VIEWS OF ONTARIO LAWYERS ON FAMILY LITIGANTS WITHOUT REPRESENTATION

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Abstract: The increasing number of family litigants without legal representation poses significant challenges for lawyers, litigants and the justice system. This paper reports on a survey of 335 Ontario family lawyers about their experiences with litigants without legal representation and related access to justice issues. These lawyers report an increase in the number of family litigants without lawyers. They attribute this increase principally to lack of eligibility for legal aid and an inability to afford counsel, but also recognize such factors as a perception that lawyers increase the expense and complexity of resolving cases, and litigants' belief that they can adequately represent themselves. Participants also recognized that some litigants have a desire to personally confront a former partner. Overall, lawyers report that cases involving litigants without representation take longer and are more costly for their clients to resolve; they also report worse outcomes for many of those without lawyers.

In an effort to look forward, the survey also reports on the lawyers' opinions about both public and private responses to the lack of legal representation in the family justice process. While such developments as mandatory information sessions and the increased use of limited scope retainers have had positive effects, the authors

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argue that concerns created by lack of representation, especially for vulnerable litigants and their children, must be better addressed.

INTRODUCTION

The Challenges of Lack of Representation for Family Litigants

While the increasing trend in many jurisdictions of family litigants without lawyers[1] has received only limited attention in scholarly literature, the number of litigants without lawyers is having a profound effect on family court judges, family lawyers, litigants both with and without lawyers, and on the very nature of family justice. As the American scholar Zorza concludes: "there is absolutely no reason to believe that the phenomenon of self-representation is going to go away. On the contrary, there is every reason to believe that it will increase".[2]

In Ontario, Chief Justice Warren Winkler recently commented on the state of the family justice system:

> There are two noteworthy trends occurring in the family justice system. Those that can afford it are increasingly choosing methods of private mediation or arbitration where they seek a faster and more efficient process over which they have greater control. Meanwhile, the public court system is increasingly dominated by self-represented litigants. These litigants either commence their litigation in this manner or are forced to represent themselves after exhausting their funds mid-way through the process. More than half of family law litigants are self-represented. In some Toronto area courts, over 70 percent are reported to be self-represented.[3]

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[1] In Canada, there is a tendency in the literature to distinguish between litigants who can afford a lawyer but who choose to represent themselves – the self-represented – and those who are unable to afford a lawyer – the unrepresented – though in practice this is often a difficult distinction to make: see D.A. Rollie Thompson & Lynn Reierson, "A Practicing Lawyer's Field Guide to the Self-Represented" (2001) 19 Can Fam LQ 529. The literature in the United States uses the term "*pro se* litigant" and in Australia and England the term, "litigant in person" or "LIP" is used.

[2] Richard Zorza, "An Overview of Self-Represented Litigation Innovation, Its Impact, and an Approach for the Future: An Invitation to Dialogue" (2009) 43:3 Fam LQ 519, at 519 [Zorza].

[3] Chief Justice Warren K. Winkler, (Remarks, delivered at the 5th Annual Family Law Summit, Toronto, Ontario, June 17, 2011), [unpublished].

These remarks reflect the stark reality of the development of a two-tiered family justice system, where those seeking relief from family courts are most often those without legal representation.[4]

Because the only Ontario government data collected on legal representation in the Family Courts is based on reports at the time of filing an application in court, it is not possible to obtain a totally accurate picture of the extent to which family litigants in the province do not have lawyers. Nevertheless, this data source makes clear that a substantial portion of family litigants do not have lawyers. Based on this data source, between 1998 and 2003, an average of 46% of litigants in the Ontario Family Courts were not represented by a lawyer,[5] rising to 62% in 2006-2007, before falling somewhat to 54% in 2009-2010, the last year for which there is data available.[6] A 2010 Ontario survey of households identified family law matters as one of the most significant areas where individuals had legal problems without adequate access to legal advice.[7] Given the importance of family cases for parents, children and society as a whole, the lack of access to legal advice and representation is a major concern.[8] It is profoundly concerning that many of those embroiled in often traumatic, life-altering family disputes, are having difficulties gaining access to

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[4] Also see Ontario Law Commission, Towards a More Efficient and Responsive Family Law System (Toronto: Law Commission of Ontario, February 2012), online: Law Commission of Ontario <http://www.lco-cdo.org/en/family-law-reform-interim-report >.

[5] Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30:2 Queen's LJ 825 at 826-827.

[6] Data obtained from Ontario Ministry of Attorney General based on all court filing applications under *FLA/CLRA* and *Divorce Act* applications in the Ontario Court of Justice, the Family Court and the Ontario Superior Court.

[7] Ontario, Law Society of Upper Canada, *Listening to Ontarions: Report of the Ontario Civil Legal Needs Project,* (Toronto: The Ontario Civil Legal Needs Project Steering Committee, 2010). Also see, American Bar Association, Standing Committee on the Delivery of Legal Services, Responding to the Needs of the Self-Represented Divorce Litigant (1994); Canadian Forum on Civil Justice, *Alberta Self-Represented Litigants Mapping Project: Final Report* by Mary Stratton (2007) ; Alberta Rules of Court Project, *Self-Represented Litigants: Consultation Memorandum 12.18* (Edmonton: Alberta Law Reform Institute, 2005) [AB LRI Memorandum 12.18]; Nova Scotia Department of Justice, *Self- Represented Litigants in Nova Scotia: Needs Assessment Study* (2004); Community Services Consulting Ltd., *A Report on the Evaluation of the Alberta Law Line* (2006); John Malcolmson & Gayla Reid, *BC Supreme Court Self-Help Information Centre: Final Evaluation Report* (2006); Legal Services Society of BC, *Civil Hub Research Project: Needs Mapping* by Gayla Reid and John Malcolmson (2007).

[8] See, Alberta Law Reform Institute, *Alberta Rules of Court Project: Self-Represented Litigants,* (Edmonton: 2005). Also, Hazel Genn & Alan Paterson, *Paths to Justice, Scotland* (Oxford: Hart Publishing, 2001); D.A. Rollie Thompson & Lynn Reierson, "A Practising Lawyer's Field Guide to the Self- Represented" (2002) 19 CFLQ 529. The only national study on unrepresented litigants in Canada to date is a study of adult accused in nine provincial criminal courts conducted by the Research and Statistics Division of Justice Canada: Canada, Department of Justice, *Court Site Study of Adult Unrepresented in the Provincial Criminal Courts,* Part 1 & 2 (Ottawa: Department of Justice, 2002). See also: Ab Currie, "A Burden on the Court? Self-Representing Accused in Canadian Criminal Courts" (2004) 11 JustResearch, online: Department of Justice Canada <http://www.justice.gc.ca/eng/pi/rs/rep-rap/jr/jr11/p5a.html>.

