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# Unhappy Contracts: The Case of Divorce Settlements

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*This paper examines a particular type of contracts: the agreements produced by divorcing couples. Virtually required by many states, they are, in theory at least, closely monitored by courts since, when children are involved, they will be incorporated into court orders. The parties to these unhappy contracts are attempting to minimize losses, rather than maximize gain. How are contracts structured that will do this, and how does a difference in the size or power of the bargaining entities change the final settlement or contracting result? This empirical study not only considers how the contractual terms come to be, but also what effect they have over a five-year period, with an eye to seeing which contracts produce (or are at least consistent with) further litigation, and which correspond with adjustment over time. The role of lawyers in the entire process is also a focus of the inquiry. Special attention is paid to the role of fault, with surprising results in a no-fault system. All divorce stipulations for parents of minor children filed in Johnson County, Iowa, during 1998 provide the beginning data, supplemented by other court records in each case.*

My first introduction to law and economics was not Richard Posner's (1987) "market for babies,"<sup>1</sup> but Mnookin and Kornhauser's (1979) "Bargaining in the Shadow of the Law,"<sup>2</sup> which stands, as my teaching interests have, at the

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\* Research assistant Nicholas Keppel xeroxed nearly all of the material used in this study, kept accurate and extensive notes on what was not copied, and coded the data from the agreements. Katie Brinig spent many hours scanning the documents so they were in usable (and portable) form. Iowa colleagues who have given useful comments include Stephanos Bibas, Herb Hovencamp and Gerald Wetlaufer. Colleagues from other schools and disciplines who've been very helpful include Douglas Allen and Steven Nock. This paper was presented at Washington University in St. Louis and at the Canadian Law & Economics Association annual meeting in Toronto, 2003. I also wish to acknowledge helpful suggestions made by two anonymous referees.

<sup>1</sup> The original paper containing the basic idea was Landes and Posner (1978).

<sup>2</sup> The idea and the title have spawned a number of papers, in family law as well as other fields. For family law pieces, see Bix (1998) (problems with enforcement when the judgment of makers of agreements is clouded by love); and Wax (1998) (women have the best bargaining power

intersection of dispute resolution and family law. Through the years, “Bargaining in the Shadow” has remained one of my favorites, both because it is so teachable and because it holds so many interesting ideas. In practice, as with many theoretical models, Mnookin and Kornhauser’s predictions do not always bear out. Their punch line is that with the change in custody laws (or endowment points) from a nearly infallible presumption in favor of the wife/mother to an indeterminate best-interest-of-the-child standard, women should lose. Because they would be willing to settle to avoid even a small chance of loss of custody of their children, Mnookin and Kornhauser postulate that women should get less in property in an indeterminate custody system than they would under the older maternal preference rule.

What empirical research shows is that even with changes in child custody regimes, not much has changed—neither with the way parents share custody time, nor with the way they (and courts) divide property.<sup>3</sup> Nor, as we will see from the empirical investigation that follows, does what other couples get when they go to court relate very closely to what most couples settle for on their own.<sup>4</sup>

Scholars explain these apparent deviations from the Coase theorem (Coase, 1960)<sup>5</sup> in a number of ways. Some argue that the legal change did not bring about distributional changes because there were (and are) significant transaction costs associated with divorce. That is, the rate of divorce changed.<sup>6</sup>

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before marriage). For others, see, e.g., Rossi (2001); Hoffmann et al. (2001); Busch and Reinhardt (2000); Dana and Koniak (1999); O’Rourke (1997); Yarkon (1997); Ford (1995); Standen (1993); and Goldberg (1987).

<sup>3</sup> For previous considerations of the problem, see Brinig and Alexeev (1993); Garrison (1991); Kelly and Fox (1993); and Landes (1978). For example, Weiss and Willis (1993:629, 656, Table 4) show that divorced wives with children received a mean of \$9313 in no-fault states, compared to \$5220 in fault states (as we define them). In most of these studies, however, the difference in payouts is not significant.

<sup>4</sup> The couples who actually litigate divorce cases, as we will see, differ from those who settle in a number of ways. Though the law (legislated and common law) certainly applies to both the litigating and settling groups, the litigators in family law seem prepared to sacrifice not only material resources but the well-being of their children to make a point. Mnookin and Kornhauser (1979) mention this, but in the context of the greater willingness of mothers to settle. The litigators thus are those who chose the “threat point,” or BATNA in the language of dispute resolution, see Fisher and Ury (1991).

<sup>5</sup> The Coase theorem, at least in its incarnation that people should bargain to an efficient outcome regardless of the way the law allocates rights, was first applied to changes in divorce laws in Peters (1986). For other studies of the effect of the change in laws on divorce rates, see Marvell (1989:544); Nakonezy et al. (1995); and Allen (1992). See also Parkman (1992); and particularly Friedberg (1998).

<sup>6</sup> See Brinig and Buckley (1998:325-40 and sources cited therein), and sources cited in footnote 6 above. Contra, see Ellman and Lohr (1998).

(As a practical matter, the lowering of the general transaction costs associated with proving grounds for divorce might be cancelled out by the increased transaction costs involved with proving "best interests.")<sup>7</sup> Mnookin (and others working with him) explained that although the awards under the new statutes themselves might change, people would, despite the legal awards, eventually settle into the more familiar pattern of maternal custody and paternal visitation (Maccoby and Mnookin, 1992). Or there simply might be a change in the frequency of going to court rather than settling (and a corresponding lowering of amounts paid to lawyers, increasing the couple's financial pie).<sup>8</sup>

This article offers another look at Mnookin and Kornhauser's bargaining paradigm, using the lens of socioeconomics.<sup>9</sup> This nomenclature hints that the result will be more nuanced, that feelings and distributional consequences will factor in to the account, and that any model offered will be subject to the scrutiny of empirical testing and "real life." More generally, I hope to begin a discussion of bargaining not merely in the shadow of the law, but also through the powerfully distorting lens of violated trust. I ignore for the sake of simplicity, and as Mnookin and Kornhauser do, the large and growing number (recently at least 50 percent) of couples who are childless at divorce,<sup>10</sup> since divorce bargaining in these cases feels one- rather than two-dimensional. We are left with the fairly typical case of a couple with at least one minor child, in

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<sup>7</sup> Proving best interests may require the use of expert psychological or psychiatric testimony, as proving adultery or abuse typically does not. In conflicted cases, states may require appointment of a guardian *ad litem* for the child, and the cost will typically be assessed to the parents. For example, the Uniform Marriage and Divorce Act, Section 310 (1998) states, "The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation." This section of the UMDA has been adopted in Illinois, Minnesota, Missouri, Montana, and Washington. According to Elrod and Spector (2000:865, 909, Chart 2), attorneys for children or guardians *ad litem* are required in 39 states plus the District of Columbia. For a description of how children actually work with their lawyers, see Buss (1999). Alternatively, Mechoulam (2001) shows first a rising and then a falling of divorce rates after no-fault. His explanation is that people are taking the new rules into account and delaying marriages, producing better marriages over time. The explanation above may also be true—the undoubted decrease in transaction costs produced by no-fault may cancel, in effect, with the increase in costs brought about by the subsequent change in custody rules.

<sup>8</sup> See, e.g., Brinig and Alexeev (1993).

<sup>9</sup> For a description of the field, see Harrison (1999).

<sup>10</sup> In our sample of Johnson County divorces, 169 of 348 couples, or 48.9%, had minor children when they divorced, so to call it a significant minority is not really accurate. For data on the number of children involved in 1989-90 divorces by state, see Clarke (1995:13, Table 4): "In 1989 and 1990, just over half of the divorcing couples had children under 18 years of age at the time of their divorce, while 47% were childless or had children who were older than 18 years of age." Similar data from Oregon in 2002 indicate 7,411 couples with at least one minor child out of 16,583 (44.6%).

perhaps a 5-10 year marriage that has, in the language of cooks, “turned.” Perhaps it does not matter why, but a marriage which had begun with trust, hope and self-sacrifice has devolved into an exchange model (with tit-for-tat bargaining) (Hanson, 1991),<sup>11</sup> perhaps into what Lundberg and Pollak (1993) call the “Separate Spheres” marriage<sup>12</sup> and, finally, to impasse.

At a core level, the couple no longer trusts (Brinig and Nock, 2003). My guess, though I have no data and am uncertain how I’d get it, is that, as with most other problems in marriage, this lack of trust can be found symptomatically or causally in their sexual relationship.<sup>13</sup> One spouse (or both) may actually violate the trust by becoming involved sexually outside the marriage. One spouse (or both), even though not physically involved, may accuse the other of infidelity or the legally lesser “disloyalty.”<sup>14</sup> Or, perhaps more commonly still, one (or both) spouses may feel that the other no longer takes his/her sexual needs fully into account. One spouse may not trust the other for romance or orgasm.

