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WHY DO WE NEED A LAWYER?: AN EMPIRICAL STUDY OF DIVORCE CASES

Judith G. McMullen*
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I. INTRODUCTION

There is a quiet revolution going on in divorce courts throughout America: many divorce litigants are foregoing lawyers and handling their divorces by themselves. This trend creates certain problems for a legal system that has been largely structured on the assumption that cases will be resolved at a trial—or in pre-trial negotiations—in which lawyers are the vehicles for advancing the interests of the litigants. Judges, practicing lawyers and legal scholars have addressed how best to handle what appears to be ever-increasing numbers of *pro se* divorce litigants and various approaches are being implemented in many states. Special forms and information packets are offered to divorcing couples, online services are available, and judges devote a lot of time and energy trying to help floundering divorce litigants without losing the impartiality that is required from the bench.¹ Practicing lawyers may lament the potential loss of clients, although lawyers also may conclude that the exodus from their offices is really the result of poor people opting for self-representation. This characterization of the phenomenon allows lawyers to rationalize the loss of business as the loss of unprofitable business they did not really want.

Here is the story as many lawyers tell it: people who have little income and few assets may conclude that a do-it-yourself divorce is a good option. These folks may be disadvantaged in custody situations, but this cannot be helped. Custody problems can be resolved in court-based mediation without the couple having separate attorneys anyway. However, divorcing couples with decent incomes, significant amounts of property or minor children whose custody might be disputed will gravitate towards lawyers. While a few people of means will opt to proceed with their divorces *pro se*, it is generally agreed that this is not a good

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¹ See, e.g., Welcome to the Wisconsin Court System Self-Help Family Web Site, <https://prosefamily.wicourts.gov/pages/welcome.html?jsessionid=FDDA7A67AF147170AD60246D7C4DC00A> (last visited Sept. 23, 2009) (a Wisconsin court's link that allows divorcing couples to access divorce materials from their counties of residence); see also Carolyn D. Schwarz, Student Note, *Pro se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel*, 42 FAM. CT. REV. 655 *passim* (2004).

idea. In other words, conventional wisdom in the legal profession says that divorce litigants are better off with lawyers and significantly disadvantaged without lawyers. Since relatively poor people are perceived as having less to lose, their financial inability to obtain lawyers is tolerated by the system. Is this version accurate?

There has been some study of self-representation by litigants in various contexts, including divorce, and we have some knowledge about levels of self-representation and the reasons behind it.² We know, for example, that many divorce cases involve at least one *pro se* litigant.³ We also know that divorce litigants choose self-representation for non-financial as well as financial reasons.⁴ We know that many people who work in the court system, including lawyers and judges, are troubled by the large influx of *pro se* litigants.⁵ There is, however, much about the *pro se* explosion in divorce cases that is not well understood. We do not know whether or not the increase in *pro se* divorce litigants is a good thing or a bad thing *from the client's perspective*. Lawyers tend to theorize that *pro se* divorce litigants would be better off if they had legal counsel, but there has been little research on that point.

Why do people choose to represent themselves in a divorce? Is it purely a question of economics, or do people avoid lawyers for other reasons (as has been suggested by some research)? What about the perception of the legal profession that self-represented divorce litigants are at a disadvantage? Are divorce litigants better off when they are represented by legal counsel?

This article attempts to address some of these issues by drawing on empirical data. We set out to examine divorcing couples within a wide range of incomes, and who are living in a county with urban, suburban and rural communities. Thus, we selected Waukesha County, Wisconsin; a county adjacent to Milwaukee, Wisconsin. We believe that by studying a specific population with such diverse levels of income and living arrangements we have taken a snapshot of how choices about lawyer representation during the divorce process are affecting average Americans. We examined a random sample of 567 divorce cases initiated in 2005. In an attempt to identify possible reasons for a decision to proceed *pro se*, we

² See, e.g., AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT (A.B.A. Ass'n 1994) [hereinafter ABA 1994 REPORT]. By the early 1990s, a majority of parties were self-represented in some jurisdictions. *Id.* at 5-7. The ABA 1994 REPORT noted that persons were more likely to self-represent if they earned less than \$50,000 per year and if the case was "simple," such as when there were no children involved. *Id.* at 9-10.

³ *Id.* at 6-8.

⁴ See, e.g., *id.* at 9 ("[More] than 20% of the *pro se* litigants studied said they could afford a lawyer.").

⁵ See generally Schwarz, *supra* note 1 (describing how the judicial system erects barriers to helping self-represented litigants: for example, judges can't give too much help lest they lose their impartiality, and court staff are prohibited from giving legal advice).

examined the relationship between various factors (such as age, income level or gender) and *pro se* status. We also attempted to examine the question of whether *pro se* litigants are worse off than those represented by legal counsel. The difficulty of defining success in the context of divorce litigation makes it especially hard to assess the impact of having attorney representation as opposed to proceeding *pro se*. For reasons discussed in detail later, we looked at two factors: the correlation between representation status and the likelihood of maintenance awards, and the correlation between representation status and the length of the divorce case.

Our data confirms the conventional wisdom that many individuals seeking a divorce elect to proceed without a lawyer: in our sample 43.9% of husbands and 37.7% of the wives chose to represent themselves in their divorce cases.⁶ Our data also showed that both husbands and wives tended to employ attorneys when certain factors, such as minor children, a longer marriage, or higher husband's income, made the divorce more complex.⁷ This suggests that divorce litigants have good, common sense notions about when self-representation is feasible and when it is not. It also suggests that *pro se* divorce litigants may not be as disadvantaged as sometimes is feared, because they may indeed be perfectly capable of handling the mechanics of relatively "simple" divorces, even though they may need professional help when more complicated legal issues are involved.

Our attempts to measure the effect of lawyers on divorce litigants who had them yielded mixed results. Our data showed that divorces tended to take longer when the litigants were represented by lawyers. This extra time is likely partly or mostly due to the greater complexity of issues in cases where lawyers were employed, but it is also possible that lawyers increase the length of the process either deliberately or by virtue of their characteristic methods of practice. Similarly, we found that spousal support and family support were more frequently awarded in divorces where either the wife, or both parties, had legal counsel. We also found, as would be expected under the laws of Wisconsin and elsewhere, that maintenance awards were strongly associated with higher husband income, and longer marriages. Since higher income and longer marriages were also associated with the hiring of divorce counsel, we cannot say for sure whether lawyers make maintenance more likely or whether clients who are likely maintenance payers or receivers are more likely to seek and hire lawyers.

Ultimately, we believe our data suggests that lawyers are most utilized to deal with the more complex aspects of divorce, and may be less necessary for the routine procedural matters that many clients handle themselves. It may also be the case, although our research could not measure this, that lawyers serve a primary role that is more psychological than mechanical, at least for some clients. This may have important repercussions for lawyer training, as well as for the construction of user-friendly family court systems.

⁶ See *infra* tbl.1, app. A.

⁷ See *infra* Part III.B.

Before describing our methodology and data, Part II of this article discusses the history of lawyer involvement in divorce cases in the United States, and describes previous research that has been performed on *pro se* litigants, particularly in the context of divorce. Part III of the article discusses the methodology and findings of our review of 567 divorce cases filed in Waukesha County, Wisconsin in 2005. Part IV discusses some of the possible implications of our findings, particularly for lawyer training and practice.

II. THE HISTORY OF LAWYER INVOLVEMENT IN DIVORCE

For much of American history, divorce was rare and available only to a wealthy few.⁸ In *A History of American Law*, Lawrence Friedman recounts that the American colonies initially followed the tradition of England, which was essentially a “divorceless society” where ordinary, unhappy couples were only able to obtain a legal separation or, in rare cases, a legislative bill of divorce.⁹ After Independence, Northern states were quicker to adopt divorce laws than Southern states, with general divorce laws replacing private divorce laws by the end of the 19th century.¹⁰ Friedman suggests that the change was driven not only by changes in the nature of marriage, but also by the need of the growing American middle class to clearly establish who owned family property.¹¹ This movement to easier divorce laws had its opponents, however, with many devout people opposing it as a symptom of moral decay in society.¹² Thus, according to Friedman, these early “[d]ivorce laws were a kind of compromise. In general, the law never recognized full, free consensual divorce. It became simpler to get a divorce than in the past; but divorce was not routine or automatic.”¹³

Once private bills of divorce were extinct, the state laws that evolved made divorce available only to “innocent” parties who could prove fault on the part of the other spouse.¹⁴ Arguments claiming “fault” and defenses thereto were based on complex doctrines, and the claims had to be proven by specific evidence. Typical fault-based grounds for divorce included adultery, cruelty, and desertion.¹⁵

⁸ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 142-44 (3d ed., Touchstone 2005).

⁹ *Id.*

¹⁰ *Id.* at 142-44.

¹¹ *Id.* at 144-45.

¹² *Id.* at 144.

¹³ *Id.* at 145.

¹⁴ The fault-based system is an adversarial model, where the husband and wife sue each other in court. “[D]ivorces could not be consensual and a divorce could be defended and defeated because of the conduct of the plaintiff (the moving or petitioning party).” SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 78 (Oxford Univ. Press 2003).