Ontario's family justice system and proceed without adequate legal advice and assistance.

Over the past few years in Ontario, members of the judiciary, government officials, and professional organizations have been engaged in extensive discussions about the reform of the family justice process, and in particular over concerns about access to justice and lack of legal representation. [9] As discussed and assessed in this article, the Ontario government undertook measures to better address issues of access to information and assistance for those with family disputes in 2011, and expenditures by the Ministry of the Attorney General on family justice support services more than doubled over the past few years.[10]

Despite growing challenges to the justice system and society more broadly, as a result of inadequate representation in family disputes, there has been little research into the causes and effects of this problem. In an effort to address this gap in understanding, the authors are undertaking a number of related research projects in Ontario and across Canada. This article reports on our first study, a survey of the perceptions and experiences of Ontario family lawyers with cases where only one party has representation.[11] The authors are not aware of any similar reported studies, giving this research significance not only for Canada, but internationally as well, because lack of representation in family cases is a growing problem in many jurisdictions.[12]

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[9] See Ontario, *Creating a Family Law Process That Works: Final Report and Recommendations from the Home Court Advantage Summit* by Barbara Landau et al (2009), online: Ontario Bar Association <http://www.oba.org/en/pdf/011-0022_Family%20Law%20Process%20Reform%20Report_final_web.pdf>. [Landau, *Home Court Advantage*] This document was endorsed by three important professional organizations: the Ontario Bar Association (OBA), the ADR Institute of Ontario (ADRIO), and the Ontario Association for Family Mediation (OAFM).

[10] See Ontario Ministry of the Attorney General, News Release, "Family Law Reform in Ontario", (9 December 2010) online: <http://news.ontario.ca/mag/en/2010/12/family-law-reform-in-ontario.html>. Expenditures on family justice services provided at the seventeen Unified Family Court sites were about $2.6 million per year.

[11] The second study, being carried out in cooperation with Pro Bono Students Canada, is a project to survey family law litigants, both those without lawyers and those who are represented, at six family law courthouses in four Ontario centres (i.e., Kingston, Toronto, London and Windsor) to better understand why some litigants are without lawyers and to learn about their experiences with family justice services available in the province. The third study is a survey of Canadian judges and their experiences with the self-represented.

[12] See Sande L.Buhai, "Access to Justice for Unrepresented Litigants: A Comparative Perspective" (2009) 42 Loy LA L Rev 979. Professor Julie McFarlane of the University of Windsor is presently conducting qualitative interviews with self-represented litigants in B.C., Alberta and Ontario to hear their views and experiences of being self-represented in family law disputes. The website for this study is: <www.representing-yourself.com>.

(A) The Study and Respondents

The study was conducted using an Internet-based survey inviting responses from all of those who registered for the 2011 Ontario Family Law Summit, a major continuing education program for family lawyers held June 16-17, 2011 in Toronto, and sponsored by the Law Society of Upper Canada, which regulates lawyers in Ontario. There were approximately 800 attendees and faculty who registered for the Summit; over half of the participants attended in person and the balance viewed the program by way of webcast. Of these attendees, 335 registrants (42%) responded to the survey.[13] This is a relatively high response rate for a survey of a busy professional audience, and reflects the deep concerns of family lawyers about this issue.

Of the respondents, 57% were females and 43% were males with an average of 19 years of practice experience as lawyers;[14] 84% practiced exclusively in the area of family law. Over half of the respondents (54%) reported that they did not do any legal aid work and another 20% had a practice that was one third or less legal aid cases; only 6% reported that their practices were exclusively legal aid work, being either in private practice or Ontario Legal Aid staff lawyers. It is interesting to note that the majority of respondents were highly experienced family law lawyers, more than half of whom do not do any legal aid work or only dedicate a limited amount of time toward legal aid cases. This seems to support the view of the Chief Justice that there is a two tiered justice system – one for those who can afford justice and one for those who may be struggling to find justice.

Respondents to the survey were assured of confidentiality, and no identifying information was requested. The survey contained 18 specific questions (5 forced choice responses, 12 questions which allowed for additional reasons or comments, and a one final question inviting additional general comments). After some demographic questions, respondents were asked about their perceptions of the incidence, reasons for, and effects of lack of representation in family cases, as well

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[13] The invitation to respond was sent out by email before the program; 167 responses were received before the Family Law Summit program. A reminder to respond was made at the Summit, resulting in a further 168 responses. There was a short presentation on the pre-conference preliminary responses at the Summit; the responses pre and post conference did not vary appreciably.

The survey was based on a purposive sample. Of the 335 participants who responded to the survey, 280 (84%) answered all the questions. Therefore, each question has a different total number of responses. The survey was designed to elicit both quantitative and qualitative responses. Therefore, narrative quotes are being used to enrich the data analysis.

[14] A very small number of registrants were not practicing lawyers, including paralegals, mental health professionals, legal academics, judges and one or two individuals who were themselves family litigants without lawyers. The instructions asked for only lawyers to respond, and the comments in the responses and quantitative answers to the demographic questions suggest that only practicing lawyers did respond.

as their experiences with parties without lawyers and their use of limited scope retainers. This was followed by questions seeking opinions about Ontario's new mandatory information program for family litigants to help address the problem of lack of representation, and the possibility of allowing licensed paralegals to have greater involvement in family cases.

Part II of this paper reports on the perceptions of the respondent lawyers about the extent and causes of the lack of representation, and on the effects of lack of representation for those without lawyers, those with lawyers, and the justice system. Part III reports on lawyers' perceptions of government programs and changes in the practice of law that are intended to address lack of representation and improve access to justice. In Part IV, the authors conclude by arguing that there need to be better efforts from government, the Bar and the courts to better address problems caused by the lack of representation in the family justice system.

The Extent, Causes & Effects of Lack of Representation

(A) An Increase in Family Litigants Without Lawyers

On average, the lawyers reported that 22% of their family cases over the previous year had no lawyer at all on the other side. Another 26% of the cases had no lawyer on the other side for part of the case. Only 4% of the lawyers reported no experience in the past year with family cases without a lawyer for the other party. Because these figures do not reflect cases where neither party had a lawyer, this data significantly understates the extent of lack of representation in Ontario's family justice system.

