the paper include providing alternatives to full adversarial hearings in some domestic proceedings; relaxing barriers to non-attorney advice and representation; identifying the appropriate categories of cases for such procedural innovations; and designing appropriate mechanisms for informed pro se representation, including education programs and wider use of standardized forms.

II. THE SCOPE OF THE PROBLEM

A. Lack of Legal Representation as a Widespread Problem

Family law issues account for thirty-two percent of all requests for legal services among low-income persons throughout the United States, making this the highest single area of legal need among the nation's poor.[2] Legal needs studies conducted in several jurisdictions throughout the country demonstrate that (1) anywhere from fifty to eighty percent of the poor seeking legal assistance for domestic problems are not receiving such assistance, and (2) almost half of all litigants in domestic proceedings are unrepresented.[3]

A Maryland study concluded that only eleven percent of low-income persons seeking legal assistance with domestic problems receive assistance.[4] A 1992 study of access to domestic remedies in the District of Columbia concluded that only thirteen percent of low-income eligible persons seeking legal

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2 A.B.A., NATIONAL CIVIL LEGAL NEEDS SURVEY: A GRAPHICAL OVERVIEW (1989).

3 The phenomenon of widespread pro se representation in relatively complex civil proceedings is not limited to domestic cases. *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 22 HOFSTRA L. REV. 533, 535, 538 (1992); OFFICE OF PROFESSIONAL STANDARDS, STATE BAR OF CAL., REPORT OF THE STATE BAR OF CALIFORNIA COMMISSION ON LEGAL TECHNICIANS 13 (July 1990) [hereinafter OFFICE OF PROFESSIONAL STANDARDS] (finding that the vast majority of litigants in landlord/tenant proceedings in Baltimore, Maryland, and Bakersfield, California, respectively, are unrepresented).

4 ADVISORY COUNCIL ON FAMILY LEGAL NEEDS OF LOW INCOME PERSONS, INCREASING ACCESS TO JUSTICE FOR MARYLAND'S FAMILIES (1992) [hereinafter ADVISORY COUNCIL REPORT].

assistance for domestic problems receive it.[5] That study also found that in over fifty percent of cases involving divorces without substantial property, contested custody, child support or alimony issues, at least one party was not represented.[6] In child support enforcement cases where potential sanctions included incarceration, the number of pro se defendants increased to ninety-three percent.[7] Pro se litigants in these cases were not limited to low-income groups.

Data collected in a 1989 Minnesota study indicated that fifty-three percent of low-income persons seeking legal assistance with domestic problems could not be served.[8] Of the forty-seven percent served, only twenty-seven percent received immediate full representation, with the balance either receiving brief advice sufficient to solve the problem or being placed on a waiting list before receiving representation.[9]

In California, a report issued by the Office of Professional Standards of the State Bar was based on a one-month survey of family law filings in Los Angeles undertaken in late 1989.[10] The survey concluded that 35.34% of new cases were filed by pro se litigants.[11] This number increased to 36.22% in San Diego and 60.94% in San Francisco.[12] Another California survey, issued by the California Commission on Gender Bias in the Courts, found that over forty-five percent of the family law judges questioned agreed that lack of representation caused problems for the court which included poor presentation, delay, and increased burden on court personnel.[13] Over thirty-six percent of the judges surveyed reported that as a consequence litigants received unfair results or treatment and experienced a

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5 D.C. BAR SERV. ACTIVITIES CORP., ACCESS TO FAMILY LAW REPRESENTATION IN THE DISTRICT OF COLUMBIA 9-10 (1991).

6 *Id.* at 10-11.

7 *Id.* at 11.

8 MINN. STATE BAR ASS'N LEGAL ASSISTANCE TO THE DISADVANTAGED COMM., FAMILY LAW: A SURVEY OF UNMET NEED FOR LOW-INCOME LEGAL ASSISTANCE, at v (1989).

9 *Id.* There were comparable findings of unmet needs in the State of Washington. *See* LEGAL AID COMMITTEE, WASH. STATE BAR ASS'N, A REPORT ON THE NEED FOR CIVIL LEGAL SERVICES FOR POOR PERSONS IN THE STATE OF WASHINGTON (1980).

10 OFFICE OF PROFESSIONAL STANDARDS, *supra* note 3, at 13.

11 *Id.*

12 *Id.*

13 JUD. COUNCIL ADVISORY COMM. ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS 97 (1990).

"lack of knowledge" regarding issues and rights.[14]

The widespread inability of low-income people to receive competent legal advice, as exemplified by the above studies, can be traced to a number of factors. A shortage of free or affordable legal services appears to be the primary problem. The above studies show that the number of "legal aid" or "legal services" attorneys providing free representation is inadequate to serve all income-eligible clients. In addition, these services are unavailable to the large numbers of individuals whose incomes fall above the extraordinarily low guidelines for free services.[15] With the national median annual family income at $29,943,[16] it is not surprising that the typical separating spouse with access to only a portion of this income cannot afford the substantial "up front" retainer required by most attorneys.