At any rate, one spouse, typically the wife (Brinig and Allen, 2000), cannot handle the current unhappiness and files for divorce. Armed by counsel,<sup>15</sup> and perhaps under the watchful eye of a mediator,<sup>16</sup> bargaining ensues.

What happens to each spouse’s feelings during this transitional period? Both spouses will, to a greater or lesser degree, feel confused (or conflicted), afraid (of the unknown future), depressed<sup>17</sup> (for to fail at marriage is, after all, to fail at something important), and lonely (since he or she probably has lost essential communication with the other spouse).<sup>18</sup> The primary custodial parent may

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<sup>11</sup> For a discussion of the problems of tit-for-tat in marriage, see Brinig (2001). “Tit-for-tat” comes from the bargaining literature. See generally Axelrod (1984).

<sup>12</sup> In this unhappy marriage, couples descend to performing only the stereotypical husband and wife gender roles, with the man being merely a good provider and the wife merely a good homemaker. This situation is similar to what Lloyd Cohen (1987:300-301) hypothesized for specific performance of marital services.

<sup>13</sup> For an attempt to answer some of these questions using empirical data, see Allen and Brinig (1998).

<sup>14</sup> A cultural anthropologist who studies infidelity is William Jankowiak (1989). See also Fisher (1992).

<sup>15</sup> In our sample of 140 cases with minor children under 14, all but 10 of the wives were represented, and all but 47 of the husbands. Only two of the petitioners, both wives, were unrepresented. In those states where there are streamlined divorce procedures, it is more common than not for couples to be unrepresented. In Oregon in 1996, 64.5 percent of couples divorced with neither having counsel.

<sup>16</sup> In the 1998 Johnson County sample, only three cases were resolved by a mediator.

<sup>17</sup> For a discussion of the stages of divorce and the attorney as a guide to the client’s progression through them, see Leatherby (1987:25).

<sup>18</sup> See Nock (1998) and Marks (1996) for two discussions of this phenomenon.

also feel angry (for having to deal with grieving children) and overwhelmed (by having to work and bearing nearly sole responsibility for household and child care).<sup>19</sup> Yet she will usually fare better psychologically because the routine, though complicated, at least resembles the old life (Whitehead, 1997:78; Reissmann, 1990:165). The non-custodial spouse may well feel violated as does the victim of a burglary.<sup>20</sup> He may also feel blind-sided and surprised.<sup>21</sup>

We might expect several typical outcomes of divorce bargaining. One would be an extension of the "separate spheres," or minimal performance, solution envisioned for unhappy couples who stayed married in Lundberg and Pollak (1993). The authors argued that instead of threatening divorce, an exit strategy, couples who were no longer happy would revert to the minimum performance required of husbands and wives, or "separate spheres" behavior. That is, wives would perform as good housewives,<sup>22</sup> and husbands as good breadwinners,<sup>23</sup> because they could not be criticized by outsiders or their spouses for playing these roles.<sup>24</sup>

In a related vein, we might expect behavior to cluster around certain foci or norms, as anticipated by Richard McAdams in his important paper on social norms (McAdams, 2000).<sup>25</sup> The prediction for these contracts would be a strong similarity of contract terms. In fact, both predictions seem borne out by my study of Michigan interconnection agreements (Brinig, 2004). In that study,

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<sup>19</sup> See, e.g., Grillo (1991), Marks (1996).

<sup>20</sup> For a discussion of depression in non-custodial fathers, see Brinig and Nock (2003) (nearly half a standard deviation more depression, even controlling for the divorce and economic events in their lives).

<sup>21</sup> There are cases in which husband or wife trusts the attorney for the other, when that is not advisable. Examples include *Hale v. Hale*, 539 A.2d 247 (Md. App. 1988) (wife trusted husband that separation agreement was precondition to their reconciliation, apparently until husband borrowed her suitcases to take his paramour on a vacation); and *Francois v. Francois*, 599 F.2d 1286 (3<sup>rd</sup> Cir. 1979) (in which wife systematically bilked the unsuspecting husband of his considerable assets before leaving the marriage). There is also some evidence that men are more than occasionally surprised when their wives file for divorce. See Braver et al. (1993) (using the NSFH, authors note the large number of husbands who were surprised when their wives filed for divorce).

<sup>22</sup> For example, they would ask for primary custody and would seek a share of the marital home rather than income-producing assets. See Weitzman (1985).

<sup>23</sup> Some evidence of the phenomenon (without clear directions for the causation) can be seen in Johnson (1999). Divorcing husbands would want very definite terms and see responsibility primarily through their financial contributions. See Fay (1989).

<sup>24</sup> The most powerful discussion of this role stereotyping phenomenon appears in Grillo (1991).

<sup>25</sup> For a discussion of social norms generally, see Posner (2000).

many of the variables we examined had only one or two solutions and gave tremendous power to the incumbent telephone company.

All of these strategies speak of minimizing losses, or minimax, a term coined by von Neumann and Morgenstern in their discussions of game theory.<sup>26</sup> To repeat, unlike most contracts, through which parties seek to maximize profits, unhappy contracts feature terms designed to minimize the losses of at least one contracting party. Though one spouse must ultimately file for divorce, spouses typically do not do so joyously and with great thought of profit, but reluctantly, fearfully, and with some sadness.<sup>27</sup> Divorce usually is a last resort, an admission that one has made a mistake or that difficulties just could not be worked out. Divorce is the lesser of two evils (the greater seen as staying married).<sup>28</sup> The contract itself is another step towards admitting failure. The goals may be to shorten the waiting period,<sup>29</sup> to prove that divorce is sought (or at least uncontested) by both,<sup>30</sup> and to establish some financial or other certainty for a dependent spouse.<sup>31</sup> Although there is no conclusive proof of what is the worst loss for divorcing parents, recent empirical,<sup>32</sup> legal,<sup>33</sup> and political activities<sup>34</sup> suggest that it may be the loss of custody, and even more, the loss of a meaningful relationship with one's child.

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<sup>26</sup> This later turned into the book "The Theory of Games and Economic Behavior." (von Neumann and Morgenstern, 1944).

<sup>27</sup> I note the parallel with some wedding ceremonies. See, e.g., <http://www.chicagoweddingrev.com/sampleceremonies.html>; and <http://www.manchester.gov.uk/registrars/marriages/cermns.htm>.

<sup>28</sup> See, e.g., Landes (1978).

<sup>29</sup> See, e.g., Va. Code Ann. § 20-91(9) (six months separation if no children and an agreement).

<sup>30</sup> See, e.g., Iowa Code Ann. § 598.8 (2001).

<sup>31</sup> Compare ALI Principles, § 4.01 (3) ("The objective of this Chapter is to allocate property by principles ... that are consistent and predictable in application."), and § 7.02, comment (b), at 956: "Agreements also give parties greater certainty about the future, and about the consequences of their actions."

<sup>32</sup> See, e.g., Brinig and Allen (2000) (custody arrangements at divorce seem to drive which spouse will file) and Brinig and Nock (2003) (divorced men significantly more likely to be depressed if they also lose custody of their children).

<sup>33</sup> See, e.g., *In re Marriage of Arnold*, 679 N.W.2d 296 (Wis. Ct. App. 2004) (rejecting a non-custodial parents' challenge on due process grounds to the custody standard of "best interest"). See also Kozlowski (2004). For a website collecting information on the class action litigation (against "unconstitutional custody statutes") now filed in 50 jurisdictions, see <http://www.indianacrc.org/>.

<sup>34</sup> See, e.g., Ill. H.B. 5214 (c): "Unless the court finds the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child. There shall be a presumption in favor of joint custody, provided that both parents agree to that custody arrangement."

How are contracts structured that will reduce these losses, and how does a difference in the size or power of the bargaining entities change the final settlement or contracting result? Considering these contracts as a whole, the reader is struck with how franchise-like they are.<sup>35</sup> Many of them (and particularly the ones that have been successfully amended over time), give great power to the custodial parent because so much is left unspecified (that is, relational). On the other hand, many of the more successful contracts are for relatively short periods of time (one to three years before modification based upon the children's age).<sup>36</sup> Because they are for more than one year, they are nonetheless candidates for analysis as relational contracts (Speidel, 2000).