When asked whether the number of family litigants without lawyers had increased in the previous five years, 37% believed that there were many more such cases, 44% reported more cases, and just 19% thought that the rate of unrepresented parties was the same. No one reported fewer litigants without lawyers.

(B) Why Family Litigants Don't Have Lawyers

The question why family litigants are without lawyers is complex. There are many reasons for a person to be without a lawyer, and some individuals may not themselves be fully aware of their own rationale for not having a lawyer. The respondents to this survey clearly believe that the inability to afford a lawyer and the narrow eligibility criteria for Legal Aid in family cases is the primary factor. However, the lawyers also recognize a range of other factors.

Respondents were given five possible reasons for family litigants to not have a lawyer, as well as the option of indicating "other reasons." The lawyers were then asked to identify those reasons which they thought were a significant factor, and to provide a ranking if they believed that more than one reason is important. The results were as follows:

	Reasons identified by respondents for family litigants not having a lawyer	
Factors (n=297)	Ranked most important	Ranked as one reason (significant or most important)
A - they cannot afford a lawyer and are not eligible for legal aid	79%	96%
B - they think they know enough family law to do it as well or better themselves	10%	50%
C - they think lawyers will increase the adversarial nature or complexity of the process	2%	29%
D - they think that having lawyers will increase time/expense of resolution	7%	52%
E - they want to directly confront former spouses/partners themselves	-	27%
F - any other reasons	2%	14%

The responses to this question reveal that a significant majority of lawyers (79%) believe that lack of the ability to afford a lawyer is the most important reason for family litigants to be unrepresented, and almost all (96%) consider this to be an important factor.

Thus, in the terminology used by Ontario's Law Society,[15] most family litigants should be viewed as "unrepresented" due to their financial circumstances, because they would have a lawyer if they could afford one. Family lawyers, however, also recognize the complexity of litigants' decisions not to have a lawyer. In some cases, individuals might say that they cannot afford a lawyer, but what they really mean is that they are unwilling, or consider it unwise, to make the financial sacrifices necessary to pay a lawyer.

Half of the survey respondents recognized that the decision not to have a lawyer is significantly influenced by the fact that litigants believe their knowledge about the law and justice system is sufficient to deal with cases on their own. Many family litigants may, accordingly, be viewed, at least to some extent, as "self-represented by choice." The "do-it-yourself" mentality of popular culture, encouraged by the Internet and such television shows as "Judge Judy," has resulted in many individuals believing that they can do an adequate job of representing themselves in court. The increasing availability of information provided by government through the Internet, brochures and court-based information services is also playing a role.[16]

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[15] The Law Society of Upper Canada offers, the following distinctions:

> It is important to distinguish between *an unrepresented party* and *a self-represented party*. An *unrepresented party* is often acting on his or her own behalf because they have no choice-the party does not qualify for Legal Aid and cannot afford a lawyer. Even if the party did have a lawyer at one time, they find that they are now representing themselves as they no longer have the funds to continue paying for representation.
>
> *Self-represented* parties represent themselves because they want to - they have an agenda that they wish to follow and believe that they are able to represent themselves. Although this [L.S.U.C.] paper generally refers to self-represented parties, some of the remarks are equally applicable to unrepresented parties.

Law Society of Upper Canada, "How to Avoid the Complaint-Dealing with Unrepresented and Self-represented Parties in Family Law" (Last revised October 2008), online: <http://rc.lsuc.on.ca/pdf/kt/avoidComplaintFamily.pdf>.

[16] There is also a growing number of non-government websites that provide information to family litigants. Some of these sites may have dubious value, but others, most notably the site, mysupportcalculator.ca, operating since April 2011 provide valuable, reliable information; this latter website provides free access to a simplified version of the Divorcemate commercial computer program that is widely used by lawyers, for a fee. Financial support for the website comes from charging lawyers willing to provide "unbundled legal services" a fee for advertising on the site.

A significant number of lawyers (over half) also believed that, for many individuals, the decision not to have a lawyer is influenced by a perception that lawyers may increase the adversarial nature, complexity, time or expense necessary to resolve their cases. If this perception is accurate, the legal profession may have to do a better job of providing real value for clients' money, or at least ensuring that family litigants are aware of the value of a lawyer's services.

More than a quarter of responding lawyers (27%) believed that a significant factor for some litigants who decide not to have legal representation in a family case was the desire to directly confront a former partner in court, though only one respondent ranked this as the most important factor. As discussed in the next section, many lawyers believe that there are gender differences in the reasons that family litigants are not represented, in particular that men are more likely to want to directly confront a former partner. The following comments from respondents help explain why individuals do not have lawyers in family cases:

> *They [those without lawyers] disagree with the advice they have been given by the lawyers they have seen; they are stubborn and/or irrational; [They] cannot see the value of spending money to get the problem ... properly resolved. They have sources of free advice such as the Family Law Information Centres and the Internet.*

> *To delay resolution of the case, to make the spouse feel sorry for them [and] to make life worse for their spouse; and they simply don't want to spend the money on counsel and believe that by forcing their spouses to spend money on counsel, they'll have the leverage to get a better deal (and/or the sympathy of the court – i.e. the "David/Goliath" effect).*

These comments reflect recognition of a complex interaction of factors that contribute to a family litigant's decision to proceed without a lawyer.

(C) Are there Gender Differences in the Reasons for not Having a Lawyer?

Respondents were asked whether they believed that there were different reasons for men and women not having a lawyer; 62.5% reported that they did not think there were differences, while 37.5% reported that they believed that different factors influence the decisions of men and women to proceed without counsel. There was a significant association found between gender and self-representation, ($x^{2=}$.016). That is, the respondents who believe that there are differences overwhelmingly reported that women are likely to be unrepresented because they are not able to afford a lawyer and are ineligible for legal aid. Men, however, were seen as more likely to be

self-represented by choice, characterized by one respondent as "know it alls." The following comments illustrate the common themes of lawyers who believe that there are differences in gender as reasons for lack of representation:

> *For women it is due to money concerns and confusion and I am not sure for the men, though the cost is definitely a concern [for men as well].*
>
> *Women can't afford representation; men tend to think they know the law.*
>
> *Men tend to be more confrontational.*

Although these comments and the quantitative responses suggest that men may be somewhat more likely to choose to be self-represented, while women's decisions to proceed without a lawyer are more likely to reflect their economic circumstances, it is still clear that the inability to afford a lawyer is the primary reason for both men and women not to have a lawyer in family proceedings.

