

THE RISE OF SELF-REPRESENTATION IN CANADA'S FAMILY COURTS: THE COMPLEX PICTURE REVEALED IN SURVEYS OF JUDGES, LAWYERS AND LITIGANTS

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This article reports on four interrelated studies on self-representation by family litigants: a study of family litigants in Ontario; a survey of perceptions of lawyers in Ontario and Alberta; and a study of Canadian judges. There has clearly been an increase in self-representation in family cases. Lack of financial resources is the most significant reason for self-representation, but a significant number of the self-represented do not believe that they will have worse outcomes without a lawyer. Lawyers and judges report significant concerns about lack of representation, including fewer settlements and a slower process, with corresponding increased expenses for a represented party.

L'article fait le compte-rendu de quatre études connexes portant sur des parties à un litige de droit familial qui se représentent elles-mêmes. Il analyse ainsi une étude sur des parties à un litige de droit familial en Ontario, un sondage sur les perceptions des avocats de l'Ontario et de l'Alberta et une étude sur les juges canadiens. Il ressort de ces analyses, une nette augmentation des parties qui se représentent elles-mêmes dans les affaires de nature familiale. Le manque de ressources financières est la raison la plus souvent invoquée par les parties dans leurs décisions de se représenter eux-mêmes. En revanche, un nombre significatif de personnes non représentées ne croient pas que l'issue des

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procédures sera plus désavantageuse sans un avocat. Pour leur part, les avocats et les juges manifestent d'importantes préoccupations relativement au manque de représentation, notamment la diminution de règlements à l'amiable et un processus judiciaire plus lent. Tout ceci entraîne comme conséquence des coûts plus élevés pour les parties représentées par un avocat.

1. The Context of Rising Family Self-Representation

Lack of access to family justice and self-representation in family proceedings are growing concerns in many countries, including Canada. There has been much discussion among lawyers, judges, researchers and policy makers about the causes for an increasing number of family litigants who do not have lawyers and the effects of this lack of legal representation particularly in family court, but there has been little empirical research about these questions. Research studies about these problems in a number of countries have focused on the impacts of legal aid cutbacks,¹ the growing number of services to assist the self-represented,² the challenges

¹ Rosemary Hunter, Jeff Giddings and April Chrzanowski, "Legal Aid and Self Representation in the Family Court of Australia," online: (2003) Socio-Legal Research Centre Griffith University <http://www.nla.aust.net.au/res/File/PDFs/NLA_selfrep_FCA.pdf>; Richard W Painter, "Pro se Litigation in Times of Financial Hardship: A Legal Crisis and its Solutions" (2011) 45 Fam LQ 45; Kim Williams, *Litigants in-person: A Literature Review* (United Kingdom: Ministry of Justice, 2011); The Law Reform Commission of Western Australia, "Review of the Criminal and Civil Justice System in Western Australia," online: (1999) The Law Reform Commission of Western Australia 92 <<http://www.lrc.justice.wa.gov.au/092-tor.html>>; Alberta, Law Reform Institute, *Alberta Rules of Court Project: Self-Represented Litigants* (Edmonton: Alberta Law Reform Institute, 2005); Hazel G Genn and Alan Paterson, *Paths to Justice Scotland* (Oxford: Hart Publishing, 2001); D A Rollie Thompson and Lynn Reiersen, "A Practising Lawyer's Field Guide to the Self-Represented" (2002) 19 Can Fam LQ 529. The only national study on unrepresented litigants in Canada to date is a study of adults accused in nine provincial criminal courts, undertaken 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 Just Research, online: <<http://www.justice.gc.ca/eng/pi/rs/jr.html>>.

² John Malcolmson and Gayla Reid, "BC Supreme Court Self Help Information Centre Final Evaluation Report," online: (2006) BC Supreme Court Self Help Information Centre <http://justiceeducation.ca/themes/framework/documents/SHC_Final_Evaluation_Sept2006.pdf>; Richard Zorza, "The Self Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers," online: (2002) National Centre for State Courts <http://www.zorza.net/Res_ProSe_SelfHelpCtPub.pdf>; Jim Hilbert, "Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self Represented Litigants in Family Court" (2009) 43 Fam LQ 545.

which they encounter as a result of not having a lawyer,³ and costs to the justice system of the lack of representation and the costs of improving access to justice.⁴ Legal scholars and practitioners have written about the challenges of increasing access to justice and the structural changes needed to improve dispute resolution,⁵ and suggested ways for judges and court managers to work more effectively with the self-represented.⁶ However, there has been very little empirical research on these issues in Canada, and

See also Barbara Landau *et al*, *Submission To Attorney General Chris Bentley: Creating A Family Law Process That Works Final Report And Recommendations From The Home Court Advantage Summit* (Toronto: Ontario Bar Association, ADR Institute of Ontario and Ontario Association for Family Mediation, 2009); Law Commission of Ontario, *Towards a More Efficient and Responsive Family Law System: Interim Report*, online: (2012) Law Commission of Ontario <<http://www.lco-cdo.org/en/family-law-reform-interim-report>>.

³ Rachel Birnbaum and Nicholas Bala, "Views of Ontario Lawyers on Family Litigants without Representation" (2012) 63 UNBLJ 99; Michael M Pettersen *et al*, "Representation Disparities and Impartiality: An Empirical Analysis of Party Perception of Fear, Preparation, and Satisfaction in Divorce Mediation When Only One Party has Counsel" (2010) 48 Fam Ct Rev 663.

⁴ The Canadian Judicial Council undertook a number of studies on self-representation including the costs to the justice system; see Canadian Forum on Civil Justice, "Designing a 'Cost of Justice' Project," online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/research/costs-en.php>>; Noel Semple, "Cost-Benefit Analysis of Family Service Delivery: Disease, Prevention, and Treatment," online: (2010) Law Commission of Ontario www.lco-cdo.org/family-law-process-call-for-papers-semble.pdf. In the USA see John Greacen, "The Benefits and Costs of Programs to Assist Self-Represented Litigants," online: (2003) Judicial Counsel of California <http://www.courts.ca.gov/partners/documents/greacen_report.pdf>. In Australia see Deborah Worthington and Joanne Baker, *The Costs of Civil Litigation: Current Charging Practices, New South Wales and Victoria* (Sydney: Civil Justice Research Centre, 1993).

⁵ Deborah L Rhode, *Access to Justice* (New York: Oxford University Press, 2004).

⁶ Jona Goldschmidt *et al*, *Meeting the Challenge of Pro se Litigation: A Report and Guidebook for Judges and Court Managers* (Chicago: American Judicature Society, 1998); Elizabeth Richardson, *Self-represented Parties: A Trial Management Guide for the Judiciary* (Melbourne: County Court of Victoria, 2004). See also various bench books for judges across the globe; see e.g. Judicial Studies Board, *Equal Treatment Bench Book* (London: Judiciary of England and Wales, 1999) at ch 1 and 3, online: <<http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/equal-treatment-bench-book>> (England); Judicial Commission of New South Wales, "Equality Before the Law Bench Book," online: (2006) <<http://www.judcom.nsw.gov.au/publications/benchbks/equality/section10.pdf>> (New South Wales); Supreme Court of Queensland, *Equal Treatment Benchbook* (Brisbane: Supreme Court of Queensland Library, 2005) at ch 12, online: Queensland Courts <http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/94054/s-etbb.pdf> (Queensland); Judicial Counsel of California Administrative Office of the Courts, *Handling Cases Involving Self Represented Litigants: a Benchguide for Judicial Officers* (San Francisco: Judicial Counsel of California, 2007), online: National

very little empirical research from anywhere that has reported on the perspectives of family litigants about the reasons for and effects of lack representation.⁷

This article reports on the results from a research project involving four interrelated Canadian studies on self-representation in the family justice process⁸ and on services intended to address their problems. The groups surveyed were:

- (1) family law lawyers in Ontario and Alberta;
- (2) Canadian judges; and
- (3) litigants in Ontario's family justice system, both with and without lawyers.