Most relational contracts literature begins with the work of Stewart Macaulay (1963), who studied the contracting practices of Wisconsin firms in the early 1960s.<sup>37</sup> More recently, Professor Ian Macneil (Macneil, 1980; Trebilcock, 1993)<sup>38</sup> and former Dean Robert Scott (Scott, 1987; Goetz and Scott,

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<sup>35</sup> For a law-and-economics discussion of franchise arrangements, see Hadfield (1990). For its theoretical application to families, including divorcing families, see Brinig (1996) and Brinig (2000:188-91, 194-96).

<sup>36</sup> Consensual modifications to the contracts occurred more often when the oldest child was older (i.e., when the time for performance was relatively short).

<sup>37</sup> Macaulay found that the parties specified time of performance, price, and quantity, but left most other terms unspecified. They did not resort to legal enforcement when they "cancelled a contract," but rather freely adjusted contractual relations as they went along. Macaulay (1977) later extended his work to several foreign countries. In a more recent empirical look at contract terms, Russell Weintraub (1992) sent a questionnaire to general counsel for 182 firms eliciting information on contract practices and views as to desirable contract policy. Two of Weintraub's respondents were from "utilities other than gas or electricity" (1992:16). Information included contract devices used to protect against market shifts during long-term contracts, the frequency with which companies request relief from or modification of contractual obligations, the results of such requests, and the use of and extent of reliance on firm offers. Weintraub also asked whether corporate executives would make more or less legalistic responses to a set of three hypothetical business problems than would general counsel (1992:1-3). Weintraub stresses nonlegal remedies such as reputation costs, but notes the increased use of litigation for contract disputes, and the tendency of judges to award even punitive damages for breach of contract cases (Weintraub, 1992:7-8, n.28):

In California from 1980 to 1984, "punitive damages were assessed against 35% of defendants who were found to have breached contracts" (Peterson et al., 1987:viii). From the 1960s to the 1980s, the number of punitive damage awards in business contract cases more than quintupled in Cook County, Illinois, and more than quadrupled in San Francisco. The total awards in constant dollars increased from less than \$500,000 in each of those jurisdictions in the 1960s to \$14 million in Cook County and \$17 million in San Francisco during the first five years of the 1980s (Peterson et al., 1987:23-24).

<sup>38</sup> See also Macneil (1978). For a recent discussion of Macneil's work, see Speidel (2000). For a highly critical essay, see Barnett (1992).

1981:1149; Scott, 2000:849-53; Goetz and Scott., 1980:1300; Scott, 1990)<sup>39</sup> have taken up the challenge of writing about relational contracts, each generating several useful papers on the subject. Macaulay, Macneil and Scott all assume that in complex, long-term contracting, many terms will be left deliberately vague or not included at all. The parties, because of the strength of their relationship and the substantial investments each has in the venture,<sup>40</sup> are likely to mutually agree to alter the contract as things change.<sup>41</sup>

Thus, Macneil's colleague Richard Speidel writes in a recent piece (that also summarizes previous scholarship on relational contracting):

First, the exchange relationship extends over time. It is not a "spot" market deal. Rather, it is more like a long-term supply contract, franchise or distribution arrangement, or a marriage. Second, because of the extended duration, parts of the exchange cannot be easily measured or precisely defined at the time of contracting. This dictates a planning strategy that favors open terms, reserves discretion in performance to

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<sup>39</sup> See also Scott and Scott (1998) (relational contracting theory applied to family law); and for related work see Ayres and Gertner (1989). All these works suggest that the courts will fill the gaps left in contracts with "default rules": What the parties would probably have agreed to had they thought about the problem at the time of contracting. But see Schwartz (1992) (concluding that courts, lacking sufficient information about party intent and market alternatives, are reluctant to intervene if the parties have failed to agree).

<sup>40</sup> On the role of reputation as a substitute for contract remedies, see Kornhauser (1983). See also Scott (1987:2026-27); Gillette (1985:559-60); and Milgrom et al. (1990:3): "It is well known...that in long-term, frequent bilateral exchange, the value of the relationship itself may serve as an adequate bond to ensure honest behavior and promote trust between the parties." For example, see Gillette (2002:1168): "Reputation is particularly effective in relational situations because long-term contracts tend to be incompletely contingent; as a consequence, the specific obligations of the parties, and hence the existence of breach, are highly uncertain. Ex post enforcement costs will therefore be high, and ex ante constraints such as reputation can therefore compensate for the risk of underenforcement."

<sup>41</sup> Weintraub (1992:19-21) notes: "Relational contracts involve parties who are presently performing a long-term contract or have dealt with one another many times in the past and are likely to do so in the future. Discrete contracts involve parties who have not dealt with one another before or, if they have, probably will not contract again. Relational contracts are likely to predominate in well-organized markets; discrete contracts will typify sales that take place sporadically, such as sales of real estate. There are important differences between situations in which parties have developed a relationship and those in which the contract is an isolated occurrence. When a dispute arises, parties with a history of mutually beneficial dealings are less likely to resort to litigation than are strangers. Efficiency is one incentive for amicable resolution of a relational dispute. Each party has custom-shaped its operations to meet the other's needs and these transaction costs would be wasted if the relationship ended. Moreover, in well-organized markets where relational contracts predominate, a reputation for litigiousness is particularly undesirable." [citations omitted].

one or both parties, and incorporates dispute resolution procedures, such as mediation or arbitration, into the contract. The inability of the parties to "presentiate" the terms of the bargain at the time of contracting shifts the focus to circumstances and conduct that occur ex post contract. Third, in the words of Lewis Kornhauser, in a relational contract the "interdependence of the parties to the exchange extends at any given moment beyond the single discrete transaction to a range of social interrelationships." [citations omitted] (Speidel, 2000:823-24)<sup>42</sup>

The current examination of divorcing couples combines relational contracting and family law. I set out to discover, if possible, why couples choose particular terms in their settlement agreements (called stipulations in Iowa) and how these contractual arrangements fare over time.

I began with the complete set of divorce files initiated in 1998 in Johnson County, Iowa.<sup>43</sup> These were set apart for me and my research assistants in a series of file drawers in the Johnson County courthouse, where they become public records when the divorce is final. The divorce was final in 348 of the cases. From these cases, we eliminated all those with no minor children, since these were less likely to involve complex bargaining and unlikely to require adjustment over time.<sup>44</sup> This meant that 175 cases were eliminated. We also eliminated the 29 cases in which the only children involved were over 14 at the time of filing, since we believed these would not require adjustment over a long time horizon: our goal was to have around five years' experience with the contracts. We therefore worked with 140 cases.

We xeroxed and then scanned major documents in each case,<sup>45</sup> and kept notes describing other court contacts, identifying later motions,<sup>46</sup> stipulations,<sup>47</sup>

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<sup>42</sup> For other work, see Speidel (1985:483-579, selected bibliography in app. A). The existence and importance of relational contracts in the real world has also been verified in an empirical study (Weintraub, 1992:16-24).

<sup>43</sup> This is the county encompassing Iowa City and the University of Iowa. According to the 2000 Census, Johnson County has a population of 111,006. It is one of the most educated counties in the country, with 47.6% of its population having at least a bachelor's degree (compared to less than 25% nationally), and has a median household income of \$40,060. It is one of the most racially diverse counties in Iowa, with nearly 10% of residents being nonwhite.

<sup>44</sup> For these couples, it is far more likely for a no-fault divorce to be a "clean break," the goal sought by family law reformers.

<sup>45</sup> In each case, this included the Petition for Dissolution, Affidavits of Financial Status filed by both parties, their written stipulation, if they had one, and the Final Judgment of Dissolution. Because there were children, Iowa requires each couple to attend a parenting class. Since there was one in each file, the parenting class-associated documents were not included. Some cases had Motions for Temporary Relief with attached affidavits: these were xeroxed.

and adjustments. For each case, we coded basic demographic data,<sup>48</sup> data that potentially involved any power each spouse might have (such as income level and independent wealth),<sup>49</sup> the names of the attorneys, if any, for each spouse, which spouse filed the case, and whether the case was resolved through stipulation (the local name for a property settlement agreement). We noted the type and number of actions prior to the divorce as well as those that followed the divorce. We noted the custody arrangement,<sup>50</sup> whether or not there was substantial visitation (which we defined as thirty percent of the time or more), whether or not the parties had a complicated visitation schedule (by number of paragraphs, which varied from 0 to 21), whether or not they imposed limitations on leaving the state, whether they provided for religious training of the children, whether or not the parties agreed to child support significantly deviating from the statutory guidelines,<sup>51</sup> whether they provided for the college education of children, whether there was alimony (found in only 7 percent of the settled cases), how the divorcing spouses divided various classes of assets, how they agreed to deal with modifications, and so forth.