(D) Effect on the Represented Party of Dealing with a Party without a Lawyer

Respondents were asked a number of questions about the effects on their clients and themselves of having a family case where the other party is without a lawyer. The responses to these questions reveal that when one party does not have a lawyer, this generally increases the costs for the party with a lawyer and results in needing a longer time to resolve the case. Lawyers also reported that the party without representation may not achieve as favourable an outcome for themselves as they could expect with representation.

The vast majority of respondents (91%) expressed a concern that when the other party has no lawyer, this increases the costs for the represented party, and many reported that their clients are usually (42%) or always (34%) upset about the increase to their legal bills as a result of the other party being self-represented, while only 4% reported that this is rarely a concern. Understandably, it is not possible for lawyers to give precise figures for the increased costs to their clients if the other party does not have a lawyer, but the lawyers' comments in response to a question about the amount of added costs are revealing. The narrative comments varied from "a few hundred dollars" to "thousands because they [self-represented litigants] don't know, understand or follow the rules." Others commented: "I can't give a dollar amount because generally self-represented parties do not respond reasonably to requests for adjournments, information, etc. Generally self-represented persons want to be 'in front of the judge' which increases the costs substantially," or "[It costs t]housands

of dollars because of the need to prepare materials, leniency of the court, explaining basics of family law, failure to make reasonable settlements." While most lawyers believe that having a party without a lawyer increases the costs for their client, this view is not universal, as revealed by the comment that: "Lawyers are as likely to needlessly increase costs as self-represented litigants. The methodology and motivation for doing so, of course, is quite different."

Respondents were also asked about the added challenges they face when the other party does not have a lawyer. The lawyers usually believed that those without lawyers often have "unrealistically high outcome expectations," with 28% reporting this as occurring always and 56% reporting this as occurring usually; only 1% reported that they rarely find that those without lawyers have unrealistic expectations.

It is also clear that those without lawyers often look to the lawyer for the other party as a source of information about law and procedure, with 9% reporting this occurring always, 38% reporting this occurring usually, and 43% reporting that it occurs sometimes. By contrast, only 10% reported that those without lawyers only look to them for information rarely. Judging by these survey results, lawyers are concerned that a party without a lawyer may misunderstand communications (either unintentionally or deliberately), and thus are more careful to document their communications with an unrepresented party, which typically adds to the expense and time it takes to resolve a case. A significant majority of lawyers (75%) reported that they are always more careful to document communications with a party without a lawyer, 18% report more carefully documented communications as their usual practice, and only 1 respondent reported that this occurs rarely.

While counsel facing a party who does not have a lawyer on the other side is likely to be involved in more court appearances, case conferences, and delay in resolving the case, most respondents report that a party without representation is more likely (54%), or much more likely (24%) to ultimately resolve a case without a trial, because those who are unrepresented are often reluctant to take a matter to trial. One lawyer commented:

> *Unrepresented litigants rarely are capable of engaging the system effectively and can often be out-maneuvered. Frequently unrepresented litigants tire of the process before its completion and irretrievably prejudice their cases by disengaging from them.*

Furthermore, although those who are unrepresented as a result of economic circumstance may be less likely to take a dispute to trial, whenever they appear in

court, litigants without lawyers take up more time. Thus, when litigants without lawyers are in court on motions or at conferences, their case takes more court time to resolve than if they had a lawyer, resulting in higher costs for the represented party, especially if the case does go to trial. As one respondent explained:

> *They frequently cause unnecessary expense of response to inappropriate communications and or require examination for discovery. They engage in other costly steps which ultimately result in increased costs in a final settlement as the judiciary loathe to order court costs when consent settlement obtained even if at eleventh hour.*

A number of lawyers expressed concern about how judges deal with cases where one party is without a lawyer and the other party has representation. One lawyer observed that judges have to be more careful when there is a self-represented litigant and that this can impact on their client:

> *The different treatment of unrepresented parties during trial is concerning as the appearance of bias is problematic. Judges help with questioning etc. This is inappropriate. There are serious cost considerations that need to be better acknowledged by the judiciary. The prolonged process and lengthened trial due to unrepresented party having no knowledge of how to conduct a trial or lack of preparedness needs to be addressed regardless of the outcome of the trial. If the unrepresented party won but the trial took 5 days rather than 2 days because he/she was so unprepared and took hours locating documents etc., then this should be considered [in making a costs award]. It is not. Judges are hesitant to blame the unrepresented party for the delay and quite frankly overly eager to help them during the process. This may be grounds for appeal but what client really has the monies to appeal?*

This opinion was echoed by another lawyer, who believed that, "self-represented clients take up far more court time because they need to be educated by the judge every step of the way."

Similarly, the survey responses make it clear that lawyers find themselves in a difficult position when the other side has no lawyer. There are cases where a lawyer is justified in the course of negotiations to suggest to the party without a lawyer that a reasonable offer to settle is being made. While the lawyer will invariably urge the other party to seek independent legal advice before accepting any

offer, the unrepresented party rarely does so. Although it is preferable for lawyers to only make settlement offers to those without lawyers before a judge at a conference, this adds to the expense for the represented party and the justice system, and leaves it to the judge to attempt to advise the party without a lawyer that the offer is reasonable.

The quantitative responses and comments make clear that if one party does not have a lawyer and the other one does, this generally imposes costs and burdens on both the justice system and on the party with representation.

(E) Outcomes for Those Without a Lawyer

The general perception of responding lawyers is that, although judges make a substantial effort to ensure there is fair treatment for those without legal representation, the outcomes achieved by those without lawyers, whether in court or as a result of a settlement process, are often less advantageous than if they had representation.

The majority of respondents (57%) believe that those without lawyers are treated "very well" by the judiciary; another 31% report that they get "good treatment" and 10% consider it "satisfactory." Only 1% of lawyers report that family litigants without lawyers receive "poor treatment" from the judiciary. Lawyers also report that their clients are often upset by what they perceive as judges "bending over backwards" to be fair to the party without a lawyer; 47% report that this is always or usually a concern, and 41.5% report that this is sometimes a concern. Only 10.5% reported that this is rarely a concern, and less than .7% of lawyers reported that they have never had this experience with a client.