Other trends in family law exacerbate the problem of lawyer scarcity. It is increasingly expensive to litigate a domestic case with one or more contested issues, such as custody, child support, or alimony.[17] Broad discretionary standards governing the allocation of family resources and child placement after divorce contribute to the expense and delay of litigating a con-

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14 *Id.*

15 To be eligible for free legal assistance in programs funded by the federal Legal Services Corporation, an adult supporting two children can earn no more than $14,863 per year. *See* LEGAL SERVICES CORP., LEGAL SERVICES MAXIMUM INCOME GUIDELINES BY FAMILY SIZE (1993). The guidelines for legal services offices funded by state and private agencies are slightly higher. *See, e.g.*, MARYLAND LEGAL SERVICES CORPORATION GUIDELINES (1992) (providing for a maximum family income of $22,422 per year for an adult with two children).

16 BUREAU OF CENSUS, U.S. DEPARTMENT OF COMMERCE, 1990 CENSUS REPORT (1991). According to a Census Bureau report based on interviews with 60,000 households in March 1991, there were 2.1 million more Americans living in poverty in 1990 than in the previous year. An estimated 33.6 million people were living in poverty in 1990, making the poverty rate 13.5%, up from 12.8% in 1989. The poverty rate reflects the percentage of Americans living below a threshold of minimal need, estimated at $13,359 for a family of four in 1990. On a per capita basis, real income for all Americans declined for the first time in eight years, by 2.9%, to $14,387.

17 RICHARD NEELY, THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE 98-118 (1984); *see also* Deborah Rankin, *Personal Finance: Keeping a Lid on a Divorce Lawyer's Bill*, N.Y. TIMES, March 23, 1986, §3, at 15. A recent Arizona study estimated that "[l]itigation of custody matters today easily can cost each middle-class divorcing spouse in excess of $15,000." Rudolph J. Gerber, *Recommendations on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 11 (1990). Data from Maryland confirms the general comments on the national need. *See* MONTGOMERY COUNTY COMM. FOR WOMEN, REPORT OF THE COALITION FOR FAMILY EQUITY IN THE COURTS 2-6 (1989).

tested domestic case.[18] The large numbers of people who are unable to obtain free representation or purchase legal assistance in the marketplace must navigate through court proceedings that are, for the most part, designed by and for lawyers, and are often too complex for the unrepresented to initiate or complete.

B. A Case Study Illustrating Barriers to Obtaining Family Law Remedies

Consider a typical client seeking a divorce and living in Baltimore, Maryland.[19] Janice Sanders is a thirty-five year-old mother of two sons, Christopher (age nine) and Samuel (age three).[20] She is a marketing representative for a health maintenance organization and earns approximately $24,000 per year. Her husband is an administrator in the Baltimore City school system earning $36,000 per year. The only notable marital assets are a home, purchased for $71,000 with an existing mortgage of $64,000, and the husband's state pension.

After two years of intense conflict, Mrs. Sanders left her husband of ten years, took the children, and moved in with her mother. Her goals are to obtain custody of her two sons, return to the family home, obtain financial assistance from her husband to contribute to the mortgage payment and the support of the children, and ultimately obtain a divorce. Although Mrs. Sanders assumes that she may need a lawyer to accomplish these goals, she has never had occasion to use a lawyer and has no idea where to find one. Because she cannot afford a lawyer, she calls the local Legal Aid office. Despite the fact that she has no disposable income or assets beyond the fifty percent share of the $7,000 equity in the family home, she is told that she is ineligible for free legal assistance. Legal Aid sends her to

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18 Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 219-20 (1991).

19 Although each state's court system has distinct features, the progress of an adjudicated case in Maryland is representative of the 37 states currently without family courts. *See* ADVISORY COUNCIL REPORT, *supra* note 4, at ch. 4; *see also* H. Ted Rubin & Geoff Gallas, *Child and Family Legal Proceedings: Court Structure, Statutes and Rules*, FAMILIES IN COURT 25 (1989).

20 Although the names and identifying characteristics have been changed, the Janice Sanders case is based on a client who the author interviewed in her work at the Family Law Clinic of the University of Baltimore School of Law, in which approximately 30 students each year represent 60-80 clients in domestic cases under the supervision of law school faculty.

the local bar association lawyer referral service, which in turn sends Mrs. Sanders to a local lawyer. The initial consultation fee is only $350, but the attorney requires a $2,500 retainer fee to begin work on the case. The Sanders have no savings and Mrs. Sanders is unable to borrow more than $500 from her parents. She calls a local women's self-help group and learns about a service called the Family Law Hotline.[21] She calls the hotline and obtains (1) an overview of the divorce process in her jurisdiction in Maryland, and (2) confirmation that it is in her best interest to obtain legal representation.

Mrs. Sanders learns that, to begin the process of obtaining court relief,[22] she will have to prepare a complaint for divorce, file it at the local clerk's office and properly serve it on her husband. There are no forms available, but the hotline informs her that she can learn what she needs to do from law books at the state law library. If she's fortunate, a friendly clerk at the law library might show her a file that contains a divorce complaint.[23] Because a trial on contested issues before a judge can

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21 The Family Law Hotline is a project begun by the Women's Law Center of Maryland in 1990. Callers receive 15 minutes of free advice from volunteer, experienced family law practitioners or law students under the supervision of family law clinical faculty. The primary goal of the project is to respond, in a limited way, to the overwhelming need for legal assistance in domestic problems in Maryland. One unexpected benefit of the project has been the Family Law Bar's and law students' increased awareness of the lack of access to remedies. *See* Volunteer Evaluations, Family Law Hotline (on file with the author).

