

## Experiences of Ontario Family Litigants with Self-Representation

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### Introduction

There has been much discussion in many countries by lawyers, judges, academics and policy makers about why an ever increasing number of family litigants do not have lawyers and what are the effects of this lack of legal representation. However, there has been very little empirical research on the perspectives of litigants themselves (either those with lawyers and those without lawyers) about the causes and consequences of the lack of representation. Further, while there have been increasing efforts by government and professional organizations<sup>3</sup> to address the problems created by lack of representation, there has been little research about the effectiveness of these responses.

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This research project on access to justice was the result of collaboration between many partners. We wish to acknowledge the support and initial inspiration of Nikki Gershbain, National Director, Pro Bono Students Canada (PBSC), and the assistance of PBSC Program Managers, Navneet Johal and Krystyna Drywa. The PBSC program coordinators at each law school had a key role in recruiting the law student volunteers to conduct interviews. 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 also thank Prof. Jasminka Kalajdzic at the University of Windsor Law School for her supervision of students in Windsor, Ontario. The authors are very grateful to Alexis Rischke, graduate social work student at Wilfred Laurier University, Kitchener, Ontario for her assistance with data entry and data analysis throughout this research project. Last, but certainly not least, we wish to thank all the participants throughout the courts of Ontario who gave their time to complete our survey and share their experiences and opinions about the family 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.

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<sup>3</sup> See, B. Landau, T. Dart, H. Swartz & J. Young, *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 (OBA), ADR Institute of Ontario (ADRIO) and Ontario Association for Family Mediation (OAFM, Dec. 2009) [Hereafter cited as *Home Court Advantage Summit*]. In December 2011 Ontario's Law Society announced that it would create an online "Unified Family Law Platform to provide better access to family justice, including providing information for those who plan to represent themselves.

This paper reports preliminary results from our ongoing study<sup>4</sup> of the experiences and perceptions of litigants in the family justice system in Ontario,<sup>5</sup> both those with and without lawyers, about issues related to self-representation<sup>6</sup> and access to justice. This is the first Canadian study to directly explore the experiences and opinions on access to family justice issues from the perspective of family litigants.<sup>7</sup>

The picture that emerges from the preliminary data in this study reveals the complexity and variation in the causes and effects of lack of representation. Many of those who don't have lawyers are unable to afford lawyers and are concerned about the effects of lack of representation on outcomes, including on their relationships with children and issues of domestic violence. A

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<sup>4</sup> This paper reports on the second of three studies about self-representation and access to justice in family courts. The first study was on the experiences and beliefs of family law lawyers in Ontario with the self-represented (Birnbaum, R. & Bala, N. "Views of Ontario Lawyers on Family Litigants without Representation," (forthcoming 2012), *University of New Brunswick Law Journal*). The third study will focus on the experiences and perceptions of judges in Canada with self-represented litigants.

<sup>5</sup> This study began in October, 2010, after the "four pillars" of reform were implemented by the government at all family court sites in Ontario. (i.e., mandatory information sessions, government subsidized mediation services, Legal Aid advice counsel, and Information and Referral Coordinators).

<sup>6</sup> This paper uses the term "self-represented litigant" to refer to a person who does not have a lawyer, for whatever reason. Like some authors writing in this area, the Law Society of Upper Canada makes a distinction in this area.

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) <http://rc.lsuc.on.ca/pdf/kt/avoidComplaintFamily.pdf> (last accessed July 19, 2011.)

For reasons discussed in this paper, this distinction, while helpful for some analytical purposes, it is often in practice impossible to make, and is not made in our analysis.

<sup>7</sup> MacRae, Simpson, Paetsch, Pearson & Hornick (2009) interviewed 33 self-represented litigants in the courts of Alberta during the evaluation of the Alberta *Family Law Act*, 2005. See also McMullen & Oswald (2010) who analyzed a random sample of 567 family court files from 2005 in a suburb of Milwaukee, Wisconsin, U.S.A.; Hunter, Giddings & Chrzanowski (2003) 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. The Ontario Government is using an online satisfaction survey on their website, <http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.asp> to obtain feedback from litigants about the Mandatory Information Sessions.

significant minority, however, report that they have chosen not to have representation, and lack of financial resources was not the prime reason for this; many in this group do not believe that a lack of representation will have a negative effect on their outcomes. While some unrepresented respondents express profound concerns about navigating the family justice system without lawyers, others seem reasonably satisfied, or very satisfied, with the information and services provided by the Ontario government and feel quite comfortable without a lawyer.

## **The Study**

This study is being undertaken at six courthouses (3 courts in the Ontario Court of Justice and 3 courts in the Superior Court of Justice) in four Ontario cities (Windsor, London, Toronto and Kingston) from October, 2011 to March, 2012.<sup>8</sup> The survey is based on a 34-item questionnaire administered by Pro Bono volunteer law students.<sup>9</sup> The students approach individuals in the waiting rooms at family court, and ask if they were willing to answer questions

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<sup>8</sup> The survey was initially piloted in Kingston, Ontario to determine the flow of the questions and the length of time the survey took that lead 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 court houses 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. These courts not only represent different levels of court but also represent different sized communities, including the largest metropolitan area in Canada and much smaller urban centres.

<sup>9</sup> All the Pro Bono student's 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. The students were also given a list of counseling services in each locale as well as Professor Birnbaum's telephone number to provide to any litigant should they require someone to talk to about the survey or a referral to counseling services. Professor Birnbaum was also available to the students throughout the study to respond to any questions or concerns about the process or any concerns related to the participants involved.