The majority of respondents report that, in comparison to similarly situated parties, a party without representation achieves a worse outcome whether the case settles (57%) or goes to a hearing or trial to be resolved by a judge (58%). Although the quantitative part of the survey did not ask the reasons for the poorer outcomes, the comments reveal that a major problem for those without lawyers is that they do not have a good idea of what evidence is persuasive, or fail to introduce it in court. While judges are often perceived as being tolerant, perhaps too tolerant, about failure of those without lawyers to follow procedural rules, some responses suggested that these litigants' lack of awareness about options and remedies affects their outcomes. Further, some self-represented litigants are seen to be "the[ir] own worst enemies" – revealing from demeanor and conduct in court why they should not get the relief that they seek.

In contrast, most of the other respondents believe that the outcome is about the same for unrepresented parties, and some lawyers even believe that those without lawyers may be able to achieve better outcomes through settlement (15%) or trial (16%) than those with lawyers. Some of the comments from respondents help explain why a litigant without a lawyer would generally have a worse outcome than one with a lawyer:

> *Worse results because they do not know what belongs in a parenting plan.*
>
> *Often worse outcomes because there is not enough detail to have a useful enforceable order.*
>
> *If they take a reasonable child focused position they achieve as good or better results but if not sometimes they just give in or prolong litigation and then give up, with worse outcomes for themselves.*

Other comments explain why those without lawyers may sometimes achieve results as good as or better than if they had a lawyer:

> *[A s]elf-rep can take an unreasonable position, and with no financial disincentive to them, they can wait and see if the represented party runs out of money or just gives in, thereby achieving a better result (from the self-rep's perspective).*
>
> *[There may be] slightly better results if the matter is resolved by a judge. The judge can add the creative suggestion to overcome an impasse.*
>
> *Usually, judges will bend over backwards to ensure that a self-represented client is not unduly prejudiced by the decision. This forces me to ensure that I have covered all of the bases necessary for my client, and also try to have the judge satisfied that the decision I am seeking is also reasonable for the unrepresented client and the best interests of the child.*
>
> *The know-it-all/arrogant self-rep does not do well in court, [but] the sympathy-seekers can do well with some judges.*

Some of the comments explaining the outcomes for parties without a lawyer focused on the difficulty that they have in presenting a case in court or the role of the judge:

> *If the represented party takes it all the way to a trial, then the self-rep's strategy of being stubborn and taking an unreasonable position can backfire, resulting in a decision less favourable to the self-rep. There may even be cost consequences, although it may turn out to be impossible to collect these costs.*

> *I think the self-represented litigant might be at a disadvantage in a trial situation. Sometimes people say things on their own behalf which would never be said if they had a lawyer because the lawyer realizes, from a more objective perspective, that what the client desperately wants to say actually puts them in a poor light.*

The comments and quantitative responses clearly reveal that lawyers believe that, generally, those without legal representation achieve worse outcomes for both economic and child related issues than if they had representation, whether a case is settled or resolved by a judge.

(F) Outcomes for Victims of Family Violence Without Lawyers

Not surprisingly, only 44% of the respondents believed that victims of family violence without a lawyer get adequate protection if their case settles without a judge deciding the case. One lawyer's comment reflected a concern that victims of domestic violence who do not have representation, typically women, may be especially vulnerable to making unfavorable economic settlements: "A victim may be afraid to be engaged in a long battle with the ex and so may be inclined to settle for less." Another lawyer observed that it is unrealistic to expect judges to protect those without lawyers from making poor settlements: "It is not the role of the judiciary to protect victims from entering unreasonable settlements that they are coerced into by abusive partners. Judges do not tend to look beyond a signed consent."

Some respondents suggested that judges should have a role in dealing with family violence even in cases that are settled, such as one lawyer who observed:

> *The judge still has to approve minutes of settlement. If, for instance, the pleadings allege domestic violence with charges being laid, and request supervised access to children, but the minutes of settlement state that the parties have shared custody on*

> *a week about schedule, the judge might not be prepared to approve the minutes without further evidence put before the court. The judge would have to be satisfied that the alleged victim was not forced to sign the minutes.*

In light of such views as those expressed above, it is not surprising that 70% of respondents believed that adequate protection is afforded to victims in family cases resolved by a hearing. Although the comments of respondents reflect a belief that victims of family violence who do not have a lawyer may be more likely to be protected if they have a hearing, they also recognize that this is not always the case. For example, one lawyer commented that:

> *Some Judges can take a more active role to ensure a woman is not unnecessarily exposed to frequent access exchanges, but abuse victims are often unwilling (for reasons of fear) or unable (for failure to report) to present even a glimmer of evidence for a Judge to rely on in rendering a decision to help protect themselves and the children.*

Other respondents noted that there are different levels of protection within the court system: "[i]f for example mediators are specifically trained to identify and deal with such issues, then there is adequate protection most of the time," whereas, "many judges have no idea at all of the psychological issues related to people who claim to be victims of violence. It is refreshing to see the odd judge who understands the nonsense."

On the other hand, some comments suggested that judges may be ready to make orders that protect victims of violence, such as the observation of one lawyer who stated: "Lots of judges hand out restraining orders like candy, and although the actual effectiveness of the those orders is open to debate, as far as getting from the court what the court is able to give, victims of violence don't seem to be having too much difficulty."

Despite this type of comment, the quantitative survey results and comments generally raised concerns about the negative effects of lack of legal representation for victims of family violence[17] and their children, especially those who maybe feel

[17] This survey of lawyers did not directly address the effect of lack of legal representation on those who are accused of family violence, though that is an important issue and one which we are exploring in our on-going survey of family court litigants. One lawyer in this survey did, however, express concerns that the courts may be insufficiently sceptical of those claiming to be victims of family violence, observing:

pressured or intimidated by the lack of representation into settling their case. Even if victims bring their cases to court, there will be concerns that the judge will not have adequate evidence to make a decision that protects victims and promotes the best interests and safety of their children.

Assessing Responses to the Lack of Representation

(A) Opinions on Limited Scope Retainers and Use of Paralegals

The last few specific survey questions were aimed at learning about family lawyers' experiences with new programs and strategies that are intended to address concerns about the lack of access to legal services in family cases. While these innovations have the potential to improve access to legal services, each is controversial, and has costs as well as advantages. It is important to know of the receptivity and concerns of the bar to these types of changes, since lawyers are generally well placed to comment on these reforms. Further, although the economic interests of lawyers may colour some of their perceptions and comments, without the support of lawyers, it may be difficult – and in the case of limited scope retainers, impossible – to effect change.