22 For a graphic representation of this process, see FAMILY LAW HOTLINE DESK MANUAL 132-33 (Kathleen Fantom Shemer ed., 3d ed. 1993) [hereinafter DESK MANUAL].

23 The Annotated Code of Maryland, Business Occupations and Professions Article § 10-10(h) defines the term "practice of law" to include "preparing or helping in the preparation of any form or document that is filed in a court or affects a case that is or may be filed in a court." Section 10-601 of that article, with certain exceptions not applicable here, prohibits the practice of law in Maryland by a person not a member of the Maryland Bar. Section 10-603(b) provides that a clerk, deputy clerk, or employee of the clerk's office may not practice law, even if he or she is a member of the Maryland Bar, while so employed. *See also* 60 OPINIONS OF THE ATTORNEY GENERAL 57 (Md. 1975). Based on these statutes, the Office of the Attorney General of Maryland has advised the court clerks of the state that they cannot provide sample pleadings to pro se litigants. *See Letter from Assistant Attorney General Julia M. Friet to the Honorable Mary Boergers* (October 22, 1991); ADVISORY COUNCIL REPORT, *supra* note 4, at app. IV.H.

As a result of a recommendation from the ADVISORY COUNCIL REPORT, legislation was passed in Maryland in 1992 permitting the Attorney General to prepare instructional materials and forms for proceedings involving child custody, visitation and support and permitting the clerks of the court to distribute these materials. *See* MD. CODE ANN., CTS. & JUD. PROC. § 2-206 (1992).

take a year to get scheduled after a request is filed,[24] the hotline advises her to seek temporary relief pending the final hearing. Temporary relief requires filing a request after her husband files an answer to her complaint and waiting roughly three months for a hearing before a master examiner.[25] A day or two prior to the hearing, she would be required to complete a six page questionnaire seeking information about the marital assets and her financial circumstances.[26] She most likely would find these steps intimidating, confusing and time consuming.

Even though child support is determined by a formula, and her husband does not contest the custody request, Mrs. Sanders would have to participate in a full-blown evidentiary hearing in which the master would ask her to testify to all the information on the six-page questionnaire.[27] Her husband or his attorney would be permitted to cross-examine her on any matters contained in the questionnaire. Her husband would then testify, and she would be permitted to cross-examine him.

Assuming Mrs. Sanders presents sufficient testimony and documentary information about her income and her husband's income, establishing her right to child support under the state's child support guidelines, the master's decision could be issued as quickly as three days after the hearing.[28] Her husband's attorney, however, could file "exceptions" to the decision which would necessitate a second hearing before a judge.[29] This hearing would occur within a month of the master's decision. However, it may be six months before a "final" order on temporary child support is issued, and as long as a year may elapse between the request for child support and the time when Mr. Sanders is required to pay child support.[30]

In the eight to twelve months between the order on temporary child support and the final hearing on the divorce, Mrs. Sanders will have to navigate complex discovery rules to obtain updated salary information from her husband, as well as pen-

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24 *See* DESK MANUAL, *supra* note 22.

25 *Id.*

26 *See* Personal History and Background Information of Husband/Wife (on file with author).

27 For a further description of this process, see J.F. FADER & R.J. GILBERT, MARYLAND FAMILY LAW 490-494 (Michie 1990).

28 MD. RULES, § 74A(c) (1992).

29 MD. RULES, § 74A(d) (1992).

30 MD. RULES, § 74(g)(2) (1992).

sion documents and other financial information. Under the state's marital property law, if she intends to make a claim for her share of the house and pension, she would also have to engage the services of a professional appraiser to value the pension and the house and, if necessary, to testify at trial.[31] Although there would probably be a pre-trial conference scheduled a month before trial, her husband or his attorney would be under no obligation to engage in settlement discussions at that time, or at any time prior to the hearing. At trial, Mrs. Sanders again would be on her own to present adequate testimony about the grounds for divorce, the financial basis for child support, and the eleven factors governing the disposition of the pension and house, including the professional testimony which places a value on these assets.[32] A final decision on these matters could be issued anywhere from two to six months following the proceeding.[33]

The preceding case study presents a relatively simple divorce with minimal assets and no contest on custody or visitation issues. Yet, due to the complexity and length of the procedure, the possibility of Mrs. Sanders obtaining an equitable result or even completing the process without an attorney are remote. The process can also be financially prohibitive.[34] There are numerous barriers to a successful outcome that Mrs. Sanders, or any other pro se litigant, will encounter in many jurisdictions. These include the lack of domestic pleading forms geared for pro se litigant use, such as complaints and requests for hearings or discovery requests; the difficulty pro se litigants face in navigating the complexities of completing and providing the court with proof of service; the discovery burden a pro se litigant carries, in terms of discovery document and pleading preparation, in order to obtain the financial information which

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31 MD. CODE ANN., FAM. LAW § 8-204 (1991); MD. RULES § 74 (1992); *see also* Gravenstine v. Gravenstine, 472 A.2d 1001 (Md. Ct. Spec. App. 1984) (burden rests upon proponent of value of marital property to produce evidence of value).