Consistent with prior studies, most of these cases settled before the divorce hearing: 88 percent used contracts to settle all matters dealing with custody and visitation, child support, property division and alimony.<sup>52</sup> Also consistent with prior studies, wives brought the vast majority of the divorce actions (78

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<sup>46</sup> These most frequently included motions to change custody, motions to prevent relocation, and motions of various kinds to collect child support.

<sup>47</sup> Most frequently, these were changes in custody or visitation arrangements, or were to note that amounts owed had been paid. Some were also for changes in the amount of agreed-upon support.

<sup>48</sup> This included the date of marriage (from which the length of the marriage could be calculated), the dates of birth of husband and wife (from which the ages of husband and wife, and the age of wife at marriage could be calculated), the number, ages and genders of the children, income of the wife, income of the husband, independent assets of the wife, independent assets of the husband, and assets over \$100,000.

<sup>49</sup> Education levels, highly correlated with employment prospects, would have been valuable but simply were not available in the vast majority of cases.

<sup>50</sup> Custody arrangements were classified into husband custody, joint custody (nearly a 50-50 share), or wife custody.

<sup>51</sup> Iowa Child Support Guidelines appear in Iowa Court Rule Chapter 9, and the worksheets for calculating the guideline amount appear in Court Rule 9.13. Guidelines are required by the Social Security Act, Child Support Enforcement Assistance Amendments, 42 U.S.C. §658, and have been criticized by both wives (as not meeting their children's needs, see Comment to § 3.04, American Law Institute, Principles of the Law of Family Dissolution at 435-36, 2002) and husbands (Ward, 2003). For an analysis of the debate, see Betson et al. (1992).

<sup>52</sup> The 90% settlement figure comes from Mnookin and Kornhauser (1979). See also Maccoby and Mnookin (1992).

percent). Nearly all (90 percent of the divorces) involved "joint legal custody."<sup>53</sup> Sixty-nine percent involved generous sharing of custody, though only 7.1% (10 cases) had approximately equal time shares. Only another 10 cases had father custody. These Johnson County marriages lasted slightly longer than was found in divorce studies that do not involve only couples with minor children,<sup>54</sup> averaging almost exactly 11 years before divorce.

Iowa adopted a no-fault law in the 1970s.<sup>55</sup> This means that, legally, fault is completely irrelevant in the state. It makes no difference to whether or not, or how soon, a complainant can obtain a divorce. It also cannot affect the amount of alimony or property distribution a spouse receives.<sup>56</sup> Thus, fault does not appear in the legal pleadings themselves, even for one spouse to obtain some advantage. Nonetheless, the divorcing spouses in Johnson County (or their lawyers) could not restrain themselves from putting allegations of fault

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<sup>53</sup> The Iowa Code, in § 598.41 (5) (2001) provides: "Joint physical care may be in the best interest of the child, but joint legal custody does not require joint physical care....If one joint custodial parent is awarded physical care, the parent responsible for providing physical care shall support the other parent's relationship with the child. Physical care awarded to one parent does not affect the other parent's rights and responsibilities as a joint legal custodian of the child. Rights and responsibilities as joint legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction."

In contrast, Michael Newdow, the plaintiff in the recent Supreme Court case of *Elk Grove Unified Sch. Dist v. Newdow*, 124 S.Ct. 2301 (2004), did not have prudential standing to attack the pledge of allegiance under the Establishment Clause because his former wife had "'sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of' her daughter" (at 2310).

<sup>54</sup> Such studies report an average length before divorce of seven years. For a review, see Allen and Brinig (1998).

<sup>55</sup> The sections were added by Acts 1970 (63 [Iowa] G.A.) ch. 1266, §§ 1et seq., now codified at Iowa Code §§ 598.3 et seq. (2001). Fault is irrelevant to prove divorce, for under § 598.8 (2)(1) (2001) (governing cases that do not require a hearing), the petitioner must show that "The parties have certified in writing that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." In other cases, Iowa Code § 598.17 (2001) provides that "A decree dissolving the marriage may be entered when the court is satisfied from the evidence presented that there has been a breakdown of the marriage relationship to the extent that the legitimate objects have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." The decree shall state that the dissolution is granted to "the parties." Id. Fault has not been significant in reaching a property distribution since *In re Marriage of Willcoxson*, 250 N.W.2d 525 (Iowa. 1977), nor for alimony since *In re Tjaden's Marriage*, 199 N.W.2d 475 (Iowa. 1972).

<sup>56</sup> For a lengthy discussion of fault and no-fault legislation, a classification of all states, and an argument that fault should be excluded, see American Law Institute (2002:42-54).

somewhere in the files (frequently in the spouse's affidavits).<sup>57</sup> Thus, adultery could be identified from the files in 6 cases,<sup>58</sup> domestic violence in 9,<sup>59</sup> child abuse in 13.<sup>60</sup> One case involved both child abuse and adultery,<sup>61</sup> and one involved both child abuse and domestic violence. Twenty-six separate cases (18.6 %) therefore involved at least one type of fault. These fault cases were much less likely to settle and, even holding the failure to settle constant, much more likely to produce substantial post-divorce litigation. This finding confirms what women's advocates<sup>62</sup> and mediators (Gaughan, 1981:39-41, 63)<sup>63</sup> have been arguing for some years: these cases are simply poor candidates for mediation. Significant Pearson correlations<sup>64</sup> show that fault was positively related to provisions regarding religious education and training (suggesting that couples with strong religious preferences needed more than just incompatibility to justify leaving marriages, or that these marriages were simply better ones),<sup>65</sup> and was more common in marriages that had not accumulated more than

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<sup>57</sup> This result was predicted in Wardle (1991) (presenting what might be termed a "hydraulic" model in which fault that is suppressed in the divorce proceedings surfaces elsewhere).

<sup>58</sup> Adultery was most commonly brought up by one spouse to reduce the other spouse's chances of getting custody. There was also a suggestion in one case that the adulterous spouse squandered marital resources on the paramour.

<sup>59</sup> No-contact orders appeared in most of these files. Sometimes they did not appear directly, but were mentioned in affidavits involving limits on visitation.

<sup>60</sup> Usually these were in the context of petitions for temporary custody, sole custody, changes of custody, or limits on visitation.

<sup>61</sup> This was the only case of husband adultery, and the wife alleged "numerous male sex partners," at least one of whom sexually abused the child in question.

<sup>62</sup> Probably the best known of these pieces is Lerman (1984).

<sup>63</sup> See also Lundstrom (1998): "It's not recommended for dissolving marriages troubled by violence, alcoholism, or mental impairment. And without the courts' discovery process, it doesn't work if either party is intent on hiding assets."

<sup>64</sup> The correlation between two variables reflects the degree to which the variables are related. The most common measure of correlation is the Pearson Product Moment Correlation (called Pearson's correlation for short). Pearson's correlation reflects the degree of linear relationship between two variables. It ranges from +1 to -1. A correlation of +1 means that there is a perfect positive linear relationship between variables (that is, as one value increases, so does the other by proportionately as much).

<sup>65</sup> See, e.g., Nock et al. (2003): "The implications of such a finding are that successful marriages are not necessarily based on a religious foundation, but rather the values embraced by all major religions in regard to marriage serve the same purpose. In other words, it is the institutional view of marriage (a model that stresses the traditional vows of matrimony) that appears important, whether this is strictly religious or finds its source elsewhere. This is a theme we are currently investigating because we believe it is critical that we identify as many sources of strong marriages as possible. We suspect that such sources include a guiding template of normative beliefs, such as those shown in this presentation."

\$100,000 in assets. It was also closely associated with an age difference between husband and wife.<sup>66</sup>

The role of attorneys also prominently features in this study. In each case, we knew who represented the petitioner and respondent. We counted how many cases in the sample each attorney handled for wives, husbands, and in total, and found that attorney experience made a substantial difference (usually in a positive direction), both in contract terms chosen and in how the parties adjusted over time to changing circumstances. Having an attorney experienced in family law ultimately proved cost-effective for most of the subjects of this study.<sup>67</sup>

Can we predict which cases will settle and which will litigate? Here attorney experience, by any of our measures, was uncorrelated with choice of dispute resolution. Neither was wealth or income. However, if one of the parties ultimately was chosen as a sole custodian (less than 30% visitation time given to the other party), the parties were far less likely to settle.<sup>68</sup> Where fault was involved, there was also less settlement (as we discussed before).