Part 2 explains the methodologies of the different studies; the balance of the article discusses the results of this research, comparing perceptions and experiences of the different groups surveyed. Part 3 examines perceptions

Legal Aid & Public Defender <<http://www.nlada.org/DMS/Documents/1176151729.08/CA%20pro%20se%20Benchbook.pdf>> (United States).

⁷ See Jona Goldschmidt and Loretta Stalans, "Lawyers' Perceptions of the Fairness of Judicial Assistance to Self-represented Litigants" (2012) 30 Windsor YB Access Just 139, who surveyed Alberta family lawyers' perceptions of the impartiality and fairness of judges using case scenarios.

⁸ This paper uses the term "self-represented litigant" to refer to a person who does not have a lawyer, for whatever reason or reasons. Some authors and agencies, including Ontario's Law Society, make a distinction between "self-represented litigants" and "unrepresented litigants." The position of the Law Society of Upper Canada, for example, is that:

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," online: (2008) <<http://rc.lsuc.on.ca/pdf/kt/avoidComplaintFamily.pdf>>.

As discussed in this article, this distinction, while helpful for some analytical purposes, is in practice often impossible to make, and accordingly we follow the more common practice, and use the term "self-represented" for those without a lawyer for any reason. In this text we do make some distinctions based on the reason that a person is self-represented, but we do not employ different terms for these situations.

of professionals about changes in the extent of self-representation over time, and the reports of all respondent groups about the reasons for self-representation, including the extent to which respondents believe that not having a lawyer will affect the family justice process. Part 4 considers perceptions of the treatment of self-represented litigants in the family justice system. Part 5 explores the perceived effects on outcomes of being self-represented. Part 6 concludes with a discussion of implications of this research for Canadian policy and practice, identifying issues to be addressed by the judiciary, governments, bar associations and individual practitioners, as well providing some suggestions for future research.

Our research indicates there has been a significant increase in the number of self-represented family litigants over the past few years as reported by the different groups surveyed; suggesting that over half of the family cases in Canada's courts now have one or both parties without a lawyer; this is consistent with the limited government data available, which also reports an increase in self-representation in family cases. An inability to afford a lawyer is a major factor in the lack of representation, but litigants' motivations for not having a lawyer are often complex, including the rise of "do it yourself" social attitudes and a perception of some self-represented litigants that having a lawyer will not result in a significantly better outcome. Governments and others have responded to the lack of representation by increasing information and services for these litigants, which is in turn resulting in an increase in self-representation. It seems that a "tipping point" has been reached. It seems inevitable that there will continue to be large and perhaps even growing numbers of self-represented family litigants, especially among lower and middle income litigants. While some of those without lawyers achieve reasonably fair outcomes, the continuing high rates of self-representation will pose significant challenges for the justice system, and will result in frustration and concerns for litigants, both those with and without lawyers. These developments raise concerns about "two-tier" justice, with those who are wealthier tending to resolve disputes with lawyers outside the court system, and those with more limited means tending to resolve family disputes in a stressed family justice system, often without adequate legal advice or assistance.

2. Methodology of Our Research Project

While a number of research studies have been undertaken on issues related to self-representation in the family justice system,⁹ this is one of the very

⁹ See e.g. Leslie D MacRae *et al*, "An Evaluation of Alberta's Family Law Act," online: 2009 <http://people.ucalgary.ca/~crilf/publications/FLA_Final_Report_May_2009.pdf>; the authors interviewed 33 self-represented litigants in the courts of Alberta

few projects that directly explores and integrates the experiences and perceptions of very different groups about the issues of self-representation and access to family justice, and the only comprehensive study on self-representation in the family justice system completed in North America.¹⁰ Our research project involved four related surveys of lawyers, judges and family litigants.¹¹

The study of the perceptions and experiences of family lawyers was conducted using a web-based survey of attendees at the June 2011 Ontario Annual Family Law Summit, the largest family law continuing legal

during the evaluation of the Alberta *Family Law Act*, 2005. See also Judith G McMullen and Debra Oswald, "Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases" (2010) 12 *JL & Fam Stud* 57, who analyzed a random sample of 567 family court files from 2005 in a suburb of Milwaukee, Wisconsin; Hunter, Giddings and Chronowski, *supra* note 4, also explored the question of the availability of legal aid funds for family law disputes using in-person interviews with family law litigants in Australia. See also Sande L Buhai, "Access to Justice for Unrepresented Litigants: A Comparative Perspective" (2009) 42 *Loy LA L Rev* 979. Julie McFarlane of the University of Windsor is presently conducting qualitative interviews with self-represented litigants in BC, Alberta and Ontario to hear their views and experiences of being self-represented in family law disputes; see Julie McFarlane, "Representing Yourself in a Legal Process," online: <www.representing-yourself.com>.

¹⁰ John Dewar, Barry W Smith and Cate Banks, "Litigants in Person in the Family Court of Australia: Research Report No. 20," online (2000) <<http://mail.familylawcourts.gov.au/wps/wcm/resources/file/ebb87e04879610d/report20.pdf>>. This is a report on interviews, surveys, and focus groups with litigants only, judges, lawyers and court registry staff.

¹¹ These three surveys on access to justice and self-representation involved many collaborators to whom the authors are grateful.

For the survey of Ontario lawyers, we express thanks to Shari Slonim, Continuing Professional Development, Law Society of Upper Canada.

The survey of Ontario family litigants was conducted by law students recruited by Pro Bono Students Canada at Osgoode Hall Law School, Queen's University, the University of Toronto, Western University, Ontario and the University of Windsor. We are grateful to Nikki Gershbain, National Director, Pro Bono Students Canada (PBSC), and the PBSC Program Managers, Navneet Johal and Krystyna Drywa. Emily Hubling, program coordinator at the University of Toronto Law School was instrumental in facilitating the process with the other schools. We are also most grateful to Melissa MacRae, third year law student at Queen's University, and her supervisor Leanne Wight, Senior Duty Counsel, Kingston Family Court, for their work on helping to develop and pilot test the survey instrument.

We are also most grateful to Mr Justice Jim Williams, Supreme Court of Nova Scotia (Family Division) and Mary Ahearn from the National Judicial Institute for their support for the judges' survey. Thanks also to Marie Gordon of Gordon Zwaenepoel, for her assistance with the survey of Alberta lawyers.

Last, but certainly not least, we wish to thank all the participants who gave their time to complete our surveys and share their experiences and opinions about the family

education program in Canada, held in Toronto each year. There were 335 lawyer respondents, a response rate of about 42% of the program attendees. The Alberta survey was sent to 174 lawyers who were believed to practice family law; there were 71 respondents, a response rate of 41%.¹²

The study of Canadian judges was a web-based survey of judges attending national family law judicial education programs held in Toronto (February 2012) and Halifax (July 2012). This survey was completed by 54 judges: a response rate of just under 50% of program attendees; the judges were from all regions in Canada and were almost all trial judges.¹³ The response rates were high for a survey administered to professional groups, reflecting the interest and concern of these professionals about this issue.

The study of Ontario family law litigants, both self-represented and represented, was undertaken from October 2011 to March 2012, with volunteer law students approaching litigants at six court sites in four Ontario cities, and asking them to participate in the study.¹⁴ The survey

justice system; we hope that they find some satisfaction in knowing that their perspectives are being shared widely with a broad readership of family justice professionals, policy makers and scholars.

¹² The list was compiled by the Canadian Research Institute for Law and the Family.