One important, but controversial, development is the use of "limited scope retainers", or the "unbundling of legal services" by family lawyers. In cases where this approach is used, a lawyer is not retained to provide all of the advice and legal representation, but rather is retained to provide limited advice or handle specific tasks, such as drafting documents for one stage, or arguing one motion.[18] While potentially challenging for both lawyer and client, and clearly not as desirable as full representation for either, unbundling of legal services in family cases seems to be becoming a more common practice, as reflected in the finding that a majority of respondents (61%) did some limited scope retainer work in family cases. In this survey, 39% of the respondents reported no use of limited scope retainers, while 44% indicated that this type of work is 10% or less of their family cases. However, for 15% of respondents, limited scope retainers comprise 11% to 50% of their family practices, while 1% reported that over half of their family practice is based on this type of work, and another 1% reported that their entire family practice is based on limited scope retainers.

> In my experience, "victims of violence" is more imagery than reality. It is unfortunate that the legal system virtually pushes people into defining themselves as victims when in most cases they are not. The concept is overused to posture in front of the Court, mostly by psychologically disturbed women.

[18] See e.g. Elliot A Anderson, "Unbundling the Ethical Issues of Pro Bono Advocacy: Articulating the Goals of Limited-Scope Pro Bono Advocacy for Limited Legal Services Programs" (2010) 48:4 Fam Ct Rev 685; and D.A. Rollie Thompson, "No Lawyer: Institutional Coping with the Self-represented" (2001) 19 Can Fam LQ 455.

While unbundling of legal services is already part of the family law landscape in Ontario, it is not without challenges, given that the same duties of competence, diligence, loyalty, and confidentiality exist for lawyers at all times. Questions remain about the ability to provide competent and ethical advice when working on only a discrete aspect of a case, especially when one may not be aware of all the implications, particularly with respect to support and property issues.[19] Moreover, given the challenges that many litigants face in court with respect to literacy, providing a limited scope of legal assistance when more is required raises serious ethical questions.[20]

Another proposal for increasing access to some form of legal assistance is to allow paralegals to provide services in family cases. Most respondents to this survey, however, are opposed to having paralegals not under the direct supervision of a lawyer provide services in family cases. The 82% who were opposed to the provision of any services in family cases by paralegals directly retained by clients offered such comments as:

> *This is a bad idea. I have had some paralegals "litigate" against me in family court "under the table" and they have been worse than self-reps in terms of arguing about everything, refusing to settle or concede points they cannot win and most disturbingly they tend to engage in "vexatious" litigation techniques which greatly drive up costs and destroy the process of settlement.*

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[19] See e.g., Nova Scotia Barristers' Society Administration of Justice Sub-Committee, *The Unrepresented Defendant and the Unbundling of Legal Services* by Don Clairmont (2004) online: <http://sociologyandsocialanthropology.dal.ca/Files/THE_UNREPRESENTED_DEFENDANT_AND_THE_UNBUNDLING_OF_LEGAL_SERV.pdf>.

[20] A similar point made by Justice Harvey Brownstone of the Ontario Court of Justice: "If I point out a paragraph in an affidavit that I think is important and I ask for a response and they are silent, or say they've left their reading glasses at home, that is a clue that they can't read it. Then, I read the paragraph out loud myself. I try to make sure that the party who is having difficulty understanding is made aware of the evidence so they can respond."

Valerie Mutton, "Frozen moment of judicial passion" *The Lawyers Weekly,* 31:26 (11 November 2011). Mutton goes on to add,

> The growing number of self-represented litigants in family court is alarming. But even more alarming is the fact that a significant percentage of self-represented people lack the basic literacy skills to properly understand their proceedings. Canada-wide, 15 per cent of adults have serious problems dealing with any written materials and a further 27 per cent struggle with anything beyond simple reading tasks. That's a staggering 42 per cent of the adult population who have literacy issues - and this statistic plays out in potentially tragic ways each day in our courts.

Among the minority of lawyer respondents (18%) favouring licensed paralegals being permitted to provide even limited services in family cases, the comments generally indicated support for paralegal involvement in only a relatively narrow range of cases:

> *Uncontested divorces where all issues are already resolved by separation agreement or prior court order.*
>
> *Review and negotiation of separation agreements EXCLUDING property issues, preparation, serving and filing of pleadings at Ontario Court of Justice level only, assisting with Family Responsibility applications for refraining orders.*
>
> *Those who are qualified and have taken courses of a substantive and procedural nature should be able to assist in the financial disclosure, in intake, in preparation of documents, and, to the extent that a judge determines that they are qualified and they demonstrate sufficient knowledge and expertise to do so, they should be able to represent the client in court, provided that there is a lawyer who is overseeing their work. I would note that I just came from court and saw a number of lawyers who would not pass any of the above tests, and they were on their feet in court.*

It is clear that the possibility of expanding the use of paralegals in family law matters continues to be a contentious issue with the family bar in Ontario. Given that the majority of lawyers in this sample did not accept legal aid files or provided limited pro bono work, their comments - while important and valid - must be viewed in that context. The reality is that lawyers have a monopoly on providing legal services to family litigants. While paralegals in Ontario do operate side-by-side and are governed by the same rules, they are still viewed by many as not being "real lawyers," and quite possibly a threat to the incomes of some lawyers. There is another reality that must be faced—not all potential litigants can afford lawyers' fees.

(B) Opinions on Mandatory Information Programs and Access to Family Justice

Court-connected information and education programs have been established in many jurisdictions for individuals with family disputes.[21] These programs typically provide

[21] For a review of programs in Alberta, see Canadian Research Institute for Law and Alberta Justice, High Conflict Intervention Programs in Alberta: A Review and Recommendations by Joanne J. Paetsch et al, (Canadian Research Institute for Law and the Family, Alberta Justice, 2007). Most, if not all provinces

basic information about the legal process and different methods of dispute resolution, with some emphasis on the value of settlement and non-adversarial dispute resolution, as well as some information about the emotional effects of separation on children. These information programs can serve a number of important objectives, including promoting the use of alternative dispute resolution and reducing children's exposure to parental conflict.[22] They also provide an introduction to the family justice process for the growing number of family litigants without lawyers.[23] In Ontario, establishing these programs across the province and making attendance mandatory for those who are parties to cases in the family courts is one of the "Four Pillars" of Ontario family justice reform. The Ontario programs only have a single 2-hour session, appropriately referred to as "information" not "parenting education." The limited scope and duration of these programs raises questions about their value.[24]

More than three quarters of the respondents (76%) reported that at the time of completing the survey, a Mandatory Information Program (MIPs) had been established in an area where they practice. Of those with experience with this program, 38% thought that it was not helpful to their clients and 38% thought that it was too early to know, while only 23% believed that it was helpful to their clients in terms of the information provided, and just 8% thought that it made their clients more likely to settle. A slightly larger portion (29%) believed that the programs were helpful for litigants without lawyers. Some of the concerns expressed in comments were broadly dismissive: "[t]he mandatory information program has been in place

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and territories now require mandatory attendance at the parenting education program for separating and divorcing parents prior to receiving a court order.