¹⁵ See generally LESLIE JOAN HARRIS ET AL., *FAMILY LAW* 301-03 (3d ed., Aspen Publishers 2005) (listing and describing adultery, cruelty, desertion and impotence as possible grounds for divorce).

Connivance,¹⁶ collusion,¹⁷ and condonation¹⁸ were typical defenses. If both spouses were deemed to be at fault, the doctrine of recrimination stated that they could not obtain a divorce at all, since there was no innocent party deserving of a remedy.¹⁹ These defenses supported the old English adages: “one must do equity to receive equity” and “one must come into court with clean hands.”²⁰

The esoteric and complex nature of the necessary claims made it almost a necessity to hire a lawyer to provide guidance through the process. Unfortunately, the confining nature of the fault system created a system where a lawyer’s expertise was frequently employed to *get around* the divorce laws. Although the law refused to recognize divorce by mutual agreement, by the end of the 19th century, “the vast majority of divorce cases were empty charades. Both parties wanted the divorce; or were at least willing to concede it to the other party. Even in states with rigid statutes, collusion was a way of life in divorce court.”²¹ Lawyers helped clients seek divorces in jurisdictions with more liberal laws, or helped the couple collude to manufacture evidence necessary to establish grounds for divorce, such as cruelty, desertion or adultery.²²

A system of exclusively fault-based divorce laws remained in effect in the United States until the late 1960s, despite the fact that collusive divorce had been

¹⁶ KATZ, *supra* note 14, at 78 (“[C]onsenting to or being involved with the ground for divorce, particularly adultery . . .”).

¹⁷ *Id.* (“[A]greement by the couple to commit the act, which will support the ground for divorce.”).

¹⁸ *Id.* (“[F]orgiveness for the wrong.”).

¹⁹ *Id.*

²⁰ *Id.*

²¹ FRIEDMAN, *supra* note 8, at 380.

²² *Id.* at 380-81, 577-78.

Most divorces in fact *were* collusive. The wife filed a lawsuit, told her sad story of abuse, neglect, desertion, or philandering; and the husband said nothing, did nothing, filed no papers, made no defense. The judge then granted the divorce, by default. In most states, the sad story was about cruelty or desertion. In New York, the sad story had to be a story about adultery. Here a cottage industry of imitation adultery sprang up. There were women who made a living pretending to be “the other woman.” A man checked into a hotel, and went to his room. The woman appeared. The two of them got partly or totally undressed. Suddenly, and miraculously, a photographer appeared, and took their picture. The man then handed over cash to the woman; she thanked him and left. The damning photograph somehow found its way into court, as “evidence” of adultery. The judges, of course, were not fools. They knew what was going on. They rarely bothered to ask how a photographer just happened to barge into the love nest and take pictures. Usually, they said nothing and did nothing. The title of a magazine article from 1934 tells the story in a nutshell: “I Was the Unknown Blonde in 100 New York Divorces.

Id. (magazine article identified in Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1131 (1936)).

pervasive since the late 19th century.²³ Until that time, the corrupt and largely sham fault-based system represented an uneasy compromise between the rising demand for divorce, and the concerns of pious people to preserve what they perceived as a moral and tradition-based society.²⁴

In 1969, California became the first state to adopt a no-fault divorce statute,²⁵ and by 2001 all fifty American states had added no-fault provisions to their divorce laws.²⁶ In the majority of states, no-fault and fault divorce continue to coexist as options.²⁷ Perhaps the key feature of no-fault divorce is that it makes it possible for one spouse to obtain a divorce, even without the consent or cooperation of the other spouse.²⁸

As no-fault divorce became more widely available, attitudes towards divorce changed as well. Divorce rates began to soar at about the same time divorces became easier to obtain; although whether one of these realities caused the other has been the subject of considerable debate. Some scholars argue that no-fault divorce laws were a key factor in the increase in the American divorce rate. For example, economist Leora Friedberg examined data in all fifty states, and compared the trends in each state both before and after the adoption of unilateral divorce laws. She concluded that the laws themselves resulted in a significant increase in divorces.²⁹ Similarly, Margaret F. Brinig and F.H. Buckley have claimed that divorce rates are higher in states with no-fault laws because divorce under a fault-based system penalizes fault, and thus deters people from seeking divorce.³⁰

²³ *Id.* at 145.

²⁴ *Id.* at 381.

²⁵ MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 67 (Harvard Univ. Press 1987).

²⁶ KATZ, *supra* note 14, at 80.

²⁷ *Id.* at 79.

²⁸ FRIEDMAN, *supra* note 8, at 579.

[N]o-fault went way beyond the old dream of reformers—the dream of legalizing consensual divorce. No-fault was unilateral divorce. It meant that either party, whatever the other one felt, could get out of the marriage. People talked about marriage as a partnership. Partnership implies cooperation, mutuality, and sharing, which is what good marriages are. But under a no-fault system, there is no partnership at the end of a marriage. Each partner, in an intensely personal way, chooses to stay in the marriage or go. The other partner has no veto power, not even a power to delay.

Id.

²⁹ Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates?: Evidence from Panel Data*, 88 AM. ECON. REV. 608, 608 (1998).

³⁰ Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325, 326 (1998). It should be noted, as Brinig and Buckley point out, that some of these results depend on the definition of “no-fault divorce” that is used, with some researchers defining it to mean that fault is irrelevant to the grant of divorce, and other

Other scholars, like Ira Mark Ellman and Sharon Lohr, argue that the rise in the divorce rate began before the advent of no-fault divorce laws, although data suggests that states may have experienced a short-term increase in the divorce rate immediately after the adoption of no-fault.³¹ Ellman points out that “nationally, divorce rates have been stable or declining since 1981 [which] is very difficult to reconcile with any claim that no-fault caused any important increase in divorce rates.”³² Many scholars believe that the rise in divorce rates throughout the 1960s and 1970s was mainly due to significant social and cultural changes such as increasing mobility of American families and increasing rates of employment of wives.³³

Sometime after the divorce rate rose, courts began to experience another phenomenon: a steady increase in the number of *pro se* divorce litigants. In a 1994 publication, the American Bar Association Standing Committee on the Delivery of Legal Services cited several studies documenting a steady and significant increase in *pro se* divorce cases from the mid-1970s through the mid-1990s.³⁴ Their report noted that both poor and moderate income persons had unmet family law needs, and that many people with moderate incomes were increasingly “turning to self-representation as a method of gaining access to the divorce court.”³⁵ A research project sponsored by the Standing Committee in 1991 in Maricopa County, Arizona, identified some of the elements that influenced the decision whether to proceed *pro se*. *Pro se* litigants tended to be fairly well-educated, and were on average younger and earned less than their lawyer-represented counterparts.³⁶ Litigants were more likely to self-represent if they regarded their cases as relatively “simple.”³⁷ Thus, litigants with no minor children, litigants with no real estate or substantial personal property, and litigants married less than ten years were more likely to represent themselves.³⁸ In addition, the report found that parties who had previously represented themselves were more likely to proceed *pro se* if divorcing again.³⁹

The report noted some limitations of *pro se* divorces, including the observation that *pro se* litigants were less likely to get help with forms, marital counseling, dispute resolution services, or tax advice; and were less likely to

researchers defining it to mean that fault is irrelevant not only at dissolution, but also for financial settlement. *Id.* at 326-28.

³¹ Ira Mark Ellman, *Divorce in the United States*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND 342, 352 (Sanford N. Katz et al. eds., Oxford Univ. Press 2000).

³² *Id.*

³³ *See, e.g., id.* at 351-61.

³⁴ ABA 1994 REPORT, *supra* note 2, at 5-8.

³⁵ *Id.* at 1.

³⁶ *Id.* at 8-10.

³⁷ *Id.* at 12.

³⁸ *Id.* at 9-10.

³⁹ *Id.* at 10.

request maintenance.⁴⁰ However, the report also noted a bright side to *pro se* divorces: there was a high satisfaction level on the part of *pro se* litigants, both with the terms of the eventual divorce decrees and with the legal process.⁴¹ Although one might deduce from the list of limitations of *pro se* divorces that litigants were disadvantaged by representing themselves, the report did not draw that conclusion. The report did not evaluate the desirability of *pro se* divorces, but rather accepted them as a given, and advocated for reducing the complexity of the divorce process and offering more resources and assistance to self-represented divorce litigants.⁴²

In the ten-plus years that have elapsed since the 1994 ABA report, there has been little hard data about the continuing impact of *pro se* status on divorce litigants, and a paucity of data about whether self-represented divorce litigants are disadvantaged by proceeding without lawyers.