¹³ Some demographic information was collected about judges, but to preserve anonymity, none of the judicial responses are reported by gender or jurisdiction.

¹⁴ The survey of family litigants was initially piloted in Kingston, Ontario to determine the flow of the questions and the length of time the survey took that led to minor revisions. The authors sent an email to all the local administrative judges in the courts that were being surveyed to advise them that the study was taking place in their courthouse. The authors also advised the Ministry of Attorney General and both Chief Justices of the Ontario Court and Superior Court that the study was being conducted in the courthouses with the assistance of Pro Bono Students Canada. The self-represented and represented litigants were surveyed in the: Superior Court of Justice in Toronto; two Ontario Court of Justice courts in Toronto; Superior Court of Justice (Family) in Kingston; Superior Court of Justice (Family) in London; and Ontario Court of Justice in Windsor, Ontario. Thus, the survey was completed by litigants at all three family trial courts, and included litigants from the largest metropolitan area in Canada and smaller urban centres. All the Pro Bono students in Toronto, London, Kingston and Windsor were trained by Professors Birnbaum and Bala. The training addressed how to approach and interview the participants, given the stressful nature of the family court process, the inclusion/exclusion criteria for the study, and how to administer the survey. We express our sincere gratitude to these students: Dianne Verano and Jackie Strybos (University of Windsor Law School); Lina Nasir, Jessica Lipton, and Terrah Smith (Western University Law School); Jonathan Cheng, Hayley Ha, Megan Cheema, and Katherine Georgious (University of Toronto Law School); Alexandra Kocherga (Osgoode Hall Law School); and Naila Ruba, Belinda Chui, and Natasha Engineer (Queen's Law School).

consisted of a 34-item questionnaire, administered by the students. The surveys were completed by 275 litigants, about 60% without lawyers and 40% with lawyers,¹⁵ and roughly equal numbers of men and women.

All of these studies focus on experiences in the litigation process in the family courts. This is an important limitation to all of these studies, both in terms of methodology and policy implications. As revealed in these studies, when there is a lack of representation, there is a greater difficulty in settling a case. If both parties have lawyers, there may be a greater likelihood of settlement of a case, often without court proceedings even being commenced, perhaps through a process like collaborative family law, or there may be resolution by private arbitration. The experiences of litigants and the professionals who resolve their cases outside the court system were not the focus of these studies.

3. Self-Representation – Perceptions of Incidence, Causes and Effects

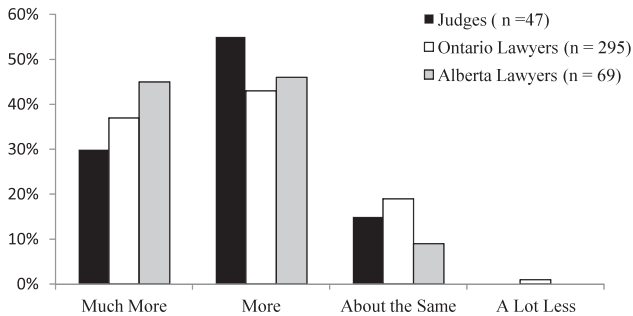
Commentators in a number of countries have observed that there has been a significant increase in the number of self-represented litigants in the family courts in recent years.¹⁶ While there is no national data on self-representation in Canada's family courts, in our surveys, the vast majority of lawyers and judges reported that over the past five years they perceived significant increases in the number of self-represented family litigants. Figure 1 illustrates the perceptions of Ontario and Alberta family lawyers and Canadian judges about the number of self-represented family litigants over the previous five years.¹⁷

¹⁵ The proportion of self-represented litigants in our study appears to be slightly higher than was reported by the Ontario government, based on data collected at the time of original filing of a domestic application. Between 1998 and 2003, an average of 46% of litigants in the Ontario Family Courts were not represented by a lawyer at time of original commencement of court proceedings, rising to 62% in 2006-2007, before falling somewhat to 54% in 2009-2010, the last year for which there is data available from the Ontario Ministry of Attorney General; this is based on applications under the *Family Law Act*, RSO 1990, c F3, the *Children's Law Reform Act*, RSO 1990, c F12 and the *Divorce Act*, RSC 1985, c 3 (2d Supp) filed in the Ontario Court of Justice, the Family Court and the Ontario Superior Court.

¹⁶ Rosemary Hunter *et al*, *The Changing Face of Litigation: Unrepresented Litigants in Family Court of Australia* (Sydney: Law and Justice Foundation of New South Wales, 2002); Richard Zorza, "An Overview of Self Represented Litigation Innovation, its Impact, and Approach for the Future: An Invitation to Dialogue" (2009) 43 Fam LQ 519 [Zorza, "Overview"].

¹⁷ The majority of lawyers had an average of 19 years of practice experience and the judges had an average of 9 years of experience as a judge.

Figure 1
Change in the number of self-represented over past 5 years?



In their survey, judges reported that in an average of 35% (range 10%-75%) of their family cases, only 1 party had a lawyer, and in an average of 24% (range 2%-70%) of their family cases neither party had a lawyer. In the survey of Ontario lawyers, respondents reported that an average of 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 Ontario lawyers reported no experience in the past year with family cases without a lawyer for the other party. The lawyers' survey does not reflect cases where neither party had a lawyer at any point in the process. In Alberta, the lawyers reported that 13% of their family law cases did not have a lawyer on the other side for the entire case and 19% reported that they had a self-represented litigant on the other side for part of the case.

Taken together, the results of the surveys of judges and lawyers clearly suggest that there has been a significant increase in the amount of self-representation over the past five years, and in over half of the cases in the family court system, one or both of the parties do not have a lawyer for all of the proceeding.

It is often difficult to determine the reason why an individual does not have a lawyer. The most obvious way is simply to ask self-represented individuals why they do not have a lawyer, but, assuming that they are being candid, they may not have carefully reflected on their own decision-making, or there may be a complex combination of reasons that may change over time. Further, some respondents may have a "pro-social" bias in their responses. For example, it may seem more acceptable to report to an interviewer that one cannot afford a lawyer than to say that one looks forward to humiliating a former partner through in-person cross-examination. Recognizing the complexity of determining motivations, we

asked each respondent group about the reasons for self-representation. While there was significant convergence in responses, there was also some interesting variation.

As the discussion below indicates, financial reasons and ineligibility for legal aid are the most significant explanatory factors for lack of representation. For many middle income individuals, however, the decision not to retain a lawyer is often at least in part based on their assessment that, given their income and asset level, the value of having a lawyer would not justify the cost. In other words, they have absolute ability to pay, but given the costs of legal services and their perceptions of its limited value for them, they have chosen to spend their money on other priorities.¹⁸ For some family litigants, the decision to self-represent reflects a confidence in their own knowledge and ability to navigate the system, a distrust of lawyers or a desire to deal directly with their former partner.

Figure 2 shows that all respondent groups rated lack of finances and ineligibility for legal aid as the primary reason for family litigants being self-represented. However, interestingly, while judges and lawyers generally share similar views about the overwhelming importance of financial reasons, the self-represented litigants actually rated lack of financial resources as a less significant factor and provided a more comprehensive picture of why they did not have lawyers.

Less than half of those (45%) without representation reported that their primary reason for not having a lawyer was that they did not have enough money and did not have legal aid. A number (8%) were waiting to see if the other party would have a lawyer, suggesting that lack of representation sometimes feeds on itself. Another 8% expressed a concern that having a lawyer would increase the delay, cost or conflict involved. There were 5% who gave as their primary reason for not having a lawyer the desire to deal directly with a former partner; these are individuals who are likely to have higher conflict proceedings, as they seek to continue to engage with, or even confront their former partner.