Which terms promote fewer conflicts over time? We can answer this question using either a positive or negative approach. The positive one asks how often the parties were able to reach consensus or modify the contract after divorce. Here total attorney experience and experience of the wife's attorney were significantly related. Consensual modification was significantly (at the .01 level) more likely as the number of children increased, when the first child was older, and if the parties had an ongoing business partnership (such as a Christmas tree farm, interest in a patent, or stock options in a company). In fact, an ongoing economic tie was associated with many desirable things in this study: longer marriages before divorce, greater accumulation of assets, more experienced attorneys (both for husbands and in total), and more independent wealth of wives. Consensual modification was also more likely if either the wife or the husband had independent wealth, and if the parties included a term for an automatic adjustment of child support based on income changes of the parents.

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<sup>66</sup> For an explanation of why that might be, based upon gendered variance in sexual interest over the life-course, see Allen and Brinig (1998).

<sup>67</sup> The exceptions are the number of post-divorce litigation events, which increases positively with the number of case for husbands handled by husband's attorney, and the prediction of whether there will be post divorce litigation at all, which varied positively with the total number of cases in the sample handled by both attorneys.

<sup>68</sup> As my colleague Jerry Wetlaufer points out, judges may be more apt to award sole custody when the parties cannot get along well enough to agree to any sort of complicated sharing of time with children. It is difficult to sort out cause and effect, in other words.

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The negative approach looks at post-divorce litigation (usually motions or sometimes enforcement mechanisms). There was more litigation when the first child was older, as the number of children increased, and when the total experience of the attorneys increased, and significantly less of it when the parties provided for an automatic adjustment based upon the child's age.

Surprisingly, traditional power variables such as income and independent wealth played little role in what the parties agreed to (or whether they were able to live with their agreement).<sup>69</sup> Obviously, higher income parents (who were most likely college educated themselves in our highly educated county) were more apt to include college educations for their children in the agreements. So were women who married when they were older (probably because they were highly educated themselves or had more job experience). College education provisions were predictably more frequent with older children, and when the wife was represented by an attorney handling more women's cases in the sample. No couples who litigated included college education provisions in the final court-ordered decree.<sup>70</sup> Higher income couples also had more assets and a greater variety of assets to divide. Greater wealth and higher income were, not surprisingly, associated closely with longer marriages.

The agreements varied widely in their treatment of visitation: some did not include schedules at all, while others had very complex visitation schedules (up to 21 paragraphs of treatment). The more complicated the schedule, the less likely that one parent had "sole custody," and the more likely that the attorneys involved were very experienced with other cases in the sample. These complicated schedules were also related to having provisions specifying religious upbringing and education.

Provisions limiting or suggesting changes when the custodial spouse relocated were more common when the wife was older when she married, when the couple had assets of more than \$100,000 and when the husband possessed independent wealth. The first correlation suggests that these wives might be more mobile, while the last two suggest that there might be property in Iowa that would be difficult for the non-custodial parent to leave behind.

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<sup>69</sup> Nor did the age of the wife at marriage. Generally speaking, women who marry young are less likely to have completed an education or launched a career before having children. Women who delayed marriage until completing education or having significant job experience were likely to have better employment opportunities outside marriage and therefore to be in a better bargaining position.

<sup>70</sup> Iowa Code § 598.21 (5)(A) (2001) justifies a college education award of up to 1/3 from each parent. Litigating couples might not have included college provisions because they were simply too bitter to be thinking in long range terms about their children at this time, or because they'd expended the resources that would otherwise be set aside for the children's education.

## REGRESSION ANALYSIS

Beginning with the knowledge gained from running the simple correlations, we can go more deeply into causation than we can just by seeing that if one thing increases, another changes in some way. As social scientists know, this is never an exact science, for some portion (and in these cases, a large amount) of the change in the dependent variable is not explained by the "right-hand side" or independent variables. For example, we can take three factors that we know are all correlated with fault divorces: whether or not the couple had a provision on religious education or upbringing in their settlement agreement, whether or not they had accumulated assets over \$100,000 and the age difference of the spouses. We speculated earlier that more religious couples might feel more comfortable alleging fault if they decided to end a marriage.<sup>71</sup> That is, for religious reasons, they believe they should not abandon a marriage without very significant reason. In legal terms, these reasons translate into the traditional fault grounds of adultery and marital violence (abuse). Adultery has been recognized as a reason for divorce since Biblical times. Marital violence has been grounds for a legal separation at least since the first divorces were granted in colonial America.<sup>72</sup> But the fault that might break up a marriage will likely have occurred before the contract (including the religious upbringing) is drafted: that is, the direction of the causation is more likely from fault to the contract provision rather than the other way around: greater religiosity, which we cannot measure, likely affects both variables. We nonetheless would predict a positive sign on the variable. The age difference variable should also have a positive sign, though here the direction is clearer: whatever changed about the marital dynamic because the spouses had a bigger gap between their ages likely occurred long before they drafted the contract. Finally, we consider the assets over \$100,000 variable. In a turbulent marriage, one would predict that it would be less likely that the parties would accumulate substantial assets. Many studies have found that both domestic violence and child abuse complaints

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<sup>71</sup> It is possible, though not so likely, that more religious people commit more abuse or adultery. This behavior would certainly be contrary to the doctrine of mainstream religions, if not all religions.

<sup>72</sup> For a discussion of the historical treatment of fault at divorce, see Brinig and Carbone (1988:860-61). Before 1600, the Catholic Church interpreted Matthew 5:31 ("Whosoever shall put away his wife, excepting the cause of fornication, maketh her to commit adultery: and he that shall marry her that is put away, committeth adultery") to mean that validly contracted marriages could not be dissolved. The Church formalized this position at the Council of Trent in 1563 (Phillips, 1988:34-46). Annulment was available because without a marriage there was no bond to dissolve. For other discussions, see Brinig and Crafton (1994:876-77); Rheinstein (1956:654); and Hartog (1991).

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increase as families are less wealthy,<sup>73</sup> so we would expect a negative coefficient. In fact, just looking at the abuse cases, the coefficient is negative, but not significant at the .05 level of confidence. So it seems that it is not just abuse, but the six adultery cases that play a role here. This observation is borne out by what we have seen before about adultery—the claim sometimes was made in the context of wasting marital assets on the paramour, which should have a negative impact on family wealth. Table III shows what happens if we combine all three factors:<sup>74</sup> we can predict nearly .12 of the difference in the probability of fault in these cases. Two of the three factors are statistically significant at less than the .05 level, and the probability of fault being involved more than quintuples if the couple has a provision on religious education in their agreement.

The causation question can be more nearly sorted out by looking at the regressions as a series of questions, each of which produces a result in an equation (called Two Stage Least Squared or 2SLS). Because the first equation in each series (predicting the existence or not of a contract provision) is binary, the method for doing a 2SLS becomes (1) estimate the existence of the contract provision using a Logistic Regression, and (2) estimate the result (here, the number of consensual modifications, the number of post-litigation events, or whether or not there is post-divorce litigation based upon a saved predicted probability from (1) plus new predictors). Thus, the model for Tables IV and V is as follows:

- (1) Automatic Income Adjustment in Agreement (AI) = f(Experience of Wife's Attorney (EW), Fault in Case (F), Independent Wealth of Wife (IW)), and
- (2) Number of Consensual Modifications (CM) = f(AI (predicted), Continuing Business or Partnership (CB), and Number of Children (C)).<sup>75</sup>

Attorneys who have more experience handling cases for women (measured by those they handled during 1998) are likely to suggest that their clients ask for automatic increases in child support. They probably choose the income

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<sup>73</sup> This does not mean that abuse is confined to the impoverished, just that there tends to be more of it when resources are scarce (particularly if abusers are unemployed) (Kurz, 1995).

<sup>74</sup> Note that because we are including a contract provision, we need to confine our analysis to those cases settled rather than all of the cases. If the same regression is done with the entire sample, the R<sup>2</sup> is .096, but the coefficients remain significant and have the same sign.

<sup>75</sup> When Equation 2 is estimated, instrumental variables include all those from Equation 1.

variation because it is easier to justify, since the Guidelines themselves are structured around income differences,<sup>76</sup> and proof of income changes will not be difficult if tax forms are submitted each year. However, proof will be more difficult if the spouses inherently do not trust each other, as is the case when fault is alleged. They should be less likely to ask for adjustments in income when they have less independent wealth to rely on, because poorer wives will need to rely on steady child support just to make ends meet. (Child support will decrease, as well as increase, automatically based upon changes in the husband's income.)