[22] See e.g. Andrew Schepard & Stephen W. Schlissel, "Planning for P.E.A.C.E.: The Development of Court-Connected Education Programs for Divorcing and Separating Families" (1995) 23 Hofstra L Rev 845.

[23] See Ontario, Minister of the Attorney General, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (1997).

[24] A Mandatory Information Program was established for the Toronto Superior Court in 1998, and this program was extended to all family courts across Ontario in the Spring and Summer of 2011. Everyone who is a party to a case is "required" to attend before appearing in court, with exceptions for urgent cases where safety or removal of children from the jurisdiction is at issue, although the requirement of attendance appears to be only loosely enforced. The program provides a 2-hour presentation by a team of a lawyer and a mental health professional or mediator, addressing the impact of separation on children, and providing a basic introduction to family law and the family justice process, with a particular focus on resolution without litigation. See Ontario, Ministry of the Attorney General, *Family Law Reform in Ontario,* (Dec. 9, 2010) online: <http://www.attorneygeneral.jus.gov.on.ca/english/news/2010/20101209-family-bg.asp>.

In Ontario the MIP program is presented based on a standardized "script". Thus, for example, litigants who do not have children are still required to hear a presentation that addresses issues related to children. Given the short duration of the program, only a limited amount of information can be provided, and there is limited opportunity to explore the value of alternatives to litigation, like mediation.

for years in my superior court. It is generally useless." Others, however, suggested that such programs could be actively detrimental:

> *The clerks of the Court already give a detailed opening remark on first appearance days. Both sides hear the same information at the same time, and there is no delay in the process. In particular in satellite courts the MIP could cause significant delay as the MIP is held on the first appearance day, but only one party can attend - the other has to wait a two weeks - month until the next first appearance day.*

While it is not within the scope of this paper to address the linkages between poverty, different cultural groups and the systemic barriers that exist, it is important to recognize that, as one respondent noted: "The Mandatory Information sessions are held in English with no interpreters available. It frustrates the purpose of MIP as it does not 'reach' many participants."

The final question on the survey was open-ended, asking respondents if they had any further comments that they wished to make about litigants without lawyers in family law cases or access to justice issues. There were 127 responses, raising a broad range of concerns about family justice in general, and more specifically about the challenges faced by lawyers and judges in dealing with litigants without lawyers. While it is impossible to reflect all of the perspectives, issues and concerns raised, some themes were apparent. Many of the comments expressed deep frustration with the family justice system, with particular concerns about Ontario Legal Aid:

> *Legal Aid has been gutted. The system is protracted and the case management system is sometimes impossibly cumbersome for them and hard to understand. I believe that much of what is implemented is done on an experimental basis, has to be abandoned, and the paperwork for the self-represented is now overwhelming and causing some people to be intimidated into settling out of frustration and inability to understand this "user-friendly" system.*

Other participants expressed specific concerns about the introduction of new services as of October, 2011 as part of the "four pillars" approach:

> *The "four pillars" dovetails nicely with the utter elimination of legal aid. The "four pillars" answers the question: what do we do*

> *with unrepresented litigants, the answer being, we shepherd them out of the litigation system and towards "quickly" mediated settlements...That many judges are actually promoting the "4 pillars" is a disgrace to the judiciary. The intent here, clearly, is to distill the law out of the process. There will be a denial of justice to the parties... Most telling is that the "4th pillar" - streamlining the court system - is not being implemented. ... The result: the poor and middle classes get short-changed and shut out of the justice system and the wealthy will settle their disputes privately through arbitration.*

Still other participants commented on more general challenges for lawyers in dealing with litigants without lawyers:

> *Judges give them [self-represented] too much slack, they should have to meet the same standards and rules and consequences as represented parties; it is not fair that the party who is paying for a lawyer is held to higher standards, in effect the paying party is subsidizing "slack" and "breaks" for the unrepresented, and incurring higher costs, and I am forced to provide procedural information (free education) to the other litigant. All this is unfair.*

> *I have concerns that self-represented litigants prolong the court process and consequently increase my client's legal expense. Recently, I had one whose inexperience and ignorance of the litigation process resulted in a Case Conference being adjourned three times and the matter settled before a hearing was held. In the process, another respondent was added to the case (one who should have been added at the start); the Application had to be amended, resulting in an amended Answer. All these delays added to my client's costs. Mediation was also attempted but adjourned three times with the other Respondent ultimately not appearing for the session.*

Some respondents offered suggestions for judges and those responsible for the administration of justice to make changes to better deal with the reality that there will continue to be many family litigants without lawyers:

> *It is the judiciary that bears the brunt of any additional burden caused by self-represented litigants. Hearing times are dramatically lengthened, court dockets are lengthened, and the tremendous patience of our Judges is the main reason the system*

> *has been able to cope as well as it has. Limited paralegal licensing and increased permission for participation in hearings by articling students would alleviate much of the burden.*
>
> *Sometimes the self-represented person acts out their unresolved hostility toward their spouse with opposing counsel. There should be a clear code of conduct for self-represented litigants when interacting/corresponding with opposing counsel and when appearing in court plus appropriate enforcement mechanisms for uncivil and otherwise improper conduct directed at counsel for the opposing Party.*
>
> *At times, when in Court, Judges are almost borderline giving self-represented litigants legal advice. They are too lenient on making self-represented litigants follow the Rules. Mistakes or missed timelines, etc. are often forgiven and this is clearly not fair to the litigants who have retained counsel, paid fees for material preparation, and who at no time would have their mistake overlooked. It creates an imbalance that ends up costing the represented litigant more than it should.*