While it is clear that financial concerns are a major issue for lack of representation, some of the comments from judges about the reasons for

¹⁸ The Australian Law Reform Commission, *Review of the Federal Civil Justice System Discussion Paper 62* (Sydney: Australian Law Reform Commission, 1999), did not find empirical evidence to connect the support in cuts to legal aid funding and an increase in the number of self-represented in the civil courts. However, Dewar, *supra* note 13, found that there was an identifiable link between the unavailability of legal aid and self-representation in the Family Courts.

Figure 2**Why Family Law Litigants are Self-Represented: A Comparison of Reasons (Reasons Ranked #1)**

self-representation suggest that the decision of family litigants not to have a lawyer is influenced by many factors:

“Mental health issues; some have been through 2 or 3 incompetent lawyers; some know it’s costing the other side and their time is free.”

“Some are obsessed with conflict.”

“They are unwilling to listen to the advice they receive from counsel.”

“There has been a cultural change where people want to participate directly in matters affecting them, where they are not afraid to speak up, where they believe they have the right to do so in a transparent arena that will treat them fairly and quickly.”

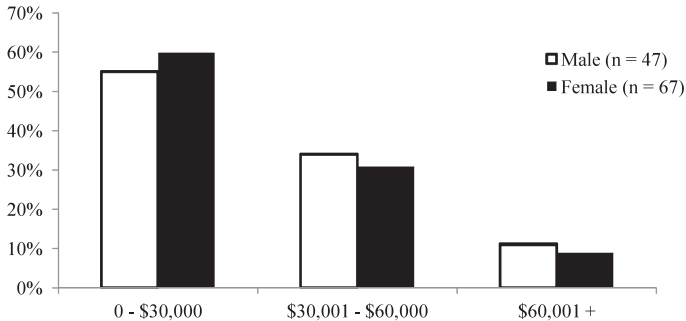
While there was a range of reasons for being self-represented, litigants who had lawyers were almost all satisfied with their decision to have representation. The vast majority of litigants *with* lawyers stated that they planned to continue with their lawyer, and reported that their lawyer was very helpful (62%) or moderately helpful (19%); only 2% said their lawyer was not helpful. Most of those with lawyers (73%) expected that they would obtain a better outcome as a result of having a lawyer, and more than a third expected that the process would take less time having a lawyer. The most common primary reason for having a lawyer (41%) was the expectation of a “better outcome,” while 26% of litigants with lawyers gave lack of knowledge of the legal process as their primary reason for representation, and 5% reported not wanting to directly deal with the other party as their primary reason.

As illustrated in Figure 3, among the respondents to the litigant survey, lack of representation was clearly associated with financial circumstance.

For both men and women, those with higher incomes were significantly more likely to have a lawyer than those in lower income groups.¹⁹

Figure 3 also shows that some litigants in higher income groups do not have a lawyer, although there was no statistical significance between genders. While there were significant differences between those that are 30 years of age or less and those that are over 30 years of age, with significantly more individuals 30 years of age and older likely to have a lawyer as compared to younger litigants,²⁰ there were no statistically significant gender or age differences once the generally higher incomes of older litigants is taken into account.

Figure 3
% of Self-Represented Litigants by Gender and Income



While a narrow majority of lawyers and judges did not report observing systemic differences between the reasons that men and women are self-represented, a substantial minority of justice system professionals believe that there are gender differences in the reasons for lack of representation. A common perception of these professional groups is that women are more likely to be self-represented due to an inability to afford a lawyer, while men may be more likely to be self-represented due to a desire to deal directly with their former partner or because of confidence in their ability to represent themselves. Comments from lawyers and judges included:²¹

¹⁹ Among males, those with higher incomes are significantly more likely to have a lawyer, ($\chi^2(2) = 24.24, p < .001$). A similar pattern was observed for females; females with higher incomes were significantly more likely to have a lawyer ($\chi^2(2) = 11.51, p < .01$).

²⁰ ($\chi^2(1) = 4.25, p < .05$).

²¹ Qualitative narratives provide context and texture to the quantitative data that was collected from all the studies.

"For women, it is finances; men think they do as well as a lawyer but without the expense." [lawyer]

"Sometimes abusive men want to be able to have direct contact with their partner." [lawyer]

"Men more often believe they don't need a lawyer. Women do not have the money." [judge]

The responses of litigants also reveal some interesting gender differences in explaining their reasons for lack of representation. While 7% of men without lawyers said that their desire to deal directly with the other party was their primary reason for being unrepresented, only 3% of unrepresented women gave this response. Almost 10% of self-represented men believed that they would experience *worse* outcomes for economic issues if they had a lawyer and their case is to be resolved by a judge, while only 2% of women believed that they would have a *worse* outcome in court with a lawyer. Only 32% of self-represented males versus 60% of represented males believe that litigants have worse outcomes for economic issues if a judge decides a case because they do not have a lawyer.²² In other words, a majority of self-represented men do not expect a worse outcome because they do not have a lawyer, though a majority of represented men would expect a worse outcome if they do not have a lawyer. By way of contrast, among females, perceptions of the value of having a lawyer for economic issues are very similar for those with and without a lawyer, with most expecting better outcomes on economic issues resolved by a judge for those with lawyers. These responses generally suggest that men have less concern about being self-represented than women, and that men's lack of representation is more likely to be a result of the desire to directly engage with their former partner.

In both Ontario and Alberta, the vast majority of lawyers (84% and 89% respectively) report that the self-represented always or usually have unrealistically high expectations for the outcome of their cases. Ontario and Alberta lawyers (78% and 88% respectively) also report that self-represented litigants are less likely or much less likely to settle. Lawyers also express concern that self-represented litigants always or usually look for advice to the lawyer for the represented party (47% in Ontario and 68% in Alberta), though of course there are very significant ethical and professional constraints in what a lawyer for one party can or should do to assist an unrepresented party. Table 1 sets out data on the views of Ontario and Alberta lawyers on some aspects of dealing with self-represented litigants.

²² There is, of course, the possibility that some people who cannot afford lawyers are engaging in *ex post* rationalizing and reporting that it will not make a difference, and that men are more likely than women to engage in this type of rationalization.

Table 1: Lawyer reports on self-represented litigants		
Self-represented have unrealistically high outcome expectations		
	Ontario	Alberta
Always	28%	26%
Usually	56%	63%
Sometimes	15%	11%
Rarely	1%	0%
Self-represented look to lawyer or other party for advice		
	Ontario	Alberta
Always	9%	17%
Usually	38%	51%
Sometimes	45%	27%
Rarely	10%	5%

Lawyers almost universally (Ontario: 91%; Alberta: 97%) report that the fact that the other side is unrepresented adds to the costs of their clients to resolve a case. Most lawyers also reported that they always (Ontario: 75%; Alberta: 86%) document communication with the self-represented more carefully than when dealing with opposing counsel, which contributes to the increased costs to their clients. It is not surprising that the lawyers reported that their clients are always or usually upset (Ontario: 76%; Alberta: 86%) about their increased costs due to the other side being self-represented. Some comments expressed from lawyers on behalf of their clients were:

“... thousands of dollars because generally self-represented parties do not respond [to]reasonable to requests for adjournments, information, etc ... self-represented want to be ‘in front of the judge’ which increases the costs substantially.” [Ontario lawyer]
 “... at trial, it always takes about a day longer while the judge tries to extract meaningful information. Also self-reps don’t follow the rules, so there is additional time expended exploring remedies for their failure to follow the rules [disclosure, giving notice, etc].” [Ontario lawyer]

“The Court imposes on the solicitor to do what the self rep can’t/won’t do and the cost is borne by the represented party. Even costs, when awarded are lower than the norm. If anything, they should be higher.” [Alberta lawyer]

“Everything with a self-rep is difficult, must be in writing, and ends up costing my client. Presently I have several male self-reps on the other side who could easily afford a lawyer but have chosen to make life difficult for their spouses. No adjournment requests are agreed to, nothing by consent, everything ends up in chambers, and judges never award costs as ‘he didn’t know the process.’ Each unnecessary appearance costs my client.” [Alberta lawyer]

A majority of lawyers report that in their experience, if the other side is self-represented, settlement is less likely (Ontario: 54%; Alberta: 46%) or much less likely (Ontario: 24%; Alberta: 43%). Similarly a majority of judges reported that if one side is self-represented, settlement is less likely (54%) or much less likely (15%) than if both litigants have a lawyer. Judges also report that if one (90%) or both sides (86%) are self-represented, the length of time to resolve or manage the case significantly increases. These results indicate that professionals clearly believe that lack of representation makes settlement less likely, takes longer, and therefore; implicitly increases the costs to the represented party as well as to the publicly funded justice system.