There has, however, been some discussion in both popular and legal literature about whether *pro se* clients in *non*-divorce contexts are disadvantaged by representing themselves. Well-known criminal defendants such as Dr. Jack Kevorkian, Colin Ferguson and Zacharias Moussaoui famously represented themselves “with seemingly disastrous (and highly publicized) consequences.”⁴³ “The media frenzies surrounding these cases, combined with the ludicrous courtroom behavior of at least some of these defendants, has led to a perception that defendants who represent themselves are foolish at best and mentally ill at worst.”⁴⁴

In the context of criminal defendants, the United States Supreme Court recently held in *Indiana v. Edwards*⁴⁵ that states can constitutionally insist upon representation by counsel, even for defendants competent enough to stand trial under the incompetency standard identified in *Dusky v. United States*.⁴⁶ In *Indiana*, the Court found that despite competence to stand trial, a defendant may “be unable to carry out the basic tasks needed to present his own defense without the help of

⁴⁰ *Id.* at 11-12.

⁴¹ *Id.* at 10-11. Notably, the report indicated similar levels of satisfaction on the part of litigants who had been represented by lawyers.

⁴² *See generally id.* at 12-44 (recommending specific procedural and informational services which could be offered to help self-represented divorce litigants succeed in court).

⁴³ Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro se Felony Defendant*, 85 N.C. L. Rev. 423, 425 (2007).

⁴⁴ *Id.* at 426.

⁴⁵ *Indiana v. Edwards*, 128 S.Ct. 2379, 2383 (2008).

⁴⁶ “Dusky defines the competency standard as including both (1) ‘whether’ the defendant has ‘a rational as well as factual understanding of the proceedings against him’ and (2) whether the defendant ‘has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.’” *Id.* (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

counsel.”⁴⁷ The Court noted the usefulness of lawyers in protecting the mentally ill defendant from humiliation resulting from self-representation at trial.⁴⁸

Although the unfair disadvantage suffered by a mentally ill, self-represented defendant may seem obvious,⁴⁹ until recently there was a paucity of empirical data either supporting or debunking the idea that litigants who represent themselves are at a significant disadvantage.⁵⁰ Measuring the relative advantages or disadvantages of self-representation would be most straightforward in cases where success is easily defined and only one party has the option of proceeding *pro se*, such as criminal prosecutions, but even here there has been a paucity of research.⁵¹ However, recent empirical research has begun to address the question of whether *pro se* representation disadvantages the litigants who choose it.

In *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*,⁵² Erica J. Hashimoto challenged the “[c]onventional wisdom” that criminal defendants who represent themselves are self-destructive and unsuccessful. After examining three databases,⁵³ Hashimoto concluded that *pro se* defendants do not necessarily have worse outcomes than defendants who are represented by counsel.⁵⁴ Moreover, contrary to the widely held theory that criminal defendants who represent themselves are either mentally ill or proceeding from illegitimate motives, Hashimoto’s research suggests that *pro se* criminal

⁴⁷ *Id.* at 2386.

⁴⁸ *Id.* at 2387.

⁴⁹ *See id.* The Indiana Supreme Court noted: “An *amicus* brief reports one psychiatrist’s reaction to having observed a patient (a patient who had satisfied *Dusky*) try to conduct his own defense: ‘[H]ow in the world can our legal system allow an insane man to defend himself?’ Brief for Ohio et al. as *Amici Curiae* 24 (internal quotation marks omitted).” *Id.*

⁵⁰ *See* Hashimoto, *supra* note 43, at 425 (citing *Martinez v. Court of Appeal*, 528 U.S. 152, 164 (2000) (Breyer, J., concurring)). In the criminal context, the U.S. Supreme Court noted the paucity of evidence on this point in 2000, stating that there was at that time “no empirical research . . . that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution’s basic guarantee of fairness.” *Id.*

⁵¹ As of 2001, the only study of *pro se* criminal defendants was written by two psychologists. *See* Douglas Mossman & Neal W. Dunseith, Jr., “A Fool for a Client”: *Print Portrayals of 49 Pro se Criminal Defendants*, 29 J. AM. ACAD. PSYCHIATRY L. 408 (2001), available at <http://www.jaapl.org/cgi/content/abstract/29/4/408>. Hashimoto’s article was the first empirical study of *pro se* criminal defendants to be published in the legal literature. Hashimoto, *supra* note 43, at n.62.

⁵² Hashimoto, *supra* note 43, at 425.

⁵³ *Id.* at 438-41 (Federal Court Database, State Court Database, and Federal Docketing Database).

⁵⁴ Hashimoto counted complete acquittals and dismissals to compute the comparative overall success rates of represented defendants with those of *pro se* defendants. While “recognizing the limitations of the databases,” she concluded that the overall success rate was similar between the two groups across all three databases, and in some instances, better for *pro se* defendants. *Id.* at 450, 447-54.

defendants choose to self-represent “because of dissatisfaction with [court-appointed] counsel.”⁵⁵

In criminal cases, the State necessarily proceeds with a lawyer. Only the defendant has the option of obtaining representation or not. Tax cases are similarly straightforward in the sense that one party, the IRS, is always represented by counsel, and only the taxpayer has the option of self-representation. In addition, taxpayers would likely agree that total success would release them from the obligation to pay any disputed taxes or penalties, while partial success would be a reduction in the required payments.

In *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*,⁵⁶ Professor Leandra Lederman and Senior Financial Economic Analyst Warren B. Hrungr examined a random sample of Tax Court cases to discern whether representation by counsel affected either the financial outcome of the case or the length of time to either trial or settlement. Their study found that attorney representation “significantly” improved the financial outcome in cases that went to trial.⁵⁷ The presence of an attorney was not associated with better outcomes in settled cases, however.⁵⁸ “The results also suggest that taxpayers’ attorneys do not affect the amount of time Tax Court cases take to settle or go to trial.”⁵⁹ “The study thus found no support for the idea that attorneys delay case resolutions where they are paid by the hour. Attorneys did not close cases any faster than unrepresented litigants did, either.”⁶⁰ The authors suggest that a lawyer’s expertise may lead to better results in a trial (as opposed to a settlement) because a lawyer’s contributions are most valuable “where the party to be persuaded is a judge rather than a government attorney—and where procedural expertise carries its greatest importance.”⁶¹

The research on criminal defendants and tax litigants suggests that self-represented litigants have, on average, a level of common sense and self-interest that seems to lead them to make rational decisions about when they can represent themselves without disadvantage, and when they need lawyers. The 1994 ABA report on the needs of self-represented divorce litigants suggested on the one hand that the high satisfaction levels of *pro se* litigants might indicate that they were as well off as their lawyer-represented counterparts. On the other hand, the identified limitations of *pro se* divorces, such as less help with forms and lower likelihood of requesting maintenance, might indicate that *pro se* divorce litigants were at a distinct disadvantage compared to attorney-represented divorce litigants. We wondered: in light of developments in law and procedure since the early 1990s, are

⁵⁵ *Id.* at 454-85.

⁵⁶ Leandra Lederman & Warren B. Hrungr, *Do Attorneys do their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235 (2006).

⁵⁷ *Id.* at 1239.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1282.

⁶¹ *Id.* at 1281.

today's divorce litigants better off if they are represented by lawyers, or are *pro se* divorce litigants equally successful?

Measuring the effect of lawyers in the divorce context presents some unique problems. Since no entity of the State is a party in divorce proceedings, either party can choose between a lawyer and self-representation. So we are not only measuring the impact of a lawyer against a *pro se* litigant, we must also consider the situation where two self-represented clients proceed against each other. In a world without complete gender equity, it might matter whether it is the husband or the wife who proceeds *pro se* if only one party has counsel.

We set out to compare the relative success of *pro se* and lawyer-represented divorce litigants in as objective a manner as possible. Success in the criminal or tax contexts is fairly easy to define: reduction or avoidance of penalties or taxes. "Success" is a far more slippery concept in the context of divorce. While merely obtaining a divorce decree was a form of success back in the days of fault-based systems where divorces were sometimes denied, this is no longer the case. Adoption of the no-fault divorce model led to virtually automatic grants of divorce to any couple requesting one;⁶² although, ironically, the no-fault concept was originally billed as having the exact *opposite* effect.⁶³

If we cannot define success in divorce litigation as obtaining the decree, then we must look at the terms of the decree to measure success. This too is problematic, and infinitely idiosyncratic. We could, for example, define success as obtaining a larger share of marital assets than the other spouse obtains. But some clients will not be satisfied with more than the other spouse; they want much more or all of the property. Other clients will want to get less than their spouse, possibly because of guilt over failure of the marriage. Moreover, the actual dollar amount may not be the real issue—certain items have symbolic or sentimental value, and despite a low market value, such property may be the subject of a ferocious dispute between the divorcing spouses.⁶⁴ Even if we steadfastly maintain that "more" is

⁶² See Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664 (1984) [hereinafter Friedman, *Rights of Passage*]. One disgruntled spouse can certainly obtain a divorce by asserting that the marriage is broken, even over the other spouse's objections. *Id.*

⁶³ The Report of the Governor's Commission on the Family (issued in 1966 as part of the discussion leading to California's adoption of a no-fault divorce statute) opined that the no-fault system would "require [. . .] the Court to inquire into the whole picture of the marriage." *Id.* at 667 (citing CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 28-29 (1966)). The implication was a court might decline to grant a divorce if the court looked at the whole picture and decided that there was still hope for the marriage, but in fact the opposite occurred. *See generally id.*

⁶⁴ Disputes over the custody of pets illustrate this phenomenon. The family dog may have little market value, and American law traditionally treats pets as property. However, divorcing spouses may dispute Fido's custody as vigorously as if he were a child. *See* Jane Porter, *Custody Battles Over Pets Look Like a Dogfight*, CHI. TRIB., Oct. 1, 2006, at Q-3; *see also* Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIMONIAL LAW. 1 (2006).

always a better result, we are faced with the reality that some divorcing spouses illegally hide assets, so an examination of the property distribution in a divorce may not show the real picture. Finally, obtaining data about financial settlements is extremely difficult as it is likely not part of the public record.