32 MD. CODE ANN., FAM. LAW § 8-205(a) (1991).

33 *See* DESK MANUAL, *supra* note 22.

34 Virtually all studies examining the impact of divorce have found that custodial parents and children are financially devastated by divorce. *See, e.g.*, LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Charles Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197, 199 (1988); James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987).

is required for child or spousal support; the potential requirement that the pro se litigant may have to compel discovery; and the inability of the pro se litigant to fund the costs of litigation (filing fees, cost of private process service, fees of professional appraisers, etc.).

III. SHIFTING THE FOCUS: DESIGNING A SYSTEM TO RESPOND TO THE REALITY OF WIDESPREAD PRO SE PARTICIPATION

Given the conclusions of the legal needs studies and the complexities of the current system demonstrated by Mrs. Sanders' case, a critical question for both family law scholars and practitioners is: How can the legal system better respond to the needs of thousands of Janice Sanders in courts around the country? Certainly, an increased supply of free or reduced fee lawyers handling domestic cases would contribute to the solution. Significantly increased funding for free or reduced fee legal services, however, does not appear likely in the near future.[35] Before evaluating any potential reform in family law, then, the assumption must be made that large numbers of people will represent themselves in court proceedings seeking domestic remedies. This assumption fundamentally changes the way a significant number of critical issues should be debated by family law scholars today.

The first step is to acknowledge that the present system places family law remedies beyond the reach of the majority of those who need them. Thus, the starting point for family law reform should be to develop innovations—both substantive and procedural—that would serve the vast majority of those seeking domestic legal remedies, namely unrepresented low and moderate income family members. Next, decisions must be made concerning how to allocate the limited resources available for free legal services. These funds should be used to help those who require legal representation obtain it and in all other cases improve access to remedies for pro se litigants.

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35 Donnie Radcliffe, *First Lady for the Defenders: Lawyers Honor One of Their Own*, WASH. POST, May 28, 1993, at B1 (President Clinton does not intend to increase Legal Services Corporation's funding in next year's budget). Alternative sources for affordable legal services are being explored in many jurisdictions. These include increased funding for Judicare programs, sliding fee scales, minimum fees, and reduced fee programs. *See* ADVISORY COUNCIL REPORT, *supra* note 4, at 58-60.

A. The Rules v. Discretion Debate

Much has been written debating the value of the broad, indeterminate standards that characterize family law. Proposals for rules to decide questions of child custody,[36] alimony,[37] and marital property,[38] have surfaced in the literature. However, the only large-scale shift from discretion to rules has occurred in the child support area. This shift has generally resulted in proceedings that are more streamlined and significantly more accessible and affordable to pro se litigants.[39] However, the impact of such standards on the cost and accessibility of family law remedies has gone largely unexamined,[40] and very little of the debate surrounding child support guidelines has focused on these benefits. Rather, the impetus for the guidelines came from the federal government's concern that states were not vigorously enforcing child support laws, and thus were adding to the federal government's share of state welfare assistance.[41]

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36 Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987) (arguing that either the maternal preference rule or primary caretaker presumption is superior to the indeterminate "best interest" standard); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982) (advocating the adoption of a primary caretaker presumption to resolve custody disputes).

37 Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 361-65 (1988-89) (replacing the current criteria for alimony with a substantive standard requiring courts to equalize the standard of living of the divorcing couple).

38 Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1114-21 (1989).

39 CENTER FOR POLICY RESEARCH, THE IMPACT OF CHILD SUPPORT GUIDELINES: AN EMPIRICAL ASSESSMENT OF THREE MODELS (1989) [hereinafter CENTER FOR POLICY RESEARCH]; Carole Schrier-Polak, *Child and Spousal Support Guidelines: A Current Update*, VA. LAW., Jan. 1990, at 42, 44; *see also* Murphy, *supra* note 18.

40 *See* Carl E. Schneider, *Discretion, Rules, and Laws: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991). *But see* Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 223 (1991).

41 In 1988 Congress passed the Family Support Act, which requires that every state establish presumptive child support guidelines as a condition for continued federal funding of the state's AFDC program. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, 2346 (1988) (codified at 42 U.S.C. § 667 (1988)); *see also* 45 C.F.R. § 301.10 (1990) (stating that an approved state plan is a condition for federal financial assistance); 45 C.F.R. § 302.56(a) (1990) (requiring that state plans contain child support guidelines). Under this statute, the child support guidelines adopted in each state must presumptively establish the appro-

The guideline debate aligned federal officials and some legal service providers[42] on one side lobbying for guidelines, with bar leaders aligned in opposition. Leaders of the organized bar in a number of jurisdictions argued against the guidelines due to concerns about separation of powers,[43] possible diminished status of judges,[44] and the impact of child support formulae on custody determinations.[45] What is striking about this debate, however, is the lack of recognition and analysis of the impact such a change would have on the pro se litigant. If the guideline critics in the bar had analyzed this change from the perspective of maximizing access to child support, they would have concluded that the benefits of proceeding simplification and predictable results outweigh the potential negative effects.