Judges reported that they deal with a case differently if one or both sides are self-represented, than if both sides have counsel.²³ Judges' comments on this issue included:

"I am always more cognizant of the perceived 'imbalance' that exists when only one party has a lawyer."

"There are obligations to assist an unrepresented party without being an advocate—the judge must be very careful to explain the process and evidentiary or procedural issues to self-represented parties—the judge must be especially alert to fairness issues."

4. Perceptions of Treatment of Self-represented Litigants by the Courts

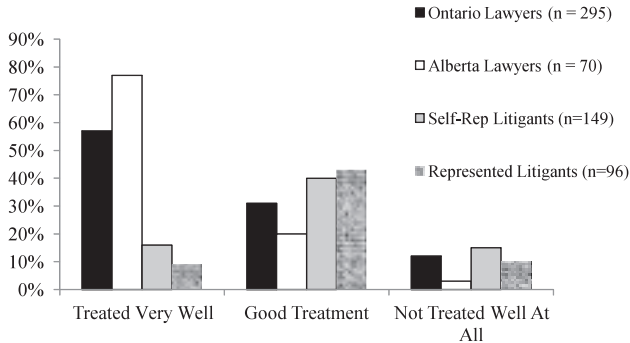
Lawyers generally have somewhat different views from litigants about how well the self-represented are treated by the judges, though interestingly both represented and self-represented litigants have similar views. As illustrated in Figure 4, most lawyers (57% in Ontario and 77%

²³ The Canadian Judicial Council in 2006 adopted a Statement of Principles on self-represented litigants and accused persons. While only advisory in nature, this statement and appellate case law in Canada makes clear that judges have a duty to assist and accommodate self-represented litigants, though this must be delicately balanced with a the need to maintain impartiality and avoid "becoming an advocate" for an unrepresented party. See Joan Goldschmidt, "Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience" (2009) 17 *Mich St J Int'l L* 60; *Hurley v Hurley*, 2012 NSCA 32, 314 NSR (2d) 346. See also e.g. *Robson v Albazi*, 2012 ONCJ 194, 213 ACWS (3d) 410, where Spence J of the Ontario Court of Justice had a trial with two self-represented litigants and stated at para 3, "Both parties were self-represented in this proceeding. Both gave evidence at trial and each had the opportunity to cross-examine the other. Because of the parties' unfamiliarity with court procedures, I assisted both of them by explaining how to give their evidence, as well as asking questions of each of them in an effort to tease out the evidence which I believed would be of assistance to me in making an informed decision".

in Alberta) believe that self-represented litigants are treated “very well” by the judiciary, while only 14% of the self-represented and 9% of the represented litigants believe that the self-represented are very well treated. On the other hand, only a relatively small percent of each group feel that self-represented are “not well treated at all” by judges.²⁴

Figure 4

Do Self-Represented Litigants Get Fair Treatment From Judiciary?



Many lawyers (Ontario: 47%; Alberta: 47%) reported that their clients usually get upset about the judge appearing to favor the self-represented in court.

Some of the comments from those who were self-represented litigants and who expressed concerns about treatment by judges as a result of not having a lawyer included:

“Judges can be very disrespectful to litigants who do not have lawyers. For example, they raise their voice and use rude names. I was so surprised that a Judge was allowed to call me a name.” [male]

“I hope they [judges] do [treat us fairly] but I don’t know. ... they [judges] treat them [self-represented] differently cause don’t all lawyers know each other and the judges?” [male]

“It seems to depend on the judge. Some judges are friends with some lawyers, and if they are friends with that lawyer, they’ll be gentler with their client.” [male]

“It’s about the judge’s character, not about you. That’s what I learned early on, to not take things personally cause otherwise you will go crazy.” [female]

²⁴ Figure 4 does not include data on “don’t know.” Understandably, questions about how self-represented litigants are treated by the courts were answered by almost all lawyers, but there were high rates of “don’t know” by litigants, especially those with lawyers.

Some comments from represented litigants reflected similar perceptions about the treatment of the self-represented by judges, which may have influenced their decisions to seek representation:

“... probably not treated too well. My friend was in court before and she didn't have [a] lawyer and she's the one who told me to get one, so maybe she felt disadvantaged.”
[female]

“Previous experiences as self-rep, judge did not listen to me.” [female]

In fairness to the judiciary, it is not possible to assess the validity of these reported concerns and perceptions of litigants about their treatment by judges. While some judges might be impatient or even rude with self-represented litigants, it is notable that in our survey, lawyers, who are regularly in court and knowledgeable observers, report that judges generally treat self-represented litigants with patience and courtesy. Some self-represented litigants, however, are very difficult for judges or opposing counsel to deal with and may require firm direction about appropriate conduct in court; others may be overwhelmed and misunderstand what has happened or report accurately on how they have been treated.

A majority of self-represented litigants, almost an even number of male and female self-represented litigants, reported that navigating the court system was difficult or very difficult (67%: gender combined); many of them believed that the lack of a lawyer made the process slower or much slower (49%: gender combined), though a significant portion (31%: gender combined) reported that they felt that lack of representation did not slow down resolution. Many believed that lawyers usually made problems for the self-represented in court worse than they need to be (53%: gender combined). Some of the negative comments of self-represented litigants about lawyers included:

“Lawyers add fuel to the flame. I wish there was more mediation.” [female]

“Number of lawyers who are simply ‘cash for kids’; objectives are not in the best interests of family, it's about the cash that they can make through litigation ...”[male]

These comments should not be taken as necessarily accurate reports about the conduct of lawyers. While some lawyers may exacerbate conflict and not seek to effectively resolve cases, there are real ethical constraints on how they can deal with or negotiate with self-represented parties; it is notable that judges in our survey report that the absence of legal representation actually hinders settlement. Further, self-represented family litigants make a large number of complaints about the lawyers for their

former spouses that are rejected by law societies as unfounded in a disproportionately large number of cases.²⁵

From the perspective of the represented litigant, a majority report that they expect (72%: gender combined) a much better outcome as a result of having a lawyer, and many expect that the court process takes less time with a lawyer (35%: gender combined) than if they had been unrepresented. Comments from the represented litigants about the court process and the value of having a lawyer included:

“There is a lot of information available for people to learn about the court system but reading all of that information is just too much. I might as well go to law school to learn all of these things. I am happy that I decided to get a lawyer.” [female]

“Custody of my children is an important matter and I would not trust myself if I had to be self-represented. My lawyer handles things for me and explains the system to me which is definitely easier.” [female]

A recurring theme in the comments of male litigants, both those with lawyers and self-represented is a perception that the family court system is biased against men, reflected in statements such as:

“You need a lawyer to have any chance of getting a favorable decision. This applies especially if you are male since family court judge favors women. Having a lawyer forces the judge to be more fair to the male party.”