Measuring success in custody is even more difficult. For one thing, many parents would define custody success as having more contact time with the children, but some parents would surely define success as having less time with the kids. For another thing, the standard for custody decisions is, at least in theory, not based on the parents' interests at all, but rather on the best interests of the child. So a divorce lawyer's zealous advocacy for a client's desired outcome might not be expected to yield the same sort of result that might occur where the standard does not depend on the unique characteristics of another person (the child) who is not a party to the litigation. Finally, emphasis on custody mediation and settlement between the parties could be expected to yield a multitude of idiosyncratic custody outcomes which cannot be compared in terms of success or failure. Indeed, a preliminary examination of randomly selected divorce files from our sample revealed a range of custody solutions so diverse that they could not be categorized. It appears that every divorcing family addresses custody in its own way.

Even more problematic from our perspective was the fact that evaluation of success in terms of the property division or custody arrangement would best be accomplished by a survey or interview of the satisfaction levels of the now divorced individuals, but surveys and interviews discern subjective satisfaction levels. We hoped to find a more objective method of comparison. One such potential measure of success in the divorce context: is the award of spousal maintenance, or family support, in appropriate circumstances.

Generally, spousal maintenance is awarded in the court's discretion in divorce cases where one spouse has significant need and the other spouse has the ability to pay. It may sometimes be awarded in lieu of a property distribution. Payment of maintenance has never been the norm, and it is certainly awarded in only a minority of cases. However, Wisconsin is a state that has clear judicial doctrines about the cases in which maintenance awards are appropriate.

Which clients are legally eligible to receive maintenance under Wisconsin law? The Wisconsin Supreme Court has stated that a court should consider the potential recipient's need for support, as well as the fairness of requiring the potential payer to provide some of that support.⁶⁵ In general, maintenance could be reasonably awarded in situations where there is a relatively long marriage,⁶⁶ a disparity in spousal incomes, and where one spouse is not capable of self-support

⁶⁵ *In re Marriage of LaRoque*, 406 N.W. 2d 736, 741 (Wis. 1987).

⁶⁶ We can find no authoritative definition of a "long" marriage in the cases or statutes, as judges routinely exercise their discretion to find that marriages of different lengths are long enough to justify an award of alimony. The average length of a first marriage ending in divorce is eight years. See <http://www.divorcereform.org/rates.html>. Thus, any marriage lasting over eight years is arguably relatively long. Later in the paper, we use fifteen years, or nearly twice the eight-year average, as a somewhat arbitrary round figure to denote a long marriage.

at the standard of living enjoyed during the later years of the marriage.⁶⁷ Normally, any maintenance would be awarded for the length of time required for the lower-earning spouse to become self-supporting at an acceptable standard; permanent maintenance could be awarded in cases where that is not likely to ever happen.⁶⁸

Like the complex no-fault rules of yore, the maintenance doctrines are more likely to be known and understood by lawyers. If lawyers have a positive impact on divorce outcomes, one would expect that divorce litigants who fit the profile of “appropriate maintenance recipients” would be more likely to obtain maintenance if their cases are handled by lawyers. If *pro se* status is indeed a disadvantage and represented status is an advantage, we would expect that appropriate maintenance recipients would be most likely to receive maintenance if they are represented by counsel but their spouses are not, and least likely to receive maintenance if they are self-represented and their spouses have counsel. We would also expect few maintenance awards where neither party is represented by counsel. Where both parties are represented by counsel, we might expect a somewhat larger number of maintenance awards, because lawyers may tend to encourage their clients to settle for something within the range of what a court is likely to order. However, it may be impossible to measure attorney effect on the maintenance issue where both parties are represented by counsel because we have no adequate means by which to assess the relative quality of the different lawyers.

Another measure of attorney effect can be found in the length of time the divorce case takes from the filing of the petition to the granting of the divorce judgment. Divorce is a painful process for most couples, and it seems reasonable to assume that most clients would prefer to get through it as quickly as possible. Where lawyers are involved, a longer process could also be a more expensive process, at least if delays are due to additional attorney time spent on the case. We are cognizant of the fact that a longer time from filing of the petition to final judgment may also reflect factors such as the complexity of the case, the thoroughness of the lawyers, and the indecisiveness of the parties. Nonetheless, we believe that the impact lawyers have on the length of the divorce process is something of interest.

Ultimately, all objective measures of lawyer effectiveness may be inadequate because it is possible that the benefits of having a lawyer are largely intangible. If this is the case, it would be worth knowing because it should have an impact on how we train lawyers to work with divorcing clients.

⁶⁷ See generally *In re Marriage of LaRoque*, 406 N.W. 2d at 736 (The Court found that the circuit court had abused its discretion in awarding the wife in a twenty-five-year-long marriage maintenance of \$1,500 per month for five months and \$1,000 per month for thirteen months. The Court remanded the case to the circuit court, instructing it to consider whether the ex-wife could reasonably be expected, within eighteen months of divorce, to earn enough to support herself at the marital standard of living, which the court defined as the standard of living enjoyed in the latter years of the marriage. *Id.* at 741-44.).

⁶⁸ *Id.* at 741.

III. METHODOLOGY AND FINDINGS

A. *Description of Information Gathered*

Our research endeavors to answer two very general questions: (1) Why do *pro se* divorce litigants choose to represent themselves? and (2) Are lawyer-represented divorce litigants better off than self-represented divorce litigants? Since there is no data that would directly answer these queries, we have asked seven specific questions whose answers will provide us with important clues about our general questions. In order to discern the reasons for self-representation in a divorce, we asked the following questions: (1) What percentage of divorce litigants opts to proceed *pro se*? and (2) What are the characteristics of individuals who elect to represent themselves in a divorce? Examination of how *pro se* status correlates with gender, age, length of marriage, income, and presence or absence of children of the marriage may give us some clues as to why some spouses elect to represent themselves in the divorce process, and whether the decision to self-represent is sensible under the circumstances.

In order to examine the possible effects of having attorney representation, we asked another set of questions: (1) What is the average length of time between the filing of a divorce petition and the final judgment of divorce? (2) Does lawyer representation affect the length of the divorce process? (3) In what percentage of divorce cases is maintenance awarded? (4) What are the characteristics of the divorce litigants in cases where maintenance is awarded? and (5) Does lawyer representation affect whether maintenance is granted or not? Comparing the length of time a divorce takes with attorney representation and without representation can provide clues about one possible effect of having legal counsel. Examination of the characteristics of divorce litigants in cases where maintenance is granted will help us to assess what percentage of persons who, under Wisconsin law, are reasonable recipients of maintenance are in fact receiving it. Then we will better address the question of lawyer effect: if lawyer representation does not correlate with maintenance awards generally, it could be because none of the divorcing parties are likely candidates for maintenance, and may not be a reflection of the lawyer's impact on the outcome. On the other hand, if likely candidates for maintenance are no more likely to receive it despite being represented by counsel, there is a legitimate question about what the lawyer's impact on the case outcome is.

Our case sample was taken from Waukesha County, Wisconsin; a county with a total population of 360,767 as of the 2000 census,⁶⁹ and a 2008 estimated population of 380,629.⁷⁰ Waukesha County is adjacent to Milwaukee County, and includes residences that could be considered suburban, urban and rural. The

⁶⁹ U.S. Census Bureau, Census 2000 Demographic Profile Highlights, Waukesha County, Wisconsin, <http://factfinder.census.gov> (enter "Waukesha County" in "Fast Access to Information" search field; then follow "2000" tab) (last visited June 15, 2007).

⁷⁰ U.S. Census Bureau, State & County QuickFacts, Waukesha County, Wisconsin, <http://quickfacts.census.gov/qfd/states/55/55133.html> (last visited June 26, 2007).

median family income in 1999 was \$71,773⁷¹ and the 2007 median household income was \$72,432.⁷²

We selected Waukesha County because although its residents represent a range of living situations and incomes, the median household income is considerably above both the median income for the state of Wisconsin and for the United States as a whole. If there is a significant *pro se* movement in the divorces of such an affluent county, we believe that it would suggest something other than sticker shock is involved in the rejection of lawyer representation by divorce litigants. In addition, since maintenance is rarely if ever awarded in cases where the parties have extremely low income, we wanted to examine a population where the median income makes maintenance a possibility for a noticeable percentage of divorce litigants.