Other comments consider not only the effects of unrepresented parties on professionals, courts and litigants, but also the burden on children:

> *By and large clients need lawyers who will guide them towards a reasonable and non-adversarial resolution. If the resolution is adversarial and polarizing, regardless of the order that is obtained, the parties and the children pay a very high emotional cost that isn't easy to recover from. An unrepresented person is usually unable to be objective when trying to resolve issues, which causes unnecessary stress for all involved and polarizes these families.*

A few of the lawyers offered advice to their colleagues about how to deal with family litigants who do not have counsel:

> *I recently got great advice from a colleague that I would like to share--never even allow e-mail communication with unrepresented, as it is too easy. I had a recent case where I would receive at least 5 e-mails daily from the unrepresented party. (He is abusive). I switched communication to written letters by mail or fax only. It was great advice.*

> *In every written communication to a self-represented party, we need to advise them to retain counsel. If we don't we are placing our own reputation and practice at risk. I try to keep things in writing (email) so that my words are not changed and twisted later.*

CONCLUSION: ADDRESSING THE CHALLENGES OF FAMILY LITIGANTS WITHOUT LAWYERS

The increasing number of litigants in family cases without legal representation is having far-reaching impacts on lawyers, judges and the family justice system, and, more importantly, on litigants, both those with lawyers and those without, as well as on their children. There is no single or simple solution to the challenges created by family litigants without lawyers, because the reasons that parties are without representation are varied and complex, and the resources to address these concerns are limited. Furthermore, opinions on the best method to address these challenges vary with one's perspective and role in the family justice system.

For individual family lawyers, the challenge is to steer towards the least expensive and best outcome for their clients, which may include seeking an order requiring the party without a lawyer to pay for the added costs of dispute resolution. For the organized Bar, one of the challenges is to educate litigants on the value of legal representation and the potential risks of proceeding without a lawyer, as well as encouraging such cost-reducing methods of providing legal services as limited scope retainers.

For the individual family litigant with limited financial resources, no safety concerns and a claim of limited economic value, the decision to proceed without a lawyer can represent a rational economic response to the high cost of legal services and the very low income eligibility level for legal aid.[25] There are a significant number of family litigants, who are reasonably well-educated, have good English language skills, and relatively simple cases, who are able to represent themselves without being significantly disadvantaged. For some of those with shorter relationships, no children or limited assets, proceeding without a lawyer may be a

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[25] See Judith G. McMullen & Debra Oswald, "Why Do We Need a Lawyer? An Empirical Study of Divorce Cases" (2010) 12 J L & Fam Stud 57, who conducted an empirical study of the outcomes of family litigation based on a review of court files and found that having a lawyer was correlated with higher incomes, longer marriages and the presence of children, that is of "complicating factors." They conclude: "It appears ...that many litigants have realistic ideas about when they need lawyers and when they do not, and these litigants act accordingly...The widespread phenomenon of *pro se* divorce litigation is undoubtedly here to stay, and it may not be a bad thing for many litigants." at 81-82.

sound decision. Substantive legal reforms over the past few decades, including the introduction of guidelines for child and spousal support, presumptions of equal division of property and virtually no fault divorce, have simplified family law. Of course, one may not be certain that one's case is "not complex" without appropriate legal advice, and even cases that have limited complexity in terms of economic issues can be complex and critically important as regards the care of children or domestic violence. Further, even if they are aware of their legal rights, those without legal representation may be pressured into accepting an unfair settlement.

For those who are "rationally without lawyers," the challenge for the government is to improve access to information about the legal system and the law and to dispute resolution services in a way that both minimizes their burden on the justice system, and ensures that the social costs of their disputes are minimized. The Ontario government is taking steps to improve access to information about the family court process, including introducing Mandatory Information Programs[26] for all family litigants, though a majority of the lawyers responding to this survey believe that these programs have limited value, even for those without lawyers. While governments try to respond with mandatory information programs, simplifying forms, and adding more human resources in the courts to "triage" the self-represented, one concerning irony is that these changes may result in even larger numbers of litigants who decide that they can adequately represent themselves.

Trial judges in cases involving two unrepresented parties may face what one American commentator refers to as "a chaotic hearing" [27] and may create the perception that the family justice system has broken down. If one party has a lawyer and the other does not, the judge faces the challenge of trying to ensure a fair trial without unfairly imposing costs on the party with counsel.[28] One of the challenges for trial judges and the justice system in these cases is that even if family litigants are intelligent, well-educated and properly informed about the law, their emotional

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[26] The Ontario Government is using a satisfaction survey on its website, at <http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.asp> to obtain feedback. The social science research in a number of jurisdictions has consistently reported that while many participants are "satisfied" with the information provided at these programs, the research almost never has comparison groups and rarely assesses the effect of attendance as opposed to the perception of these services. See A Sigal, et al, "Do Parent Education Programs Promote Healthy Post-divorce Parenting? Critical Distinctions and a Review of the Evidence" (2011) 49:1 Fam Ct Rev 120.

[27] Zorza, *supra* note 4 at 519; see also Marguerite Trussler, "A Judicial View on Self-represented Litigants" (2001) 19 Can Fam LQ 547. For an example of a case where a judge awarded costs in favour of one of two parties to a family case because of the tactics, delay and unreasonable conduct of the other party, see LJCC v VSC, [2006] OJ No 491(available on CanLII), (Ont Sup Ct).

[28] See discussion in Russell Engler, "The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented Ones" (2011) 62:1 Juv & Fam Court J 10.

agendas may prevent them from dealing rationally and reasonably with a case and result in substantial increases in costs for the justice system and the other party.[29]

It is clear that the challenges posed by family litigants without lawyers need to be better understood in order to be properly addressed. The problem is not just about technical challenges to the operations of the court; the more pressing issue is achieving greater access to justice and equity in the judicial system. Lack of legal representation raises fundamental concerns about how courts can make good decisions about a critical question: what is in the child's best interest? How can judges make good decisions about children post-separation if they do not have the information they need for decision-making because one or both of their parents are self-represented?

Political will, government resources and professional flexibility are all needed to better address the challenges of lack of representation in family proceedings. Increasing knowledge about the issues, including more empirical research about the changes presently occurring in the family justice system, will also be important.

[29] See e.g. discussion of Voglesang J. in Broadbear v Prothero, 2011 ONSC 3656, especially paras1 & 2, [2011] OJ No 3136.