“Courts have a bias in favor of the mother/woman. Having to come to court and pay a lawyer thousands of dollars just to get access to a child when there is no claim of abuse or other issues is wrong ...”

“Court system is biased against men—it is harder ‘we have to do all the running around’ Kids tend to go to the mother, not the father—because we leave the family home to maintain stability for the kids and then have to go to court to fight for the right to see them.”

Women, on the other hand, tended to raise financial and safety concerns for themselves and their children, as well as concerns about lack of access to justice. Comments made by women included:

“... the court entertains whatever my husband brings up to the court as entertainable claims which cause a huge amount of expense. To deal with my 2010 income I had to provide photocopies of accounts for the past 5 years and this was over 500 pages of photocopying and this is very expensive ...”

²⁵ Law Society of Upper Canada, *supra* note 11; See also Gwen Goebel, “Emerging Issues Related to Ethics and the Practice of Family Law (a.k.a. Why Are They Picking on Us?)”, online: (2002) <<http://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/UCA1.pdf>> .

"I can't get legal aid because I make too much money, even though I am the victim. Whereas my husband, as the aggressor, is going to get legal aid, because he's unemployed ... difference between physical and mental ailments, I'm not being looked after. My concerns are not being heard."

4. Ontario Court Services

In 2011 Ontario followed the lead of several other jurisdictions²⁶ to establish a number of services to assist and better inform family litigants, especially those who are without lawyers, about the court process. One program is the Mandatory Information Program (MIP), which all family litigants, whether represented or not, must attend. A two-hour presentation is given by a lawyer and a social worker, providing 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. In addition, the Ministry of the Attorney General has established Family Law Information Centres (FLIC)²⁷ at the courts with brochures, forms and other materials about the family justice process. There are scheduled times when litigants can seek summary advice from Advice Counsel at the FLICs; these are lawyers paid by Ontario Legal Aid who will provide summary legal advice to individuals who meet financial eligibility criteria. There are also Duty Counsel lawyers paid by Legal Aid who can provide summary assistance for unrepresented litigants on the day of a court appearance. The Ministry also has a website with family law information and court forms. Of the 31% of family litigants who attended the two hour MIP session, 42% reported that it was very helpful or somewhat helpful for learning about the family justice process. Another 47% believed the sessions were very helpful or somewhat helpful about learning more about alternatives other than court, and 29% reported that the session was very helpful or somewhat helpful about learning the effects of separation on children.

²⁶ For a review of programs in Alberta, see Joanne J Paetsch *et al*, *High Conflict Intervention Programs in Alberta: A Review and Recommendations* (Alberta: Canadian Research Institute for Law and the Family, Alberta Justice, 2007). Some provinces offer a six-hour course (British Columbia, the Alberta Court of Queen's Bench, and the Family Division of the Supreme Court of Nova Scotia) and most, if not all provinces and territories, now offer mandatory two-hour sessions for separating and divorcing parents prior to receiving a court order.

²⁷ In addition, the Law Society of Upper Canada, Ontario has recently launched a website, <<http://yourontariolaw.com>>, that provides parents with free information and access to resources on the emotional, financial, legal and social considerations relating to child custody, access and child support.

All respondents were also asked if they used the Ministry of Attorney General (MAG) website. Less than half (37%) reported that they had used the website; of those who had, 21% reported that it was very helpful and another 47% reported that it was somewhat helpful. Respondents were also asked about the brochures and materials at the FLICs at court houses. Of the 40% who reported that they used these materials, 18% reported that they were very helpful, 46% reported somewhat helpful, and 23% reported they were moderately helpful.

While the responses to the surveys indicate that there is considerable value to these services, clearly there are limitations. Many family litigants do not have the education and literacy skills²⁸ to benefit from these materials, and some have visual impairments or other disabilities making them inaccessible, as reflected in some comments in the survey of litigants:

“... There are many people with disabilities and people cannot understand. I have a reading disability and it is hard for me to understand all the issues. If you don’t understand you can get denied legal aid and lose your kids. People do not have time to sit all day and wait to talk to someone, since so many people have jobs. It is a lot of money to come to downtown to court ...” [female]

“Things in the information materials need to be much clearer. The forms are too complicated and should be simplified for people who don’t have lawyers.” [female]

“The information provided is practically in another language. You can’t understand it. It’s in court legalese, and nobody understands it. They can’t break it down in laymen’s terms and a hell of a lot of these people are not upper class. They probably don’t understand 85% of what is written down and handed to them ...” [female]

Perhaps understandably, those litigants who actually spoke to a lawyer about their family law issues, even relatively briefly, were generally more positive about this source of assistance than those who only received information from the internet or by print materials, as there was greater

²⁸ Brownstone J of the Ontario Court of Justice stated: “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;” see Valarie Mutton, “Frozen Moment of Judicial Passion,” online: (2011) 31:26 *Lawyers Weekly* <www.lawyersweekly.ca>. 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.”

opportunity for specific information and interaction. Of the 31% of respondents who had the opportunity to speak to Advice Counsel at a FLIC, 40% reported that it was very helpful and another 35% found it somewhat helpful; only 10% reported that it was not helpful at all. There was, however, a degree of frustration with the summary nature of the assistance that could be provided. As one respondent commented:

“They told me they shouldn’t be speaking to me and that I should get a lawyer. ... The exact quote was, ‘Your case is too complex. You need to hire a lawyer, I cannot help you.’”

“Depends on who you get. Some are helpful and some you can tell are just doing their job, give you the basics and then move to the next person.”

“They don’t get detailed, but they give you some information.”

Of the 34% of respondents who consulted with Duty Counsel on the day of a Family Court appearance, 39% reported that it was very helpful and another 34% found it somewhat helpful; only 10% reported that it was not helpful at all.

5. Expected Effects of Self-Representation on Outcomes

A) Economic and Child-Related Issues

As regards custody and access arrangements for children, lawyers tend to believe that self-represented litigants have worse outcomes than those who have lawyers, whether a case is settled by negotiation (Ontario 57%; Alberta 37%) or resolved by a judge in court proceedings (Ontario 57%; Alberta 42%). Judges were also concerned about the effect of lack of representation on child-related outcomes, with 46% believing that self-represented litigants generally have worse outcomes with respect to children. Some of the judges’ comments reflect concerns about lack of representation on arrangements for children:

“Even if they reach agreement it is often based on what they consider to be ‘fair’ as opposed to a child’s best interests.”

“Generally worse because all possible scenarios are generally not explored.”

“Unrepresented litigants have far more chance of a less favourable outcome, because they are unable to articulate their case.”

“They [unrepresented] fail to address those issues that are probative. Their evidence/submissions are often overwhelmed by their emotions.”

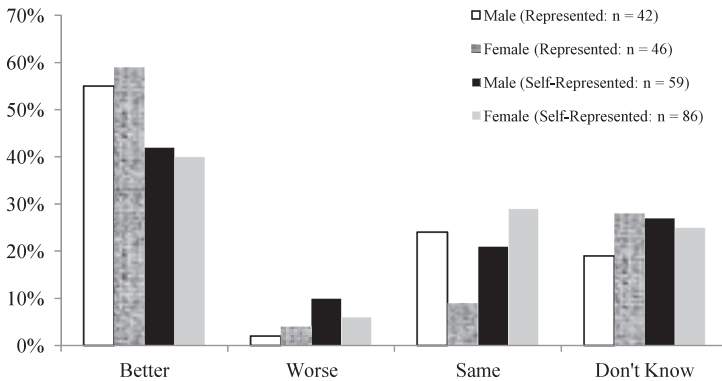
As regards the economic issues of property and support, judges expressed greater concern about the effect of lack of representation, with 65%

reporting that self-represented litigants generally have worse outcomes as a result of lack of representation.