B. Summary of Data Collected

As described above, we first asked questions designed to give us straightforward descriptions of what was happening in the Waukesha County Family Court in 2005 in terms of the incidence of *pro se* litigants in different identified groups. We specifically addressed the following questions: (1) what percentage of divorce litigants opts to proceed *pro se*? and (2) What are the characteristics of individuals who elect to represent themselves in a divorce?

Our research showed that 43.9% of the husbands and 37.7% of the wives chose to proceed *pro se*.⁷³ Thus, the majority of husbands (56.1%) and wives (62.3%) had legal counsel.⁷⁴ Moreover, we concluded that the relationship between the husband's use of counsel and the wife's use of counsel was statistically significant.⁷⁵ In 46.4% of the divorce cases both the husband and wife had counsel and in 27.7% of the cases both individuals were *pro se*. It was relatively unusual for one spouse to have counsel and the other spouse to proceed *pro se*. In 9.7% of the cases the husband had counsel and the wife did not. In 15.9% of the cases the wife had counsel and the husband did not.

Our research also gave us important information about the characteristics of divorce litigants who represented themselves as compared to those who chose to hire lawyers. We first examined the characteristics of the wives who chose to have representation compared to those who proceeded *pro se*. To do this, we compared the two groups of women for: their husband's reported gross monthly income, their own gross monthly income, the length of their marriage (computed from date of

⁷¹ U.S. Census Bureau, Census 2000 Demographics Profile Highlights, *supra* note 69.

⁷² U.S. Census Bureau, State & County QuickFacts, *supra* note 70.

⁷³ See *infra* tbl.1, app. A (showing 43.9% (n=249) of the husbands and 37.7% (n=214) of the wives chose to represent themselves).

⁷⁴ *Id.*

⁷⁵ In other words, it was an association unlikely to occur by chance. A chi square test of independence examining the relationship between husband and wife having counsel was significant ($\chi^2(1, N = 567) = 128.83, p < .0001$), indicating that there was a statistically significant association between the spouses' decisions to obtain counsel or not.

marriage to date of divorce filing), and their age at divorce using independent *t*-tests.⁷⁶ Our data showed that women with legal counsel, compared to those without counsel, had husbands who earned significantly more money.⁷⁷ However, there was no statistically significant difference in their own monthly income between the women with counsel and those without counsel.⁷⁸ The data also revealed that women with counsel were married longer than were women without counsel,⁷⁹ and that women with counsel were older at the time they filed for divorce than were those without counsel.⁸⁰

Having minor children was also statistically associated with women having counsel.⁸¹ Of the 311 women who had minor children, 67.2% had counsel⁸² and 32.8% were *pro se*.⁸³ In contrast, of the 253 women who did not have children, 56.5% had counsel⁸⁴ and 43.5% were *pro se*.⁸⁵ In other words, women with children were 1.58 times more likely to have a lawyer (rather than proceed *pro se*) than were women without children. Our data showed that while having children increased the likelihood of a woman having legal counsel, it did not seem to matter *how many* children a woman has.⁸⁶

We found similar results when we compared men who had legal counsel to men who proceeded *pro se*. Compared to those without counsel, men with counsel

⁷⁶ An independent sample *t*-test is an inferential statistical test that compares the means of two groups (e.g., women with lawyers compared to women without lawyers). The test determines if the means are, or are not, statistically equivalent to each other. A “statistically significant test” indicates that the group means are different. An independent *t*-test is computed to compare the two groups for each outcome variables of interest (i.e., income, length of marriage, etc). See FREDERICK J. GRAVETTER & LARRY B. WALLNAU, STATISTICS FOR THE BEHAVIORAL SCIENCES 260 (6th ed., Wadsworth Publishing 2008).

⁷⁷ For women with counsel, $M = \$5,194.41$, $SD = \$4,800.70$. For women without counsel, $M = \$3,813.19$, $SD = \$2,563.23$, $t(324) = 3.03$, $p < .01$. It should be noted that the sample size for this analysis is smaller than for the other analyses because some litigants elected not to report their incomes in the publicly available portion of the divorce file.

⁷⁸ Women with counsel: $M = \$3,166.67$, $SD = \$2,050.19$, women without counsel: $M = \$2,948.79$, $SD = \$2,680.82$, $t(316) = .82$, $p = .41$.

⁷⁹ $M = 161.76$ months, $SD = 111.53$ for women with counsel, and $M = 111.09$ months, $SD = 88.44$ for women without counsel, $t(552) = 5.54$, $p < .001$.

⁸⁰ For women with counsel, $M = 40.94$ years, $SD = 9.15$, and for women without counsel, $M = 35.24$ years, $SD = 9.17$, $t(560) = 7.16$, $p < .001$.

⁸¹ A chi square test of independence examining the relationship between the wife having counsel and her having minor children was significant ($\chi^2(1, N = 564) = 6.78$, $p < .01$).

⁸² ($n = 209$).

⁸³ ($n = 102$).

⁸⁴ ($n = 143$).

⁸⁵ ($n = 110$).

⁸⁶ The number of minor children did not differ between women with counsel ($M = 1.86$, $SD = .81$) and without counsel ($M = 1.78$, $SD = .77$), $t(314) = .87$, $p = .39$. So, having minor children, but not necessarily the number of children appears to be associated with increased likelihood of women having counsel representation during the divorce.

had a higher reported gross monthly income⁸⁷ and were married longer.⁸⁸ Men with counsel were also older at the time they filed for divorce than were those without counsel.⁸⁹ The median income of the wives was similar between the group of men that hired counsel and the group that did not, indicating that the income of the wives did not seem to affect the decision whether to hire a lawyer.⁹⁰

Having minor children was associated with men having legal counsel, just as it was associated with women having counsel.⁹¹ Of the 311 men who had minor children, 61.7%⁹² had counsel and 38.3%⁹³ were *pro se*. In contrast, of the 253 men who did not have children, 49.4%⁹⁴ had counsel and 50.6%⁹⁵ were *pro se*. In other words, men with children were 1.65 times more likely to have a lawyer (rather than proceed *pro se*) than were men without children. As with the wives, having minor children, but not necessarily the number of children appeared to be associated with increased likelihood of husbands having attorney representation during the divorce.⁹⁶

These results are generally consistent with the ABA Working Group data from the early 1990s.⁹⁷ For both men and women, those who represented themselves tended to be younger, tended not to have minor children, and were exiting relatively shorter-term marriages.⁹⁸ Our data showed something slightly different from the 1994 ABA report in terms of the effect of litigants' income, however. While the Working Group stated that *pro se* litigants earned less on average than their lawyer-represented counterparts, our research indicated that it is the husbands' income that correlates with representation status for both spouses, while the wives' income is not so correlated.⁹⁹

Next, we turned our attention to an examination of factors that might indicate whether hiring a lawyer noticeably affects either the process or the outcome of a

⁸⁷ For men with counsel, $M = \$5,359.59$, $SD = \$5,049.20$; for men without counsel, $M = \$3,709.93$, $SD = \$2,063.96$, $t(324) = 3.68$, $p < .01$.

⁸⁸ For men with counsel, ($M = 157.53$ months, $SD = 110.12$), for men without counsel, ($M = 124.24$ months, $SD = 98.41$), $t(552) = 3.68$, $p < .001$.

⁸⁹ Age of men with counsel: $M = 42.59$ years, $SD = 9.93$; Age of men without counsel: $M = 39.03$ years, $SD = 10.16$, $t(560) = 4.17$, $p < .001$.

⁹⁰ There was no statistically significant difference between the men with counsel ($M = \$3,166.87$, $SD = \$2,466.88$) and without counsel ($M = \$2,976.72$, $SD = \$2,147.60$) for wives' monthly income, $t(316) = .73$, $p = .47$.

⁹¹ Another chi square test of independence examining the relationship between the husband having counsel and his having minor children was statistically significant ($\chi^2(1, N = 564) = 8.62$, $p < .01$).

⁹² ($n = 192$).

⁹³ ($n = 119$).

⁹⁴ ($n = 125$).

⁹⁵ ($n = 128$).

⁹⁶ However, the number of minor children did not differ between men with counsel ($M = 1.83$, $SD = .81$) and without counsel ($M = 1.84$, $SD = .77$), $t(314) = -.14$, $p = .89$.

⁹⁷ See *supra* Part II.

⁹⁸ See *id.*

⁹⁹ See *supra* Part III.B.

divorce. As described above, we first investigated whether lawyer representation affects the length of the divorce process.

Of the 567 divorce petitions examined 476, or 84%, resulted in a final judgment of divorce. Of the cases that did not result in a divorce final judgment, eighty-four were dismissed, two resulted in legal separation, and three were annulled. The mean length of time between filing a divorce petition and final judgment¹⁰⁰ was 6.64 months, with a standard deviation of 3.10 months. The median length of time to final judgment was 6.0 months. Thus, most cases reached a final judgment within three to nine months, with the average length of six months.