Similarly, the lack of support for rules governing custody, alimony and marital property decisions is surprising in light of the potential benefits to unrepresented litigants. As with child support formulae, predictable results on these issues would encourage quicker settlements. Even in cases where parties cannot reach a settlement, the cost of litigating issues of alimony, custody, and marital property distribution under determinate standards should be significantly less expensive than under the prevailing discretionary standards.

The "primary caretaker rule" used in custody litigation illustrates a standard that would make domestic litigation quicker and cheaper. This rule instructs the judge to award custody to the parent who has been most involved in providing

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priate child support obligation in any child support proceeding. 42 U.S.C. § 667(b)(2) (1988). The act preserves limited judicial discretion because decision-makers may rebut the presumption by a specific finding that application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by each state.

42 Paula Roberts, *Child Support and Beyond: Mapping a Future for America's Children*, CLEARINGHOUSE REV., Nov. 1988, at 594.

43 These critics argued that guidelines, whatever their practical impact, inappropriately shift judicial functions to the legislature. *See, e.g.*, Robert E. Caine, *Child Support Guidelines: Disaster for Parents, Worse for Children*, 201 N.Y. L.J. 2 (1989).

44 According to one critic, judges become mere "computer operators" in this kind of system. Paul E. Levy, *Child Support Guidelines: Point-Counterpoint*, 1989 ADVOC. 9.

45 "With such high levels of support required . . . the desire and need for men to preserve assets for themselves would be significantly increased." Doris J. Freed & Joel R. Brandes, *Child Support Guidelines—The Final Chapter*, 209 N.Y. L.J. 3, 6 (1989).

day-to-day care, such as preparing meals, purchasing clothes, arranging for medical care, education, social activities, putting the child to bed at night, and waking the child in the morning.[46] The rule applies in most circumstances, but is subject to rebuttal upon an older child's preference or a finding of unfitness.[47] Litigation under this rule involves straight fact-finding based on the parents' child-rearing behavior throughout the marriage, not subjective judgment-making based on expensive expert testimony.[48]

Clear post-divorce income-sharing formulae for alimony and marital property distribution would also improve the negotiation process and reduce the costs of litigation.[49] Proposed rules make asset allocation a function of objective, easily proven facts. Rather than amorphous factors that attempt to measure fault of the parties or relative contributions to the marriage, readily calculable factors like the number of years the marriage lasted and the incomes of the parties constitute these formulae.[50] As a result, the hearings on alimony and marital property in a fixed-rule regime could be simplified and more accessible to pro se litigants.

B. Evaluating the Impact of Hearing Requirements on Pro Se Litigants

The Supreme Court has recognized that the right to full enjoyment of family relationships is, to some extent, a liberty interest protected under the Due Process Clause of the Fifth and Fourteenth Amendments.[51] Although the right to constitutional protection is narrowly circumscribed in family law matters, this recognition has led to the assumption that full hearings in most contested domestic matters benefit litigants.

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46 West Virginia adopted a version of this rule in Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981). For a full discussion of the merits of the primary caretaker rule, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 527-38 (1984) (recommending a rule favoring the primary caretaker for young children); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180-82 (1984) (arguing for a presumptive rule in favor of the primary caretaker); Polikoff, *supra* note 36, at 241-43.

47 Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 772 (1988).

48 *Id.* at 770-73.

49 Singer, *supra* note 38, at 1119-20; *see also* Goldfarb, *supra* note 37.

50 Singer, *supra* note 38, at 1119-20.

51 *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 647-58 (1972).

The demonstrated lack of legal representation in many of these proceedings suggest that the assumption in favor of full hearings needs to be reexamined. There are instances where the average unrepresented litigant is better served by no hearing.

1. Hearing and summary judgment in child support proceedings

As noted earlier, the use of formulae has successfully made child support awards predictable and equitable. Some jurisdictions, however, have retained procedures for establishing child support that were in place under the old discretionary standard. Using these systems, the courts examine an almost unlimited range of factors to determine the needs of the child and the noncustodial parent's ability to pay.[52] As a result, many of the potential benefits of using a formula have not been realized.[53]

Under most child support formulae, the factual inquiry in hearings to establish child support can be narrowly focused on issues such as the parties' incomes and a few identified expenses such as health insurance and child care. In some jurisdictions, however, lengthy hearings in which testimony is taken on a full range of expenses, assets and liabilities are still the norm.[54] These full-blown hearings may be justified in the exceptional case where the statute permits a litigant to attempt to rebut the presumption of the guidelines under narrowly prescribed facts.[55] However, where there is (1) no dispute about the incomes of the parties and (2) no attempt to rebut the presumption in favor of applying the guidelines, child support should be set initially or be modified subsequently without a hearing.

In cases of this type, the party seeking the award or modi-

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52 *See, e.g.*, Beck v. Jaeger, 604 P.2d 18, 19 (Ariz. 1979); Unkle v. Unkle, 505 A.2d 849, 854 (Md. Ct. Spec. App. 1986).

53 In some jurisdictions, like Maryland, lengthy hearings in which testimony is taken on a full range of expenses, assets and liabilities are still the norm. For example, parties are still required to fill out a lengthy questionnaire that details all their financial information prior to the hearing. *See supra* note 26.