Family litigants were also asked whether they believed that having a lawyer would make a difference with respect to outcomes for child related and financial matters, taking account of whether they settle their case or it is decided by a judge. Figure 5 presents results for the effect that litigants expect from a lack of representation on arrangements for the care of children, if a case is decided by a judge (as opposed to settled by negotiation).

Figure 5

When it comes to plans for your children, do you think that having a lawyer gives you a better, worse, or the same outcome if judge makes decision?



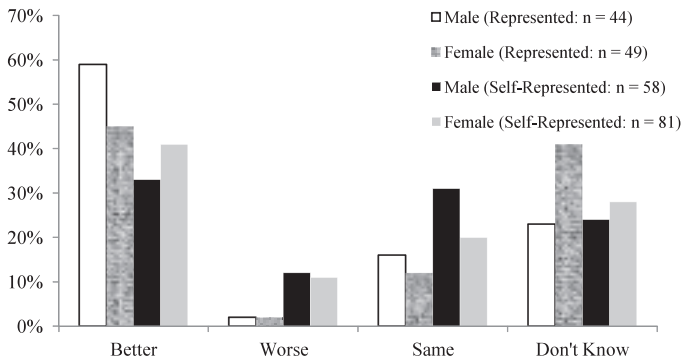
The general expectation of litigants is that they will have better outcomes with lawyers. Those with lawyers, however, generally have a greater belief than the self-represented that representation will result in a better outcome. Represented men (54%) were more likely than self-represented men (41%) to believe that having a lawyer would result in a better outcome, and similarly represented women (57%) were more likely than self-represented women (40%) to believe that they would have a better outcome with a lawyer if a judge makes a decision about their children. Interestingly, almost 10% of self-represented men believed that for cases resolved by a judge, they would experience *worse outcomes if they had a lawyer*. These results suggest that a significant portion of those without lawyers do not expect it to have an effect on the outcome of their case, and some even expect to have a better outcome without a lawyer.

Figure 6 shows that only 32% of self-represented males versus 60% of represented males believe that if a judge decides a case litigants without lawyers have worse outcomes. In other words, a majority of unrepresented

men do not expect a worse outcome because they do not have a lawyer, but a majority of represented men expect that they would have a worse outcome if they did not have a lawyer. By way of contrast, among women, perceptions of the value of having a lawyer for economic issues resolved by a judge are very similar for litigants with and without a lawyer, with most women expecting better outcomes on economic issues resolved by a judge for those with lawyers.

Figure 6

When it comes to money and property issues do you think that having a lawyer gives you a better, worse, or the same outcome if the judge makes the decision?



B) Domestic Violence Issues

Both Ontario and Alberta lawyers were asked if they thought the self-represented who are victims of domestic violence get adequate protection. A majority of Ontario lawyers (Ontario: 56%) and a little less than half of the Alberta lawyers (41%) believe that self-represented litigants who are victims of domestic violence (usually women) do *not* get adequate protection if their case is *settled*. However, a majority of Ontario and Alberta lawyers (71%; 91%, respectively) believe that self-represented litigants who are victims get adequate protection if the case is resolved by a judge. Lawyers have concerns about self-represented victims of violence being coerced in negotiations into accepting settlements that may not adequately protect them, but seem to have more confidence that judges who learn of the domestic violence will take adequate steps to protect victims.

However, judges clearly have concerns about the effect of lack of representation on cases that they decide where there is domestic violence, as reflected in the following comments:

“There is always the fear that this category of self rep is not truly or accurately articulating their position because of fear or intimidation.”

“Domestic violence and the definition of a victim (subjective and objective) of violence is a very, very complicated dynamic. Some ‘victims’ will suffer a disadvantage because they accommodate and avoid conflict. Others may achieve better outcomes because they are empowered by the ‘victim’ perspective. Some ‘victims’ may choose a lawyer who further victimizes him or her, with a terrible outcome. Those who see themselves as victims—but who objectively are not—may instruct counsel to act aggressively towards the other party, and may overreach ...”

The litigants were all asked if domestic violence concerns were a part of their case. 26% of males and 31% of females who were self-represented reported that domestic violence was part of the dispute, while 18% of men and 27% of females with lawyers reported that domestic violence was an issue. Although this study did not deal with “matched pairs” of litigants, the somewhat higher rates of reporting that domestic violence is an issue by women may reflect differences in the perception of this issue, with women more likely to see this as a concern.²⁹

All respondents were also asked their views about the effect of lack of representation on both victims of domestic violence and those accused of domestic violence in family court. As might be expected, many respondents answered that they were unable to express an opinion on the question of whether self-represented litigants get fair treatment on domestic violence issues in the family courts. Of males who were self-represented, 35% reported that they disagreed or strongly disagreed with the statement that self-represented litigants *accused* of domestic violence get fair treatment in the family courts. Of females who were self-represented, 11% reported that they strongly agreed with the statement that self-represented litigants who are *victims* of domestic violence do not get adequate protection from the family justice system.

Interestingly, while litigants with lawyers generally expected better outcomes as regards children and financial matters because they had lawyers, they generally expected that legal representation made less difference in regard to domestic violence issues; for example 23% of the women with lawyers had expressed concern about the lack of representation of protection for victims of family violence, compared to

²⁹ The question did not differentiate different types of domestic violence (i.e., verbal, emotional, sexual, physical, financial). In future studies this may be an important differentiation as litigants may not be aware of the differences or even wish to discuss them. It should also be noted that the Information Sheet that each litigant received prior to consenting to the study clearly stated that any form of abuse that impacts children would be reported to the local child welfare authorities.

the 17% of women without representation who expressed this concern. These responses suggest concerns, especially by the self-represented, about the effect of lack of representation on the resolution of domestic violence issues in the family courts, though the general perception seems to be that lack of representation has less effect on this issue than in regard to economic or child-related issues, presumably because there is an expectation that judges will intervene more in domestic violence cases.

6. Conclusions: Adjusting the Justice System for Self-represented Litigants

This article presents results of surveys of the views and experiences of four different groups about the causes and effects of lack of representation in Canada's family justice system. It is apparent that there has been a substantial increase in the number of self-represented family litigants over the past five years, with significant evidence that over half of the family cases in the courts now have one or both parties without a lawyer as reported by the different groups surveyed. As there is a range of causes and effects of self-representation, there needs to be a range of responses by different institutions, agencies and professionals to deal more effectively with self-representation in the family courts.

It is notable that the responses of each group surveyed reveal that each group has a somewhat different perception of the causes and consequences of self-representation, and understandably will have different views about how to address the challenges posed by self-representation. It seems likely that the number of self-represented family litigants will grow, or at least remain large, and the results of this research project reveal that they have unique perspectives and experiences; therefore, it is important that their voices and views be equally considered as legal organizations, the judiciary and government address issues related to access to justice and lack of representation.

The results of this project confirm results of earlier smaller studies in Canada as well as research from other countries³⁰ that have examined the causes of the increasing number of self-represented litigants: the most important reason for the lack of representation is the inability of family litigants to afford a lawyer, and the lack of eligibility for legal aid. It is also clear, however, that a significant number of litigants could manage to afford a lawyer but are deciding to be self-represented because they feel

³⁰ Zorza, "Overview," *supra* note 19; Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 *Queen's LJ* 825 at 826-827; Painter, *supra* note 4; Williams, *supra* note 4; Law Reform Commission of Western Australia, *supra* note 4.

that it is not worthwhile to retain a lawyer, and some, especially some men, actually believe that they will have a better outcome without a lawyer or wish to represent themselves to have the opportunity to directly engage with their former partners.