One possible outcome of having legal counsel is that the divorce process might take longer than it would if a case were handled *pro se*. To examine this issue, we compared the differences in length of divorce time for four situations: when both husband and wife had counsel,¹⁰¹ when both were *pro se*,¹⁰² when only the husband had counsel,¹⁰³ and when only the wife had counsel.¹⁰⁴ Our analysis showed that the divorce process was significantly longer in cases where both the husband and wife had counsel, as compared to situations where only one spouse had counsel or neither had counsel.¹⁰⁵ Interestingly, the mean divorce length when both husband and wife were *pro se* was statistically shorter than all other situations. However, there was no statistically significant difference in length of divorce between situations when only the husband had counsel or when only the wife had counsel. In sum, when both individuals have counsel the divorce length was statistically the longest process. However, when neither individual has counsel the divorce length was statistically the shortest process. On average, the divorce length when both have counsel was approximately 3.75 months longer than when both were *pro se*.

Next, we examined the possible effect that lawyer representation might have on awards of spousal support. In Wisconsin, either maintenance or family support can be awarded in divorce case decisions. As explained previously, family support includes both maintenance and child support and, as such, provides a stream of

¹⁰⁰ This mean length of time excludes the dismissed cases.

¹⁰¹ ($n = 238$).

¹⁰² ($n = 135$).

¹⁰³ ($n = 42$).

¹⁰⁴ ($n = 65$).

¹⁰⁵ An analysis of variance was statistically significant ($F(3, 476) = 61.19, p < .001$), and Tukey HSD post hoc tests ($p < .05$) indicated that when both husband and wife have counsel ($M = 8.16$ months) the divorce time was significantly longer than when only the wife has counsel ($M = 5.69$), only the husband has counsel ($M = 6.71$) or when neither have counsel ($M = 4.41$). An analysis of variance (ANOVA) tests whether the means for two or more groups are equivalent. A significant ANOVA indicates there is more variance between the group means than is expected due to chance, thus not all means are equivalent. Follow-up post hoc statistical tests are then used to make all possible comparisons to determine specifically which means are different from each other. See GRAVETTER & WALLNAU, *supra* note 76, at 336.

income that may be used by the recipient spouse personally, as well as for child-related expenses. We began by examining support awards that could be used personally by the recipient spouse, and hence originally considered family support and maintenance together. Overall, in 11.3% of the cases¹⁰⁶ one spouse was awarded either family support or maintenance. In 8.6% of the cases maintenance was awarded,¹⁰⁷ in 12.5% of the cases maintenance was left open,¹⁰⁸ in one case the decision of maintenance was still pending arbitration, and maintenance was not awarded in 78.1% of the cases.¹⁰⁹ Family support was awarded in 2.6% of the cases,¹¹⁰ left open in 0.7% of the cases,¹¹¹ and was not awarded in 96.1% of the cases.¹¹² In no case did someone receive both maintenance and family support; however, in seven cases where family support was awarded, maintenance decisions were left open.

C. Characteristics of the Maintenance and Family Support Awards

We found that the husband was the payor of maintenance and family support in all but two of the cases.¹¹³ Fifty-eight percent¹¹⁴ of the award decisions were for a set number of months, with the mean length of the awards being 60.69 months,¹¹⁵ and the median length of awards being fifty-one months. The mean monthly payment in these cases was \$1,767.80. There was a great deal of variation in the duration of the support awards. 17%¹¹⁶ of the awards were for permanent maintenance or family support. Eight percent¹¹⁷ of the awards were tied to the fulfillment of certain conditions, and were payable until events such as until finishing a college degree, obtaining full-time employment, retiring or selling the family home. Another 15.6% of the awards had a payment that was variable over time,¹¹⁸ and one person had a fixed, one-time payment award.¹¹⁹

¹⁰⁶ ($n = 64$).

¹⁰⁷ ($n = 49$).

¹⁰⁸ ($n = 71$).

¹⁰⁹ ($n = 443$).

¹¹⁰ ($n = 15$).

¹¹¹ ($n = 4$).

¹¹² ($n = 545$).

¹¹³ See *infra* tbl.2 (summarizing the characteristics of the maintenance and family support decisions).

¹¹⁴ ($n = 37$).

¹¹⁵ ($SD = 38.91$).

¹¹⁶ ($n = 11$).

¹¹⁷ ($n = 5$).

¹¹⁸ ($n = 10$).

¹¹⁹ It is highly unusual to characterize a one time payment as support rather than property division, and we can only speculate as to why this was done, although we suspect that the choice may have been made for tax reasons.

To investigate the characteristics of divorce litigants in cases where pure maintenance¹²⁰ was awarded, we conducted a series of analysis of variance to compare three groups (those where maintenance had been awarded, those where maintenance was not awarded, and those where maintenance had been left open) for differences in husbands' gross monthly income, wives' gross monthly income, length of marriage, length of divorce, age of husband, and age of wife.¹²¹

We found that maintenance awards were associated with husbands earning a higher gross income, but were not associated with variations in the wives' incomes.¹²² We also found that length of marriage significantly differed across the three groups.¹²³ The couples in cases where maintenance was not awarded were married significantly less time than were the couples in the cases where maintenance was awarded or the decision was left open.¹²⁴

Age of the litigants was also significantly different across the three groups. Husbands were significantly older in cases where maintenance was awarded than when it was not awarded, however the husbands' age in cases where maintenance was left open did not differ from the other two groups.¹²⁵ Likewise, the wives' age differed across the three groups¹²⁶ such that wives were significantly older in cases where maintenance was awarded than in cases where maintenance was not awarded, and the age of wives in cases left open did not differ from the other two groups. The data showed that the length of the divorce process¹²⁷ was significantly shorter for cases where maintenance was not awarded than the length of time for both cases where maintenance was awarded and left open.¹²⁸

¹²⁰ As opposed to family support which could properly be used for the support of either the spouse or the children.

¹²¹ Tukey HSD post hoc tests ($p < .05$ criteria) were used to determine specific group differences. Table 3 provides descriptive means. *See infra* tbl.3.

The analyses with husbands and wives income have smaller sample sizes due to missing data for the reports of income, and thus these analyses should be interpreted with caution. For the analysis with husbands' income, there were thirty-seven cases with reported income where maintenance was left open, and there were 255 cases with reported income where no maintenance was awarded. For the analysis with wives' income, there were twenty-eight cases with reported income where maintenance was awarded, 250 cases with reported income where maintenance was not awarded, and thirty-nine cases with reported income where the maintenance decision was left open.

¹²² *See infra* tbl.3. We found that husbands made significantly more money in cases where maintenance was granted ($M = \$6,961.30$) than in cases where they were not granted ($M = \$4,313.91$).

¹²³ ($F(2, 468) = 26.71, p < .001$) and Tukey HSD post hoc tests indicated that couples had been married significantly longer in cases where maintenance was awarded than when it was denied or left open.

¹²⁴ *Id.*

¹²⁵ ($F(2, 476) = 10.21, p < .001$). Tukey HSD post hoc ($p < .05$) used.

¹²⁶ ($F(2, 476) = 12.71, p < .001$). Tukey HSD post hoc ($p < .05$) used.

¹²⁷ Computed as the time between filing a petition and judgment dates.

¹²⁸ ($F(2, 476) = 13.63, p < .001$).

Finally, although the presence of minor children of the marriage did not make the award of maintenance more likely, it appears that cases were more likely to have maintenance decisions left open when minor children were involved.¹²⁹

To investigate the characteristics of divorce litigants in cases where family support was awarded we conducted a similar series of analysis to compare those cases where family support had been awarded to those where family support was not awarded. Only three cases had decisions on support left open and so those cases were not included in the following analyses due to the small sample size. Table 4 provides a summary of the descriptive means and test statistics.¹³⁰

The findings indicate that the husband's average gross monthly income was noticeably higher in cases where family support was awarded than when it was not awarded.¹³¹ We found that the length of the marriage was significantly longer in cases where family support was awarded than when it was not awarded.¹³² Furthermore, the length of time for the divorce was significantly longer when family support was awarded than in cases where family support was not awarded.¹³³ There were no statistically significant differences between the groups for age of wife, age of husband, or wife's gross monthly income.

As expected (given the fact that family support is defined as a combination of spousal and child support), there was an association between having minor children and being awarded family support.¹³⁴ Specifically, in all of the fifteen cases where family support was awarded, there were minor children in the marriage. In the cases with minor children, 6% were awarded family support,¹³⁵ and 94% of the cases¹³⁶ were not awarded family support.¹³⁷

¹²⁹ A chi square test of independence also indicates that maintenance awards were associated with there being minor children in the marriage ($\chi^2(2, N = 480) = 8.60, p < .05$). Of cases with minor children ($n = 254$), 10.2% ($n = 26$) were awarded maintenance, 19.3% ($n = 49$) had maintenance decisions left open, and 70.5% ($n = 179$) were not awarded maintenance. However, for couples without minor children ($n = 226$), 10.2% ($n = 23$) were awarded maintenance, 9.7% ($n = 22$) were left open, and 80% ($n = 181$) were not awarded maintenance.

¹³⁰ See *infra* tbl.4.