54 In Maryland, for example, some masters and judges hearing child support cases believe that a full evidentiary hearing is necessary in the event one of the litigants seeks to rebut the presumption that guidelines should be applied. B.J. Dancy, Remarks at Child Support Guidelines Conference, Baltimore, Md. (February 1990) (audio tapes on file with the author).

55 *See, e.g.*, MD. CODE ANN., FAM. LAW § 12-201 (1991).

fication could simply file a petition, or make the request in a complaint for divorce, with a motion for summary judgment. As with any request for summary judgment, if a response is filed raising an issue of fact, a hearing would be held.[56] If no response is filed or no issue of fact is raised, an order could be issued without a hearing. The use of such a procedure coupled with the availability of form pleadings would significantly enhance the ability of litigants to obtain or modify child support orders with or without counsel.

2. Hearing requirements in uncontested divorces

Uncontested divorces are another category of cases in which the need for a hearing should be reexamined.[57] While the practice varies across the country, there are still many jurisdictions which require a hearing in *any* divorce, whether or not there are contested issues.[58] The procedural requirements in Maryland are typical of states retaining this requirement.[59] Under the existing scheme, all divorce cases require a hearing before a judge or master-examiner.[60] At such a hearing, the moving party must testify as to all facts alleged in the divorce complaint and present the testimony of a corroborating witness.[61] After the hearing, if a divorce is recommended, the parties or judicial officer prepares a judgment of divorce and sets forth in the judgment any agreement to or denial of alimony, custody, child support and visitation.[62] If a master has heard the case, the judgment is prepared and forwarded to the trial court for the judge's signature.[63]

This requirement of a hearing in uncontested divorces makes the process longer and more burdensome to all participants while offering little or no benefit. For low-income clients, legal service offices usually designate uncontested divorces as low priority cases and do not provide legal representation.[64]

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56 MD. RULES § 2-501 (1992).

57 "Uncontested cases" as used here are those cases in which the grounds for divorce and issues pertaining to alimony, custody, child support and property have been resolved prior to the master's hearing.

58 *See* MD. CODE ANN., FAM. LAW §§ 1-203(c), 7-101 (1991).

59 *Id.*

60 *See* DESK MANUAL, *supra* note 22, at 132-33.

61 *Id.*

62 *Id.*

63 *Id.*

64 *See, e.g.*, B.J. Butler & William Leahy, Remarks at Expanding Access to

While fees for such hearings are waived in most jurisdictions for income-eligible clients, the "fee waiver" hearings often subject the clients to greater delays and additional burdensome procedures.[65] In addition, the added complexity of a hearing with live testimony of two witnesses may present significant barriers to pro se clients.[66] Even if parties are represented, the hearing requirement demands additional time from both the courts and legal services providers.

Some argue that the hearing process adds solemnity and ritual to obtaining a divorce, helps ensure truthfulness, and protects rights that might otherwise be jeopardized.[67] It seems unlikely that the truthful individual seeking a divorce will more likely lie to an attorney and through affidavit than he or

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Domestic Legal Remedies for Maryland's Poor: What's Working and What's Not Conference, Baltimore, Md. (April 19, 1991) (on file with the author); Domestic Relations Policy, Southeastern Ohio Legal Services (1991) (on file with the author).

65 For a description of the differences between uncontested hearings for fee-paying litigants versus "fee waiver" hearings in Baltimore, see ADVISORY COUNCIL REPORT, *supra* note 4, at 56. As a result of recommendations made in that report, procedure for fee-waiver hearings in both Baltimore City and Baltimore County have been changed to conform with the less burdensome procedures in place for non-fee waiver hearings.

66 Pro se education programs can help to overcome these barriers. The Legal Aid Bureau in Maryland, for example, operates two different pro se divorce programs. One pro se divorce project operates in five or six counties in Maryland. It conducted 19 clinics during 1990, each consisting of two classes. Legal Aid staff conducted the training on a voluntary basis, and the project also employed a full-time paralegal. After the clinic training, clients fill out the necessary forms, and the staff reviews them. One hundred sixty-four individuals were scheduled for the clinics in 1990, and 90 attended. Almost 90% of those attending actually obtained divorces. The project costs $18,000 annually, including the paralegal's salary and overhead.

The Legal Aid Bureau also operates a pro se program out of its central office in Baltimore City. This program, unlike the county project, provides substantial assistance to clients throughout the process, instead of just during the clinic. A pro bono attorney advises the clients, then a paralegal assists the clients in filling out and filing the necessary forms. The paralegal also attends the hearing. Approximately three days of paralegal time are expended in assisting one client from the beginning to the end of a case. During 1991, 230 individuals participated in this program, and most eventually obtained divorces. The rate of obtaining decrees, however, is slowed by the limited number of pro bono cases that can be scheduled for hearing each month. The average cost per divorce for the Legal Aid Bureau under this program is also $200.

Elimination of the hearing requirement would not only speed up the process and save resources, but would also allow more persons to proceed pro se. Although the Legal Aid Bureau's Pro Se Divorce Project has met with success, divorce by affidavit would allow more poor persons to obtain divorces with less expense and delay.

67 *See, e.g.*, ADVISORY COUNCIL REPORT, *supra* note 4, at Minority Report.

she would at a hearing. Conversely, the untruthful individual would not necessarily suffer a conversion on the stand.