Many of those without lawyers are being helped by an expanding range of services provided by government or otherwise available, for example on the internet, and some litigants feel reasonably comfortable dealing with the family justice process without retaining a lawyer. For example, in the Alberta Court of Queen's Bench in Calgary, there is a courtroom set aside for cases where both parties are self-represented litigants, with special support staff arrangements in place. In Ontario, the Superior Court of Justice provides self-represented litigants who are taking their case to trial with a 10-page *Memorandum For Trial*, outlining the court's expectations of how to conduct a trial, the procedure for a introducing evidence, and general conduct during a trial. It seems that a "tipping point" has been reached. With the growing range of services available for the self-represented and changing social attitudes and knowledge, expectations of those who are going through separation or divorce have changed. There is an understanding and expectation that having a family lawyer is one option, but self-representation is also an option, especially for those who have limited means. Reforms to substantive family law in Canada, especially the introduction of guidelines for spousal and child support, and reforms to property legislation, have also tended to make the law more comprehensible and clearer, especially for those with limited incomes and assets, suggesting that there is less need for a lawyer for individuals with less wealth if economic matters are at issue. For those with a low conflict separation, adequate education and literacy skills, and relatively simple financial affairs, lack of legal representation may not present a serious problem, at least for the self-represented litigants. Given the cost of legal services and the availability of "free" or subsidized government services, for some individuals the decision not to retain counsel to resolve family matters may well be a rational economic decision (though these self-represented litigants may be imposing added costs on the justice system and government, and often on the other party).

There is, however, also a very significant portion of self-represented family litigants who are unable to afford a lawyer in cases where there are serious concerns about the effect of lack of representation on outcomes for litigants and their children. Our results indicate that for about one half of self-represented litigants, the primary reason for not having a lawyer was that they did not have enough money to pay the costs of retaining a lawyer and were not eligible for legal aid. Many of those without lawyers expect

worse outcomes and less protection because they are without counsel. As one unrepresented female litigant commented:

“Either lawyers should charge less, or there should be more legal aid. Something’s gotta give, or they can’t say it’s really justice, right?”

As in other countries, governments and the judiciary in Canada are trying to deal with this growing problem by providing more information and through a range of “free” services. The information and brief advice provided by these services to the self-represented litigant cannot, however, replace the detailed advice, analysis and advocacy provided by a lawyer who is trained and knowledgeable in family law, particularly when children or domestic violence are matters of concern. More needs to be done for the vulnerable self-represented litigant. Legal aid schemes clearly have an important role, though they are under increasing financial strain. There also needs to be an expansion of services provided by limited scope retainers by lawyers and increased efforts to reduce the cost of legal services. Clearly there are cases in which lawyers in family cases are not making efficient use of the legal system,³¹ and all family lawyers need to be aware of the importance of making use of cost effective and proportionate legal responses.

This project also reveals that there is a group of “do-it-yourselfers” who are able to afford representation but who choose to represent themselves. Some of them, especially some men, believe that they will

³¹ See e.g. Phil Epstein “Epstein This Week in Family Law” *Family Law Newsletters* 47 (November 2011) (WL Can) where he discusses *Gogas v. Gogas*, 2011 ONSC 5368, [2012] WDFL 597: “This is a ruling by Justice Healey of the Ontario Superior Court of Justice with respect to costs as a result of a motion to change. This case is a good illustration of why we continue to see more self-represented parties, why access to the courts is being limited to those who either have no money and get legal aid or have relatively unlimited bank accounts. The costs awarded on this motion to change were \$75,000. It appears that there were 13 affidavits and four financial statements filed by the applicant and 10 affidavits and three financial statements filed by the respondent. The respondent’s net worth was about \$700,000. I am not sure of the applicant’s net worth but the costs are out of all proportion to the likely means of the parties and in any event the costs only represent a fraction of what the parties must have paid in total to their respective lawyers. There is something wrong with the family law judicial system that allows the filing of 23 affidavits and seven financial statements in the same case. It demonstrates a complete lack of adequate lawyer management and case management and judicial intervention in an attempt to find a resolution. If everyone is permitted to file 23 affidavits in each case and then expect that judges will spend time reviewing them all, then the family law justice system is truly doomed. I find this case very depressing. It says a great deal about what is wrong with our family justice system and surely it cries out for a better way of dealing with the problems.”

actually have *better* outcomes if they represent themselves, and some may relish the prospect of personally confronting their former partners. There is also some indication that this group of litigants may prefer to have a judge resolve their cases rather than to have a settlement. While individuals have the right to represent themselves and take their disputes to court, there need to be continuing efforts by governments, judges and law societies to educate family litigants about the value of obtaining sound legal advice and settling disputes outside the court system. Further, in appropriate cases, those who choose to represent themselves and thereby impose costs on the other party, in particular due to procedural errors, delays, unnecessary prolongation of trials or rejection of reasonable settlement offers, should be ordered to pay a substantial portion of the costs imposed on the other party,³² and should be warned by judges at settlement conferences and other occasions that they may incur cost sanctions.

The high rates of self-representation in family cases will pose ongoing challenges for judges and lawyers, and will continue to result in frustration and concerns for litigants, both those with and without lawyers. At the same time, the vast majority of those with greater resources will continue to have legal representation, though often resolving their cases outside of the court system. This raises concerns about “two-tier” justice, with those who are wealthier tending to resolve disputes with lawyers outside the court system, and those with more limited means being unrepresented and resolving family disputes in an increasingly stressed family court system.

There have been many calls for major reforms to the family justice system from policy makers, judges, lawyers and the mental health community, as well as by those most affected by the family justice system, litigants.³³ Yet, there remains little empirical research that helps with

³² For examples of cases where judges took account of the fact that a self-represented litigant increased the legal expenses incurred by the represented party, see *JC v AK*, 2010 ONCJ 455, [2011] WDFL 953 (costs of case conferences for which he was poorly prepared imposed on self-represented party); *AGL v KBD*, [2009] OJ 2371, 73 RFL (6th) 218 (Ont Sup Ct), where McWatt J awarded \$251,000 against a partially self-represented mother in an alienation case, commenting: “I can only characterize the costs incurred by the father as a litigant’s worst nightmare.” In an unreported 2009 Ontario Family Court decision, Thomson J awarded \$10,000 in costs against a father who had never lived with a child but sought custody, observing: “prosecuting unmeritorious claims is never reasonable, regardless of whether a party is represented or not;” see *Luckham v Molleson* (unreported August 26, 2009, Kingston, Ontario).

³³ See e.g. Landau, *supra* note 5; Law Commission of Ontario, *supra* note 5; Nicholas Bala, “Reforming Family Dispute Resolution in Ontario: Systemic Changes & Cultural Shifts,” in Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 271.

understanding about what works effectively and what does not. Too frequently services have been put into the family justice system without proper evaluation and a proper understanding of the impacts. There is very little empirical research, in Canada or elsewhere, that follows litigants and their children through the different stages of the litigation process and that assesses the effect on outcomes of different methods of dispute resolution. Policy and structural reforms remain scattered and limited, despite the increasing number of self-represented litigants in the family courts and the concerns that outcomes, especially for children, vulnerable women and victims of domestic violence may be negatively affected by the lack of advice and representation. Moreover, knowing that some of the self-represented and represented litigants are satisfied with outcomes or services does *not* address issues related to costs to the justice system – to courts, lawyers, litigants – of self-representation, nor does it answer questions about the effect of lack of representation on outcomes for children of separated and divorced families.

There is a need for government, professional groups and scholars to undertake interdisciplinary collaborative research to better understand the costs and benefits of various policy and program initiatives but also what is working well and what is not working well across the globe. This type of research is essential if appropriate use is to be made of the resources and programs or further reforms are to be undertaken. Children and victims of domestic violence, in particular should expect nothing less from the family justice system.