¹³¹ The husband's average gross monthly income was \$9,994.68 in the fifteen cases where family support was awarded compared to an average gross monthly income of \$4,451.15 cases where family support was not awarded.

¹³² An average marriage length of 205.20 months in cases where family support was awarded compared to an average marriage length of 138.77 months in cases where family support was not awarded.

¹³³ The average length of the divorce process was 8.40 months in cases where family support was awarded compared to an average divorce process time of 6.58 months in cases where family support was not awarded.

¹³⁴ ($\chi^2(1, N = 477) = 13.94, p < .001$).

¹³⁵ ($n = 15$).

¹³⁶ ($n = 236$).

¹³⁷ Family support was never awarded in cases where there were no minor children, which is consistent with the definition of family support as being a combination of spousal and child support.

Next, we examined how lawyer representation was associated with maintenance awards by computing a chi square test of independence between the four types of cases (both have counsel, only husband has counsel, only wife has counsel, and both spouses were *pro se*) and maintenance decisions (maintenance awarded, maintenance not awarded, decision left open). We found an association between lawyer status and maintenance award outcomes.¹³⁸ Specifically, both husband and wife had counsel in 77.6% of those cases where maintenance was awarded.¹³⁹ In 12.2% of the cases awarding maintenance only the wife had counsel,¹⁴⁰ and in 10.2% of the cases awarding maintenance, neither had counsel.¹⁴¹ Maintenance was never awarded in the cases where only the husband had counsel. We found a similar pattern in the seventy-one cases where maintenance decisions were left open. In 69.0% of those cases both husband and wife had counsel,¹⁴² in 14.1% of the cases only the wife had counsel,¹⁴³ in 12.7% of the cases neither had counsel,¹⁴⁴ and in 4.2% of the cases where maintenance was left open, only the husband had counsel.¹⁴⁵

In contrast, both husband and wife had counsel in 41.9% of those cases where maintenance was not awarded.¹⁴⁶ In 13.6% of the cases not awarding maintenance, only the wife had counsel, in 33.6% of those cases neither had counsel, and in 10.8% of those cases only the husband had counsel.¹⁴⁷ Based on these findings it appears that maintenance was most likely to be awarded in cases where both husband and wife had representation.

Due to the small number of cases where family support was awarded, similar chi-square analyses could not be accurately computed. Of the fifteen cases where family support was awarded, both the husband and the wife had counsel in twelve cases. In two cases, neither spouse had counsel. In one case, only the wife had counsel.¹⁴⁸

¹³⁸ A chi square test of independence tests whether there is an association between two variables. See GRAVETTER & WALLNAU, *supra* note 76, at 483. This chi square test was statistically significant indicating an association between lawyer status and maintenance award decisions ($\chi^2(6, N = 480) = 40.66, p < .001$). Table 5 presents the percent of cases within the maintenance decisions that fell into the four types of representation categories. See *infra* tbl.5.

¹³⁹ In other words, maintenance was awarded in thirty-eight out of the forty-nine cases where both the husband and the wife had counsel.

¹⁴⁰ ($n = 6$).

¹⁴¹ ($n = 5$).

¹⁴² ($n = 49$).

¹⁴³ ($n = 10$).

¹⁴⁴ ($n = 9$).

¹⁴⁵ ($n = 3$).

¹⁴⁶ In other words, both the husband and the wife had counsel in 151 of the 360 cases where maintenance was not awarded.

¹⁴⁷ See *infra* tbl.5.

¹⁴⁸ In other words, both the husband and the wife had counsel in 80% of the cases where family support was ordered, and neither had counsel in 13.3% of the cases.

A final question that remains unanswered is whether clients who are legally eligible to receive maintenance under Wisconsin law are helped or harmed by having counsel or proceeding *pro se*. As discussed above, Wisconsin law envisions maintenance in cases where, after a relatively long marriage one spouse needs additional income to continue at the marital standard of living, and the other spouse can afford to pay some income for that purpose.¹⁴⁹ Since we cannot directly assess the marital standard of living, we have limited ourselves to the pre-divorce family income.¹⁵⁰ Specifically, we were interested in the cases in our sample of couples who were divorcing after fifteen or more years of marriage¹⁵¹ and who had a disparity of income. Of the forty-nine cases where maintenance was awarded, 55.1% of the couples¹⁵² had been married for fifteen years or more. We also found that the earning disparity between spouses was significantly larger in cases where maintenance was awarded ($M = \$4,035.81$) than when maintenance was not awarded ($M = \$1,250.55$).¹⁵³

Due to the small sample size of maintenance cases we could not compute a chi square test of association between counsel and maintenance decisions. However, in 77.8% of the cases where maintenance was awarded, both husband and wife had counsel.¹⁵⁴ In 11.1% of the cases only the wife had counsel, and in 11.1% of the cases, neither had counsel.¹⁵⁵ There was no case in which maintenance was awarded when only the husband had counsel.

¹⁴⁹ See *In re Marriage of LaRoque*, 406 N.W. 2d 736 (Wis. 1987).

¹⁵⁰ It should be noted that divorce litigants are not required to disclose their incomes in the part of the file that is a public record. Many report it in the public part of the file anyway, and our analysis on this point is based on the income numbers for couples who chose to publicly report.

Obviously, family income is only a rough approximation of the standard of living enjoyed by the couple, since wealthy couples could live frugally and poor couples could live beyond their means.

¹⁵¹ ($n = 143$ couples).

¹⁵² ($n = 27$).

¹⁵³ To examine the relationship between earning disparity and maintenance awards for this sample of couples who had been married at least fifteen years, a disparity of income variable was computed as the difference between the husband and wife's reported income (higher numbers indicate how much more the husband makes than the wife). An independent *t*-test was computed to compare the earning disparity between the cases where maintenance was awarded and cases where maintenance was not awarded, $t(68) = 3.13$, $p < .001$. Missing data is again an issue with these analyses. There are thirteen cases in the maintenance group and fifty-seven cases in the no maintenance group that reported income, so these analyses should be interpreted with caution.

¹⁵⁴ ($n = 22$).

¹⁵⁵ For cases where only the wife had counsel, $n = 3$, and in cases where neither had counsel, $n = 3$.

IV. DISCUSSION OF IMPLICATIONS OF FINDING

Our data provides us with important clues about the reasons for self-representation in divorce, as well as clues about the effects of having lawyer representation. Although our research data cannot answer all questions, it does suggest that lawyers and law schools may need to approach education about divorce practice in new ways in order to best serve divorce litigants.

A. *Why do Divorce Litigants Represent Themselves?*

Our data supported the popular notion that the decision about whether or not to hire divorce counsel is often based on financial considerations, since both husbands and wives were more likely to have counsel as the husbands' income increased.¹⁵⁶ Increases in the wives' income did not seem to impact the decision of whether or not to hire a lawyer, however, there are probably factors involved in the decision other than whether there was enough money to pay an attorney fee and whether or not there was any property to divide.¹⁵⁷ We can only speculate, but one possibility is that both husbands and wives feel a strong sense of entitlement to the husband's income, perhaps because of social traditions of the husband being the primary breadwinner. Husbands may feel a stronger need to protect their ownership of their own incomes, but may not feel as entitled to pursue their wives' earnings. Wives may feel a greater need to have income from the husband in order to maintain the marital standard of living, and they may feel entitled to some sort of stipend based on whatever child-rearing or homemaking services they have provided during the marriage. Whatever the reason, the litigants appeared more motivated to hire counsel as the husbands' gross income increased.

There were also non-monetary factors associated with the decision to hire counsel. Both men and women who hired counsel were older and had been married longer at the time the divorce was filed than were men and women who proceeded *pro se*. Again, we can only speculate, but a couple of possibilities are apparent. Age and length of marriage both suggest higher levels of education, either formal or through life experience.¹⁵⁸ Greater experience might make a person more receptive to the sort of expert advice provided by a lawyer, and it might make a person more aware of the sorts of complications that might make such advice

¹⁵⁶ See *supra* Part III.B.

¹⁵⁷ Since property valuations are in the part of the file that is not public record, we have no data on whether or not there was significant property to divide in any of these cases. We mean to suggest only that accumulation of property can result from either the husband or the wife's income, and the fact that the husband's income is associated with lawyer representation status, but the wife's income is not suggests that other factors are at play.

¹⁵⁸ We were not able to gather data on the levels of formal education attained by the litigants.

desirable.¹⁵⁹ People who have been married longer may feel that they have more invested in the relationship, and hence might seek help in order to leave the relationship as advantageously as possible. People who are older or have been married longer might also feel that they have more to lose, such as accumulated property, and may be more willing to invest in a lawyer in order to protect whatever property they share with their spouses.

We also found that both men and women were more likely to have legal counsel when there were minor children in the marriage.¹⁶⁰ This pattern may reflect a consciousness that there are important interests at stake, such as time with the children or preservation of decision-making authority with respect to the children. Hiring counsel may reflect a desire to protect those interests, and a willingness to make a financial sacrifice in order to achieve that protection. Parents of minor children may also hire lawyers in the hopes of having a smoother process with better results that will protect their children from losing important relationships or economic benefits that have been enjoyed during the marriage.