Perhaps the strongest argument for a hearing requirement remains the potential for a judge or master to ensure that persons do not unknowingly waive or jeopardize rights. In practice, however, few masters in hearing these cases probably take that active a role. A good pro se education and a referee reviewing the papers filed in each consent or uncontested case could assume this role.

C. Reconsidering Unauthorized Practice Rules

The recognition that large numbers of persons desiring domestic remedies are without legal representation should compel a reexamination of the profession's rules against unauthorized practice.[68] Despite the number of people unable to afford representation by a licensed attorney, state bar groups throughout the nation continue to prosecute non-attorneys who violate rules regarding the unauthorized practice of law.[69]

Some states have enacted legislation or rule changes to permit "do-it-yourself" legal forms.[70] Most states, however, have rejected legislation that would license nonlawyer "legal technicians" or paralegals to provide legal services directly to the public.[71]

The advantages to allowing non-attorneys to render assistance in domestic matters are significant. Paralegals charge

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68 *See, e.g.*, MD. RULES OF PROF. CONDUCT, Rule 5.5, (1992) stating, "A lawyer shall not: a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

Currently, no state allows non-lawyers to practice law in the broader sense unless supervised by an attorney. The nation's 4,000 or so legal technicians, many of whom run what are commonly referred to as self-help law clinics or typing services, are restricted largely to helping customers complete and file forms. Those who provide additional services risk charges of unlicensed practice of law if they cross the line. Whether paralegals do more harm than good is an open question. Most state bars do not keep statistics on complaints lodged against paralegals. Of the 14 state bar groups that do track complaints, only four reported an average of more than one complaint a month and only Florida had a heavy caseload. Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 217 (1990).

69 *See, e.g.*, Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978) (issuing an injunction against a non-attorney for operating a "do it yourself service" for simple legal proceedings, including uncontested divorces).

70 *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 2-206 (1991).

71 See recent New Jersey and California legislation.

lower fees, offer convenient neighborhood locations, are more willing to take smaller cases, and can handle many routine legal matters quickly and competently. One commentator has estimated that the average price in 1990 for a lawyer-assisted uncontested divorce in California was $600 to $900, compared to roughly $200 for a non-lawyer practitioner.[72]

Despite these advantages, bar leaders (including a former American Bar Association President) insist that expanding opportunities for non-attorney assistance in legal matters will harm the public.[73] The principle argument made to support this claim is the assertion that anyone without a law school education could jeopardize clients' interests, either by handling legal matters for which they are untrained or by failing to grasp the full implication of a particular case.[74]

Once again these arguments fail to acknowledge the critical reality of persistent unmet need. Any potential dangers must be weighed against the pressing need to provide access to legal remedies. The question is not what would best serve domestic clients in a world of unlimited resources, but what realistic alternatives can be fashioned to address the existing crisis.

D. Reexamining Allocation of Existing Resources

All of the foregoing arguments suggest that a careful reexamination of how legal service funds are allocated must be undertaken. In this reexamination one must remember that, (1) representing all income-eligible clients in every domestic case is currently unattainable, and (2) the need for assistance to non-income eligible domestic litigants is substantial. While none of the studies identified in this article have undertaken such an evaluation, the Maryland report makes some tentative conclusions.[75]

From 1990-92, I directed a study on access to domestic legal remedies in the State of Maryland.[76] The central goal of the study was to recommend solutions that would: (1) increase the availability of legal services for domestic dispute resolution for low-income persons; (2) reduce the expense and delay of

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72 *See* Rhode, *supra* note 68, at 227.

73 Rosalind Resnick, *Looking at Alternative Services: The Lawyer/Non-Lawyer Wall Continues to Erode*, NAT'L. L.J., June 10, 1991, at 1.

74 *Id.*

75 ADVISORY COUNCIL REPORT, *supra* note 4, at 45-46, 51-63.

76 *Id.*

resolving domestic disputes; and (3) propose legislative and rules changes to produce more equitable decisions in domestic cases. These solutions focus on the types of cases in which pro se representation presents significant dangers to the litigants, and court practice and procedure reforms which facilitate pro se representation in cases in which it is deemed appropriate.

The study reviewed pro se programs in over a dozen states and the Maryland Legal Aid Bureau's Pro Se Divorce Projects.[77] The Advisory Council also reviewed a summary of pro se programs prepared by the National Council of Juvenile and Family Court Judges, and studied a survey of pro se programs conducted by the National Center on Women and Family Law.

The obvious benefit of pro se programs for low-income persons is that these programs permit clients to achieve desired legal goals without the assistance of counsel, which is either unavailable or prohibitively expensive. In addition, pro se programs can educate individuals and the community about access to the courts in other contexts. However, dangers do exist in pro se litigation that pro se programs must guard against and attempt to eliminate. Most significantly, the pro se litigant might inadvertently waive or jeopardize important rights. Thus, all pro se programs must have safeguards to minimize these risks.