I hypothesized that the parties would find it much less painful to adjust over time when they had provided for changes in their agreement, so the predicted sign on the Automatic Income Adjustment (AI) was positive. I included ongoing business or partnership not only because there had been a positive correlation, but because I had anecdotal evidence, from people I knew and from reported cases, of couples who could successfully continue business enterprises but who had problems living together as married couples.<sup>77</sup> I also suspected that with more children involved, more cooperation over time would be needed (and, remember, the litigated cases have been screened out here).

Results are shown in Tables IV through IX. As I hypothesized, the predicted probability of the automatic adjustment of child support based upon income was positively and significantly (at .065) related to the number of consensual modifications (Table V).<sup>78</sup> So was a continuing business or partnership (at .0484),<sup>79</sup> and the existence of such an economic partnership contributed more than any other variable to the final equation. The number of children was also significant (at .0217).<sup>80</sup> These results are all intuitive: if the parties are required,

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<sup>76</sup> Thus the husband's income determines the columns, wife's the rows, on the chart.

<sup>77</sup> For example, the cafeteria at George Mason Law School was run for at least ten years by a divorced couple, John and Nancy Martin. The man was the heir to the department store that became the law school building, and his wife did the cooking. The litigated cases include *Bass v. Bass*, 814 S.W. 2d 38 (Tenn. 1991) (video game and diner partnership).

<sup>78</sup> We can use the equations generated by the regressions to get some idea of the magnitude of the effects. Holding other variables at their means and using the coefficients of the tables, if we vary only the existence or not of the modification provision, the number of modifying amendments changes from essentially zero (.011) to .5904149. The mean values were .02970 (for the provision), .06 (business), and 1.75 (number of children).

<sup>79</sup> Using the procedure outlined in the preceding footnote, but this time varying only the existence or not of the continuing business relationship, the number of modifying amendments changes from essentially zero (.009) to 2.2654557.

<sup>80</sup> Using the procedure above, but varying the number of children from 1 (since all couples had at least one child) to 2, the number of provisions increased by .20.

for economic or personal reasons, to be cooperative over some period of time, they are likely, in this kind of “friendly divorce,” to adjust.

Next, we turn to the less happy question of what produces continued litigation. The contract provision (as opposed to failure to settle at all) that was correlated with post-litigation events turns out to be another automatic child support adjustment, this time for the age of the child. We would predict that, like the automatic adjustment for income, this type of planning ahead would be related to better behavior (that is, it would be negatively related to the number of post-divorce litigation events). The first step is to predict the likelihood of such a provision, again using a logistic regression. (See Table VI). Correlations revealed that such adjustments were more likely when the parties simultaneously agreed to vary the amount of child support from the Guidelines amount, and that the likelihood should increase as the variance increased. Why might this be so? These couples might see the need for generous provision for children, and might recognize (as is the truth) that the child’s needs would increase as the child aged (ALI, 2002:§3.05A, Comment 1, at 603). This tendency would be more likely when there was a big discrepancy between the husband’s income (typically the non-custodial parent) and the wife’s (typically the primary custodial parent).

As noted, the automatic adjustment of child support should be inversely related to the number of post-divorce litigation events. The interesting factor in these equations (and the reason we have included Table VIII) is the role of the experienced attorney for the husband. Though this was statistically unrelated to provisions specifying age-related adjustments (though it was negative—these provisions are sought by women and their attorneys), the husband’s attorney’s experience was positively related to the number of post-litigation events,<sup>81</sup> and, when the child support deviation was included as an instrumental variable, statistically significant (at .03) and with a larger standardized coefficient than the predicted probability term. What are these attorneys doing? Most likely, they try to limit automatic provisions of this kind, which can only increase (as opposed to the income-based ones, which can decrease as well). If the provisions are included, later litigation (to resist collection of child support,

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<sup>81</sup> To get some idea of the magnitude here, by plugging actual (as opposed to predicted) average values into the equation and varying only the experience of the attorney handling husbands’ cases by adding one more case in the sample, the number of post-divorce litigation events increased from 1.62555 for the attorney who handled the average number of cases (2.7021) to 2.0320073 if the attorney handled just one more divorce case for a husband in the sample. Comparing this with contracts that did or didn’t have modifications based upon the child’s age, again plugging in mean values otherwise into the equation, the number of post-litigation events without the provision was 8.80, and with the provision .456634 (a very significant decrease indeed).

decrease amounts paid or change custody) may be sought when their (male) clients claim that their ex-wives are not granting sufficient visitation, are not spending the child support money on the child, do not need the amount provided for in the agreement, and so forth.

Finally, in Table IX we consider how well the automatic adjustments for age and other factors predict the presence or absence of any adversarial post-divorce litigation. Since the dependent variable is binary, again we run a logistic regression. We would predict, based upon our prior discussion of them, that the coefficient for an automatic age-based adjustment would be negative, and that the coefficient for the presence of fault grounds (child abuse, domestic violence or adultery would be positive). This time we include two other factors. One is another provision: religious education or upbringing, which might be positive, since it is related to the presence of fault grounds, or negative, if it indicated a more forgiving attitude or greater concern for the children. We also included an attorney experience provision: the number of cases in the sample handled by both husband's and wife's attorneys. This, we would guess, would be positive, because experienced attorneys (holding the agreements the parties wrote constant) would enforce agreements for support and visitation before arrearages accumulated significantly or denial of visitation became a big problem.

As Table IX shows, all these factors were significant. The most important, more than tripling the likelihood of litigation (and significant at .096), is the presence of fault.<sup>82</sup> The second most influential coefficient was the attorney experience variable, significant at .005. Decreasing by more than 36% were both the provision for automatic adjustment of child support and the religious education provision, significant at .033 and .046, respectively.

## DISCUSSION AND CONCLUSIONS

What can we learn from Johnson County divorce files? First, many factors that Mnookin and Kornhauser (and economist Elizabeth Peters) would have predicted would be important do not seem to have really large effects. How custody is arranged (except in cases where visitation is really limited) does not affect much in terms of litigation or the terms of the agreement. Child support always ceases when the child becomes emancipated or reaches majority.<sup>83</sup> Neither does the most obvious indication of power, the absolute and relative

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<sup>82</sup> For a discussion of the importance of real as opposed to statistical significance, see McCloskey and Siliak (1996).

<sup>83</sup> Iowa Code § 598.1 (6) (2001), with exceptions for children in college between 18 and 22 or children of any age who remain dependent because of disability.

incomes of husband and wife (though differences in income do matter in the equation on automatic adjustment for the age of the child).

However, some factors do matter. The most obvious of these is the presence of child abuse, domestic violence or adultery. In cases where these traditional marital “fault grounds” appear, we see much less cooperative behavior either in terms of coming to a settlement, including automatic adjustment terms, or post-divorce litigation (even for those spouses able to come to written agreements). In a positive vein, we see in a number of cases the importance of some sort of ongoing business or partnership in enabling divorcing spouses to work out their problems. Finally, the previous experience of the attorneys involved in the case seems to be critical in terms of getting clients to come to settlement and to agree on terms that will help them adjust over time (though there may be more litigation after the divorce, particularly if the former husbands have experienced attorneys).<sup>84</sup>

This brings us back to our original prediction that parties will select contract terms to minimize potential losses. Unlike the commercial franchise contracts with which it shares many features, the separation agreement (or stipulation) typically cannot last for a short time specified in advance, thus reducing the risk of big losses. When children are involved, provisions for their custody and support must control through their minority,<sup>85</sup> in the analyzed cases at least four years.

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<sup>84</sup> Husbands brought actions for change of custody, especially when wives attempted to move out of the area. They resisted increases in child support, sometimes counterclaiming for more custody time. Both of these actions are fully consistent with attorney experience. It is less obvious why in eight cases, experienced family law attorneys would help their clients resist child support collection efforts by the wives. Of these eight, one attorney represented three clients, and two others represented two of them. These attorneys may have a reputation as “gunners” who will litigate. Analysis of all of the cases they handled supports this conclusion. Each had well above the mean pre- and post- divorce litigation events (1.67, 5.67 and 3.33 before stipulation compared to the overall mean of 1.35; and 2.67, 3.67 and 2.83 post-divorce litigation events compared to an overall mean of 1.6). Those with reputations for conflict are generally supposed to be less successful than those who cooperate, see, e.g., Sobel (1985); Painter (1996:150); Johnston and Waldfogel (2002); and Gilson and Mnookin (1994:545-46) (describing matrimonial practice as one in which attorneys can cooperate even though their clients are not equipped to do so; and one cooperative attorney as reporting “If a client is hell bent upon hiring an advocate to disembowel the adverse party, I direct them elsewhere”). This may not be true, though, for first amendment or consumer advocate lawyers, see Hollander-Blumoff (1995).