It should be noted that factors such as higher husband income, longer marriage and minor children are all factors that complicate resolution of legal issues in a divorce, and may make self-representation inadvisable. On the other hand, litigants with lower incomes, shorter marriages and no minor children may indeed be able to adequately handle their cases *pro se*. It appears, therefore, that many litigants have realistic ideas about when they need lawyers and when they do not, and that these litigants act accordingly.

B. Do Lawyers Make a Difference?

Our data showed that the divorce process was longest when both parties were represented by legal counsel and shortest when both parties were *pro se*.¹⁶¹ Since longer cases generally cost more, it is possible that lawyers deliberately extend the process so as to collect higher fees. However, as described above, the divorce litigants who are most likely to hire counsel are the litigants with complicating factors such as higher husband income, longer marriage and minor children. Since the issues raised by these factors typically take time to resolve, it is likely that lawyers are not *causing* the delays, even though the methods of resolution employed by lawyers do take more time.

It is difficult to assess the impact of lawyers in relation to maintenance awards. We found that maintenance was most likely to be awarded when both the husband and the wife had legal counsel, although approximately 10% of the maintenance awards were in cases where neither party had counsel.¹⁶² One

¹⁵⁹ However, as noted earlier in this article, data compiled by the ABA Working Group indicated that *pro se* litigants were “reasonably well-educated, with most having some college.” ABA 1994 REPORT, *supra* note 2, at 9.

¹⁶⁰ *See supra* Part III.B.

¹⁶¹ *See id.*

¹⁶² *See id.*

possibility is that the presence of lawyers makes a maintenance award more likely, because lawyers understand when a judge might award maintenance under Wisconsin law, and encourage their clients to settle for something that would be reasonable under the law. It is also possible that litigants have a basic instinct about when maintenance is a reasonable likelihood, and that those litigants are more likely to hire lawyers to negotiate more favorable terms for the maintenance. Under this theory, the lawyers would not make it more likely that clients would get or pay maintenance, rather, the lawyers would have input into the terms of the maintenance agreement.

We are cognizant of the fact that we did not measure all possible lawyer effects on the divorce process. It is possible, for example, that persons who are represented by counsel have different satisfaction levels with the divorce process than do people who represent themselves. We considered, but decided against, the collection of data about one objective method for assessing post-divorce satisfaction; namely, the number of post-judgment actions initiated by the divorced parties. Presumably, people who are satisfied with their divorce outcomes would carry on their post-divorce lives without revisiting and re-litigating past grievances, while dissatisfied people would attempt to re-litigate in the hopes of obtaining a more favorable outcome the second time around. The structure of current Wisconsin divorce law, however, largely prevents extensive post-judgment actions, except in limited circumstances involving child custody. Specifically, property distributions and waivers and denials of maintenance are final.¹⁶³ Custody orders cannot be reopened until at least two years have passed since the initial custody order, except in cases where the child is at serious risk of significant harm.¹⁶⁴ While the family court decisions are appealable (like those of any trial court), in fact only a small percentage of litigants appeal portions of their divorce orders, and the number who do so without lawyers is likely to be so small that no useful data could be gleaned.

Subjective satisfaction with divorce outcomes could also be measured by interviews or surveys. In this study, we tried to limit ourselves to objective rather than subjective data, such as the sort of oral or written surveys of divorced persons that might discern their satisfaction levels after their divorces. The data reported by the ABA Working Group in the early 1990s suggested that many *pro se* litigants have high levels of satisfaction.¹⁶⁵ A fruitful area for future research might be the examination of satisfaction levels at this point in time, after developments in court processes, divorce law and society.

CONCLUSION

The widespread phenomenon of *pro se* divorce litigation is undoubtedly here to stay, and that may not be a bad thing for many litigants. It appears that many

¹⁶³ WIS. STAT. § 767.59(1)(c)(b) (2006).

¹⁶⁴ WIS. STAT. § 767.45(1)(a) (2006).

¹⁶⁵ ABA 1994 REPORT, *supra* note 2, at 10-11.

divorcing couples are accurate in their assessment of whether they need lawyers or not. Lawyers are increasingly being relegated to more complex cases involving long-term marriages, significant property, higher income, and minor children. To the extent that lawyers handle “simple” divorces, their role as buffers from the conflict may be more important than their legal expertise. Law school curriculums may need to adjust to the changing needs of divorce clients by providing more education on conflict resolution and client counseling on the one hand, and more detailed instruction on the kinds of property and custody disputes that are likely to result in lawyer involvement on the other hand. Thus, legal education should prepare lawyers to help their clients psychologically by reducing stress and conflict during the divorce process, as well as by providing the sophisticated analysis and handling of the complex legal issues for which a lawyer’s expertise is most often sought.

APPENDIX A

Table 1. Percent and number of husbands and wives who have legal counsel or proceed *pro se*.

	Wife had counsel n = 353 (62.3%)	Wife <i>pro se</i> n = 214 (37.7%)
Husband had counsel n = 318 (56.1%)	n = 263 46.4%	n = 55 9.7%
Husband <i>pro se</i> n = 249 (43.9%)	n = 90 15.9%	n = 159 27.7%

Table 2. Characteristics of awards.

Type of payment*	Frequency	Percent**	Length of payment in months	Amount of monthly payment
Permanent	11	17.2	Indefinitely	Mean = \$1,260.73 SD = \$1,035.85 Median = \$1,500 Range \$200 to \$3,500
Set # months	37	57.8	Mean = 60.69 SD = 38.58 Median = 51 Range 7 to 156	Mean = \$1,767.80 SD = \$2,084.75 Median = \$1,000 Range \$140 - \$7,500
Conditional ***	5	7.8		Mean = \$2,614.80 SD = \$2,170.22 Median = \$2,674.00 Range \$250 to \$6,000
Variable payment****	10	15.6	Mean = 136.90 SD = 106.28 Median = 89.50 Range 34 to 339	Weighted mean = \$2,349.20 SD = \$1,519.81 Median = \$2,411.50 Range = \$509 to \$5,718

Table Notes

* One person received a one-time payout of \$14,000. This payment was not included in any of the calculations for mean payments or length of award.

** This percent is of the number of people who received either a maintenance or family support award ($n = 64$).

*** Conditional awards were monthly payments until some specified event, such as bachelor's degree completion, full-time employment, retirement, or sale of a home. Thus, length of payment was not computable.

**** Variable payments changed, generally decreasing in value, overtime. To compute the mean monthly payment, the monthly payments were weighted by the number of months to allow for the computation of weighted values. Thus, this reflects the average monthly award, recognizing that some months had higher payments and some months have lower payments than this weighted mean.

Table 3.

	Maintenance awarded	Maintenance left open	Maintenance not awarded	F-statistic
Husband's gross monthly income	\$6,961.30	\$4,793.88	\$4,313.91	$F(2, 320) = 5.98, p < .01$
Wives' gross monthly income	\$2,683.30	\$2,540.97	\$3,211.20	$F(2, 314) = 1.86, p = .16$
Length of marriage (in months)	225.43	172.97	121.99	$F(2, 468) = 26.71, p < .001$
Age of wife (in years)	43.63	41.16	37.41	$F(2, 476) = 12.71, p < .001$
Age of husband (in years)	46.06	42.74	39.71	$F(2, 476) = 10.21, p < .001$
Length of divorce (in months)	8.02	7.77	6.22	$F(2, 476) = 13.63, p < .001$

Note. Degrees of freedom for gross monthly income vary from total sample size due to missing data in Table 3.

Table 4.

	Family Support awarded	Family Support not awarded	<i>F</i> -statistic
Husband's gross monthly income	\$9,994.68	\$4,451.15	$F(1, 319) = 18.53, p < .01$
Wives' gross monthly income	\$2,152.61	\$3,099.39	$F(1, 313) = .97, p = .33$
Length of marriage (in months)	205.20	138.77	$F(1, 466) = 5.64, p < .05$
Age of wife (in years)	41.71	38.56	$F(1, 474) = 1.48, p = .22$
Age of husband (in years)	44.29	40.71	$F(1, 474) = 1.65, p = .20$
Length of divorce (in months)	8.40	6.58	$F(1, 474) = 5.05, p < .05$

Note. Degrees of freedom for gross monthly income vary from total sample size due to missing data. Due to the small sample size of cases being awarded family support (and missing data for monthly income), these findings should be interpreted with caution.

Table 5. Percentage of cases within each maintenance award decision that fell into each legal representation category.

	Both have counsel (n = 238)	Wife only has counsel (n = 65)	Husband only has counsel (n = 42)	Neither have counsel (n = 135)
Maintenance awarded (n = 49)	77.6% n = 38	12.2% n = 6	0% n = 0	10.2% n = 5
Maintenance not award (n = 360)	41.9% n = 151	13.6% n = 49	10.8% n = 39	33.6% n = 121
Decision left open (n = 71)	69.0% n = 49	14.1% n = 10	4.2% n = 3	12.7% n = 9

Note. Cases where family support was awarded are not included in this table.