The various programs the Maryland study surveyed represent a broad range of approaches to pro se litigation. At one extreme are programs that provide very little structure or monitoring of pro se litigants: they provide sample forms and cursory explanations to any interested individual. Other programs appear far more organized and formal. For example, Maryland's Legal Aid Bureau's Pro Se Divorce Project in Baltimore City[78] carefully screens all potential clients to ensure that their divorces remain uncontested, requires all clients to attend instructional classes, and provides a paralegal who works through the pleadings and attends the hearing.[79]

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77 *Id.* at 53. The study reviewed programs in Arizona, California, Delaware, Maine, Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Vermont, Virginia, and Washington.

78 For a more complete description of Baltimore City and various county Legal Aid Bureau programs, see *supra* note 66.

79 The Maryland Legal Aid Bureau is also developing a new pro se program for defendants in child support proceedings. In contrast to the pro se divorce project, the screening in this new program is expected to be minimal because dangers inherent in pro se representation have been diminished considerably by child sup-

Similarly, the court systems in which these pro se programs operate also differ significantly. Some states have a separate family and domestic court that employs specially-trained personnel to assist pro se litigants in drafting and filing domestic pleadings.[80] Other states have a general court system with specialized personnel who assist pro se litigants.[81] Still others merely provide form pleadings to litigants who request them.[82]

The problems that arise vary with the type of cases handled, and knowledgeable persons have differing views on the range of cases with which pro se programs should assist. Participants generally agree that pro se programs function well for uncontested divorces. Some states have also established programs in the areas of child custody, child support, and visitation enforcement,[83] but these programs give rise to several problems and concerns.

One concern involves the degree to which pro se programs should assist with contested cases. Most advocates of pro se programs agree that they should not include contested custody cases.[84] In addition, programs allowing pro se litigants to seek child support modifications based on changed financial circumstances raise concerns about whether child support recipients can defend themselves adequately. These concerns particularly arise in cases where the change in financial circumstances will last a long time, or where one does not know how long the

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port guidelines.

80 States with separate family courts generally provide the highest level of assistance to pro se litigants. For example, the Deputy of Family Case Management in the Vermont Family Court assists pro se litigants with all procedural requirements for filing an action. *See* ADVISORY COUNCIL REPORT, *supra* note 4, at 43.

81 For example, Michigan has one general jurisdiction trial court which hears domestic and other civil matters. However, in its Friend of the Court system, Michigan employs specialized personnel to assist families in resolving disputes. *See* ADVISORY COUNCIL REPORT, *supra* note 4, at 41-42.

82 Although form pleadings are not yet widely available for domestic matters in Maryland, they are available in proceedings where victims of domestic violence can obtain short term relief including custody and immediate family maintenance. As a result of recommendations in the ADVISORY COUNCIL REPORT, *supra* note 4, Maryland has recently enacted a statute permitting the Attorney General to promulgate forms to be used in custody and visitation disputes. MD. CODE ANN., CTS. & JUD. PROC. § 2-206 (1991).

83 See, for example, the description of Michigan, Maricopa County, Arizona, and Vermont Court's pro se assistance in custody, visitation and child support cases in ADVISORY COUNCIL REPORT, *supra* note 4, at 41-44.

84 ADVISORY COUNCIL REPORT, *supra* note 4, at 54.

change in circumstances will exist. The level of concern necessary depends in large part on how well the local bureau of support enforcement, or the state attorney's office, functions in representing recipients. A pro se support program may need to monitor modification cases to ensure additional modification of the order when the payor can make increased payments.

In visitation enforcement, problems may arise where a custodial parent has a viable defense to continued visitation but cannot present it. Courts might ameliorate this difficulty with the increased availability and intervention of court social workers.

The Advisory Council concluded that pro se programs should be maintained and expanded in the area of uncontested divorces, and the possibility of creating pro se programs in the areas of child support and visitation, uncontested custody, and name changes should be studied further.[85]

To ensure the right balance between increasing court access through pro se programs and guarding against waiver of rights, the study recommended that all pro se programs and the courts work to create: (1) training programs with experienced staff and volunteer family law attorneys to screen cases, teach pro se classes, and represent clients where cases become contested; (2) clear, simply written step-by-step materials describing the process; (3) judicially-approved standard pleading forms available from the court; (4) informational materials available through the courts, including instructional videotapes and interactive computers; (5) simplified court rules and requirements, for example divorce by affidavit in uncontested cases; (6) simplified service and fee waiver procedures; (7) simplified and expedited procedures for scheduling necessary hearings; and (8) specially-trained court personnel to assist pro se litigants.[86]

IV. CONCLUSION

The gap between the model of a legal system in which every litigant has a lawyer and is informed about her legal rights, and the realities within courts hearing domestic matters, is widening. Legislatures and courts continue to maintain a complex system of adjudicating disputes that is beyond the

85 ADVISORY COUNCIL REPORT, *supra* note 4, at 54.
86 *Id.* at 55.

understanding of the average, unrepresented family law litigant. Before any meaningful improvements can be made in this system, the scope of the problem must be recognized. Family law practitioners and scholars must acknowledge that the traditional system is not meeting the needs of an increasing number who turn to that system for help. Acknowledgement of this problem should provide a new context within which to evaluate family law reform proposals. The maintenance of a system that serves a limited number very well, must be replaced by a goal of providing at least minimal education and representation to the vast numbers of people currently unable to afford legal representation.