<sup>85</sup> Courts invalidate provisions designed to remove judicial oversight from child support or custody cases. For example, *Anthony v. Anthony*, 204 N.W.2d 829 (Iowa 1973), holds that an agreement by a custodial parent to waive child support in return for a promise by the non-custodial parent not to exercise visitation rights was void as contrary to public policy. See also *Goodpasture v. Goodpasture*, 7 Va. App. 55, 371 S.E.2d 845 (1988). Also see Iowa Code 598.21(8): “A modification of a support order...is not valid unless the modification is approved by the

However, many of the contracts in the Johnson County sample contained other terms that suggest the parties were trying to minimize their losses. For example, the provisions for automatic adjustments (for age or income) minimize the possibility of getting a larger (to the non-custodial spouse) or smaller (to the custodial spouse) amount should the matter be relitigated at a later date. In other words, they reduce the variance in the amount of future child support.<sup>86</sup>

Most of the studied divorce settlements provided for some reasonable share of physical custody to go to each parent: there was no complete loss of custody in any but a few extreme cases.<sup>87</sup> In a related vein, a number of the agreements provided that children could not be moved out of a specified area (sometimes the metropolitan area, sometimes within 50 or 100 miles, sometimes out of state) without the relocation becoming a change of circumstances requiring reassessment of custody. For a non-custodial parent, the greatest fear may well be losing touch with one's children by having them move away.

All alimony awards that were agreed to (and, remember, there were only 8 of these) were for fixed periods (in only two cases for more than 60 months, and one of these was for \$1 per month). For the payor spouses (all husbands), this short term would limit their exposure, potentially for the remainder of their working careers.

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court, after proper notice and opportunity to be heard is given to all parties to the order, and entered as an order of the court."

<sup>86</sup> For a discussion of the reduction of variance in the context of the parole evidence rule, see Posner (1998:542): "This alternative characterization would not affect the analysis for parties that are risk-averse, since such parties are willing to pay for a reduction in variance. Even risk-neutral parties would prefer the reduction in variance because the uncertainty of the legal decision in case of a dispute would cause parties to incur greater litigation costs than they would if the legal decision could be accurately predicted."

<sup>87</sup> About a quarter of these involved allegations of abuse of a child or the other parent.

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**Table I. Descriptive Statistics - All Cases**

Descriptive Statistics-All Cases	N	Minimum	Maximum	Mean	Std. Deviation
Date of Stipulation	138	1998.00	2001.00	1998.7246	.72261
Petitioner (w=1)	107	0	1	.78	.419
Date of Marriage	135	09/11/1971	10/15/1998	07/24/1989	11/18/1588
Age of Wife	138	22.00	52.00	34.0290	6.95338
Age of Husband	136	20.00	55.00	35.8382	7.48452
Difference in Spouses' Ages	135	.00	15.00	3.3185	3.22456
Wife's attorney cases for wives in sample	130	1.00	10.00	3.9231	2.72973
Husband's attorney cases for husbands in sample	94	1.00	6.00	2.7021	1.80101
More experienced attorney (abs 11-13)	57	.00	7.00	2.2105	1.67691
Number of Children	140	1	5	1.75	.760
Age of Child1 (Year of Birth)	141	1975	1998	1990.35	4.953
Sex of Child 1 (1=girl)	137	0	1	.42	.496
Age of Child 2 (Year of Birth)	82	1979	1997	1991.06	4.029
Sex of Child 2 (1=girl)	80	0	1	.48	.503
Age of Child 3	16	1983	1998	1991.06	4.328
Sex of Child 3 (1=girl)	16	0	1	.44	.512
Prior Actions	140	0	1	.14	.344
Fault grounds? (domestic violence, child abuse, adultery seen in file)	140	0	3	.32	.771
Income W (\$ / year)	118	0	145600	24077.53	19631.983
Income H (\$ / year)	117	0	341477	37720.20	39275.416
Guidelines Figure (\$ / month)	115	0	5000	606.33	604.386
Independent wealth W	131	0	1	.06	.240
Independent wealth H	132	0	1	.11	.319
Valuable assets (more than \$100K)	134	0	1	.22	.418
Joint Legal Custody (1=yes)	139	0	1	.90	.302
Physical Custody Arrangement(1=W, 0=H)	137	0	2	.89	.354
Physical custody less than 30% for non-custodial (1=yes)	131	0	1	.31	.462

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Child Support Deviation (actual awarded, \$/month)	111	0	5000	504.63	590.875
Automatic Adjustment-Kid's Age (1=yes)	132	0	1	.86	.352
Automatic Adjustment-Income (1=yes)	131	0	1	.38	.488
College Expenses (1=yes)	135	0	1	.27	.448
Alimony (1=yes)	139	0	1	.08	.271
Method of Resolution (1=stipulation)	141	0	1	.88	.327
Allegations of Abuse (1=allegation)	141	0	1	.14	.350
Disposition of Marital Home (0=to one; 1=equal)	88	0	1	.24	.429
Complicated Visitation Schedule (number of paragraphs)	139	0	21	5.31	4.614
Limitation on Removing Kids from State (1=yes)	140	0	1	.28	.450
Religious Education/Observances (1=mentioned)	140	0	1	.21	.412
Post-contract litigation (prior to divorce--temporary support or custody (1=yes)	141	0	15	1.58	2.211
Post-divorce litigation (1=yes)	141	0	1	.65	.480
How many post-divorce (motions, hearings, etc.)	141	0	13	1.96	2.455
Consensual modifications	141	0	3	.30	.557
Ongoing business/partnership	141	0	1	.06	.232
Date Stipulation Signed	139	12/29/1997	08/30/2001	03/31/1999	06/16/1583
Date Stipulation Entered	141	01/06/1998	09/05/2001	04/16/1999	06/19/1583
Length of Marriage (years & fraction)	135	.45	31.29	10.9927	6.90206
Age of wife at time of marriage	133	2.47	50.05	23.1445	9.55178
resolut=1 (FILTER)	141	0	1	.88	.327
Difference between H and W income	116	-136448.00	221477.00	13737.6205	37188.72290
Predicted probability that has adjustment for income	107	.02970	.86215	.4106159	.20580923
Valid N (listwise)	0				

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**Table II. Comparison of Litigate and Settle Groups**

Comparison of Litigate and Settle Groups	method of resolution (1=stipulation)	N	Mean	Std. Deviation	Std. Error Mean
Petitioner (w=1)	0	12	0.83	0.389	0.112
	1	95	0.77	0.424	0.044
Age of Wife	0	17	32.0588	7.33545	1.77911
	1	121	34.3058	6.88458	0.62587
Age of Husband	0	16	33.3125	7.79503	1.94876
	1	120	36.175	7.41072	0.6765
Age Difference	0	16	3.3125	3.49702	0.87426
	1	119	3.3193	3.20205	0.29353
Attorney's cases for W in sample	0	16	4.0625	2.46221	0.61555
	1	114	3.9035	2.77463	0.25987
Attorney's cases for H in sample	0	12	2.1667	1.85047	0.53418
	1	82	2.7805	1.79178	0.19787
More experienced attorney (abs 11-13)	0	6	1.8333	1.16905	0.47726
	1	51	2.2549	1.73024	0.24228
Number of Children	0	17	1.65	1.057	0.256
	1	123	1.76	0.714	0.064
Age of Child1 (Year of Birth)	0	17	1992.29	4.524	1.097
	1	124	1990.08	4.966	0.446
Sex of Child 1 (1=girl)	0	16	0.38	0.5	0.125
	1	121	0.43	0.497	0.045
Fault grounds? (1=abuse, 2=child abuse, 3=adultery)	0	17	0.35	0.493	0.119
	1	123	0.15	0.355	0.032
Income W (\$/year)	0	16	16569.13	8962.35	2240.587
	1	102	25255.31	20596.347	2039.342
Income H (\$/year)	0	15	36464.61	31413.775	8111.002
	1	102	37904.85	40430.123	4003.179
Guidelines Figure (\$/month)	0	16	577.96	545.498	136.374
	1	99	610.92	615.81	61.891
Independent Wealth W	0	17	0	0	0
	1	114	0.07	0.257	0.024
Independent Wealth H	0	17	0.12	0.332	0.081
	1	115	0.11	0.318	0.03
Valuable Assets (more than \$100K)	0	17	0.12	0.332	0.081
	1	117	0.24	0.429	0.04

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Joint Legal Custody (1=yes)	0	17	0.88	0.332	0.081
	1	122	0.9	0.299	0.027
Attorney's Fees (0=each party)	0	17	0.35	0.493	0.119
	1	120	0.22	0.414	0.038
Physical Custody Arrangement(1=W, 0=H)	0	17	1	0	0
	1	120	0.87	0.375	0.034
Physical custody less than 30% for non-custodial (1=yes)	0	17	0.53	0.514	0.125
	1	114	0.27	0.447	0.042
Child Support Deviation (Actual awarded, \$/month)	0	13	548.99	395.904	109.804
	1	98	498.74	613.38	61.961
Automatic Adjustment-Kid's Age (1=yes)	0	17	0.76	0.437	0.106
	1	115	0.87	0.338	0.032
Automatic Adjustment-Income (1=yes)	0	17	0.24	0.437	0.106
	1	114	0.4	0.493	0.046
Other automatic adjustments (1=yes)	0	17	0.24	0.437	0.106
	1	113	0.19	0.391	0.037
Non-Automatic Adjustments (1=yes)	0	17	0.06	0.243	0.059
	1	115	0.23	0.42	0.039
College Expenses (1=yes)	0	17	0	0	0
	1	118	0.31	0.466	0.043
Life Insurance (1=yes)	0	17	0.59	0.507	0.123
	1	121	0.64	0.481	0.044
Alimony (1=yes)	0	17	0.18	0.393	0.095
	1	122	0.07	0.249	0.023
Dependency Exemptions (1=H, 0=split, 3=W)	0	16	0.38	0.5	0.125
	1	120	0.33	0.524	0.048
Disposition of Marital Home (0=to one; 1=equal)	0	8	0.13	0.354	0.125
	1	80	0.25	0.436	0.049
Divided IRA	0	17	0.06	0.243	0.059
	1	124	0.17	0.377	0.034
Complicated Visitation Schedule (number of paragraphs)	0	17	4.24	3.401	0.825
	1	122	5.46	4.75	0.43
Limitation on Removing Kids from State (1=yes)	0	17	0.24	0.437	0.106
	1	123	0.28	0.453	0.041
Religious Education/Observances (1=mentioned)	0	17	0.12	0.332	0.081
	1	123	0.23	0.421	0.038
Post-contract litigation (prior to divorce--temporary support or	0	17	3.24	2.728	0.662

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custody (1=yes)	1	124	1.35	2.041	0.183
	0	17	0.94	0.243	0.059
Post-divorce litigation (1=yes)	1	124	0.6	0.491	0.044
	0	17	4.59	3.554	0.862
How many post-divorce (motions, hearings, etc)	1	124	1.6	2.032	0.182
	0	17	0.12	0.332	0.081
Consensual modifications	1	124	0.32	0.578	0.052
	0	17	0.12	0.332	0.081
Ongoing business/partnership	1	124	0.05	0.215	0.019
	0	0(a)	.	.	.
Ongoing Tax Issues	1	0(a)	.	.	.
	0	17	8.1876	5.77772	1.4013
Length of Marriage (years & fraction)	1	118	11.3969	6.97762	0.64234
	0	17	0.0375	0.15071	0.03655
Time lapse between agreement and divorce	1	122	0.056	0.10924	0.00989
	0	17	23.4402	8.97027	2.17561
Age of wife at time of marriage	1	116	23.1011	9.67024	0.89786
	0	15	19657.5467	37265.50561	9621.91217
Difference between H and W income	1	101	12858.4236	37282.6129	3709.75864

**Table III. Predicting Fault (Abuse of Spouse or Child, Adultery seen in file)**

Predicting Fault (Abuse of Spouse or Child, Adultery seen in File)						
	B	S.E.	Wald	df	Sig.	Exp(B)
RELIGIOU	1.623	.599	7.333	1	.007	5.070
AGEDIFF	.109	.082	1.745	1	.187	1.115
ASSETS	-2.251	1.102	4.173	1	.041	.105
Constant	-2.287	.483	22.456	1	.000	.102
Cox & Snell R <sup>2</sup> =.119						

**Table IV. Predicting Provision Specifying Automatic Adjustment of Child Support Based Upon Income (Logistic Regression)**

Predicting Provision Specifying Automatic Adjustment of Child Support Based Upon Income					
Variable	B	Std. Error B	Beta	T	Sig. T
Number of Cases in Samples for Wife's Attorney	.294	.089	10.856	1	.001
Fault Ground	-1.506	.718	4.403	1	.036
Independent Wealth of Wife	-1.656	.960	2.974	1	.085
(Constant)	-1.193	.401	8.837	1	.003
Cox & Snell R2 =.166					

**Table V. Predicting Number of Consensual Modifications, with Automatic Adjustment of Child Support Based on Income Endogenous<sup>88</sup>**

Predicting Number of Consensual Modifications, 2SLS (Automatic Adjustment Based on Income)					
Variable	B	SE B	Beta	T	Sig T
Predicted Probability of Provision that Child Support Adjusted for Income Variation	.601581	.322670	.200769	1.864	.0651
Continuing Business or Partnership	2.275271	1.138764	.872611	1.998	.0484
Number of Children	.200629	.086073	.240820	2.331	.0217
(Constant)	-.378783	.214621		-1.765	.0805
System R2 = .337; R2 for Equation (Adjusted) =.088.					

<sup>88</sup> Instrumental variables are number of cases for wives handled by wife's attorney, fault grounds, independent wealth of wife and number of children.

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**Table VI. Prediction of Provision Specifying Adjustment Based Upon Age of Child (Logistic)**

Prediction of Provision Specifying Age-Based Adjustment

Variable Name	B	S.E.	Wald	df	Sig.	Exp(B)
Dollar Deviation from Child Support Guidelines	.006	.002	9.819	1	.002	1.006
Difference Between Husband's and Wife's Income	.000	.000	1.453	1	.228	1.000
Constant	.091	.551	.027	1	.869	1.095

Cox &amp; Snell R2 = .145

**Table VII. Predicted Number of Post-Divorce Litigation Events, Adjustment Upon Age of Child Endogenous<sup>89</sup>**

Predicted Number of Post-Divorce Litigation Events, 2SLS (Age-Based Adjustment)					
Variable	B	SE B	Beta	T	Sig T
Predicted Probability that Adjustment for Child's Age	-8.349066	4.521190	-.900711	-1.847	.0738
Number of Cases Husband's Attorney Handled for Men	.406455	.287559	.284257	1.413	.1669
(Constant)	7.707467	3.925458		1.963	.0581
System R2 =.43174; R2 for Equation (adjusted) =.13709					

<sup>89</sup> Instrumental variables are: fault grounds, religion provision in agreement, age of wife at marriage, length of marriage, non-custodial parent has less than 30% time with child, independent wealth of husband, and number of husband cases handled by attorney for husband in sample.

**Table VIII. Predicted Number of Post-Divorce Litigation Events, Adjustment Upon Age of Child Endogenous, Includes Child Support Deviation<sup>90</sup>**

Predicted Number of Post-Divorce Litigation Events, Adjustment Upon Age of Child Endogenous, Includes Child Support Deviation					
Variable	B	SE B	Beta	T	Sig T
Predicted Probability that Adjustment for Child's Age	-3.024042	1.864674	-.326239	-1.622	.1144
Number of Cases Husband's Attorney Handled for Men	.504775	.224963	.353017	2.244	.0317
(Constant)	3.183292	1.713702		1.858	.0722
System R2=.42469; R2 (Adjusted) =.16645					

**Table IX. Prediction of Whether or Not There was Post-Divorce Litigation (Logistic)**

Prediction of Whether or Not There was Post-Divorce Litigation						
	B	S.E.	Wald	df	Sig.	Exp(B)
Fault Grounds	1.219	.732	2.774	1	.096	3.385
Handled by Husband's and Wife's Attorneys in Sample	.111	.039	8.014	1	.005	1.117
Provision for Automatic Adjustment for Age	-1.007	.471	4.559	1	.033	.365
Religious Education Provision	-1.017	.510	3.970	1	.046	.362
Constant	.099	.391	.064	1	.801	1.104
Cox & Snell R2=.138						

<sup>90</sup> Instrumental variables are fault grounds, religion provision in stipulation, age of wife at marriage, length of marriage, non-custodial parent has less than 30% time, independent wealth of husband, number of cases for husbands in sample handled by attorney for husband, and dollar deviation from guidelines for child support.

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