We express our sincere gratitude to these students: Dianne Verano and Jackie Strybos (University of Windsor Law School); Lina Nasir and Jessica Lipton (University of Western Ontario Law School); Jonathon Cheng, Hayley Ha, Megan Cheema, and Katherine Georgious (University of Toronto Law School); Alexandra Kocherga (Osgoode Hall Law School); and Naila Ruba and Natasha Engineer (Queen's Law School).

about their experiences in the family justice system.<sup>10</sup> The students administer the survey questionnaires, recording answers on a laptop computer. By the end of 2011, there were 132 surveys completed, 84 by litigants (64%) who identified themselves as self-represented, and 47 litigants (36%) who identified themselves as represented by a lawyer.<sup>11</sup>

All the participants were assured of confidentiality and no identifying information was collected from them.<sup>12</sup> The survey was divided into four sections:

- (1) demographic and case information (gender, age, employment, income, stage of proceeding, matters at issue in their case, number of children);
- (2) six questions for self represented litigants;
- (3) six questions for represented litigants; and,
- (4) 16 questions for both self-represented and represented litigants about their experiences with the family justice system.

Most questions (some with multiple parts) were based on forced choice responses or rankings, though also allowing for additional reasons or comments, with a final question inviting additional general comments.

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<sup>10</sup> The survey participants included only those who were parties to a family law proceeding that involved children or spousal support, custody/access, property, including variation and enforcement proceedings and proceedings to seek a restraining order or exclusive possession of the matrimonial home. In addition, they had to be waiting to have their matter heard that day or waiting to see Advice Counsel. Finally, the participants had to have sufficient English language ability to be able to read the Information Sheet to Participants or understand the Information Sheet in order to provide informed consent to the 20 minute in-person interview. The study excluded those participants at court for a child welfare matter, estate matter, or any other civil or criminal matter, or who were at court as witnesses.

<sup>11</sup> The litigants were selected based on a purposive sample. That is, only those individuals who had a family matter before the court that day and consented to be interviewed. While it was not the intent to form a representative or randomized study; the litigants were randomly selected on different days in each six courthouses and provided characteristics to allow for comparisons (i.e., age, gender, income, stage of proceeding, geographical locations). The in-person semi-structured interviews were carried out one day per week by each Pro Bono student to accommodate their law school schedules.

<sup>12</sup> The quantitative results are based on aggregate data only and the qualitative comments are being used to provide context and enrich the results with the narratives from the litigant's perspective. The results are not meant to identify any of the participants or court locations in accordance with approval of Research Ethics Review (RERC) at King's University College, University of Western Ontario.

After some demographic questions, self-represented litigants were asked to rank reasons why they decided to not have a lawyer, if they were planning on obtaining a lawyer, how easy or difficult it was to navigate the justice system, and their views on whether they had better or worse outcomes (i.e., custody, access, support, responses to domestic violence) as a result of being self-represented. The participants with lawyers were asked similar questions, except that they were asked to rank the reasons why they had a lawyer represent them in the family dispute, and to comment on their satisfaction with their representation.

The fourth section asked all the participants about their experiences with Ontario government efforts to facilitate access to family justice, namely: the Mandatory Information Program, mediation services, the Family Law Information Centres and Informational & Referral Clerks, the government website, and the Ontario Legal Aid Duty Counsel, Advice Counsel and toll free phone line.

### **Demographics of Family Litigants**

There were 132 participants who responded to the request to complete the survey with a law student.<sup>13</sup> Of these, 40% were females and 60% were males, ranging in age from 19 to 75, with an average age of 37. There were no statistically significant differences found in responses based on age or gender. Of the respondents, 63% reported being employed full-time with a median income range of \$40,001 – \$50,000.<sup>14</sup> The majority (84%) had cohabited with the other party to the litigation as spouses (common law or legally married), for periods ranging from one month to 9 years. A majority (75%) had one child, and the average age of children involved was

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<sup>13</sup> All per cents reported are based on responses to individual questions; many respondents did not answer some questions, therefore not all the responses add to 100. Two litigants did not wish to identify their gender.

<sup>14</sup> The litigants reported other sources of income as: 13% from Ontario Works, 6% from Ontario Disability, 2% from Workman's Compensation, and 14% other (i.e., part-time employment, employment insurance, seasonal work).

8 years of age; 21% had 2 children (average 9 years of age) and 4% had 3 children (average 12 years of age).

The issues that brought them to court were<sup>15</sup>:

- (1) custody and/or access (37%) only;
- (2) support and/or property (23%) only
- (3) restraining order (5%) only
- (4) combination of issues (35%)

At the time of interview, the litigants were at different stages of the litigation process:

- beginning the process (23%);
- first appearance (16%);
- interim motion (10%);
- settlement conference (16%);
- trial (6%);
- support enforcement (2%);
- variation application (10%); and,
- some who were not sure what stage of the process they were at (16%).

## **Legal Representation and Self-Representation**

Figure 1 shows the percent of litigants who had lawyers, by gender and income group.

Those with a higher income were significantly more likely to have a lawyer, with higher income men somewhat more likely to have to have a lawyer than higher income women.<sup>16</sup>

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<sup>15</sup> The litigants were given 6 individual choices: , custody, access, support, property, restraining order ,and, other). Many litigants provided a combination of reasons for being in court.

**Figure 1: % of Litigants with a Lawyer**

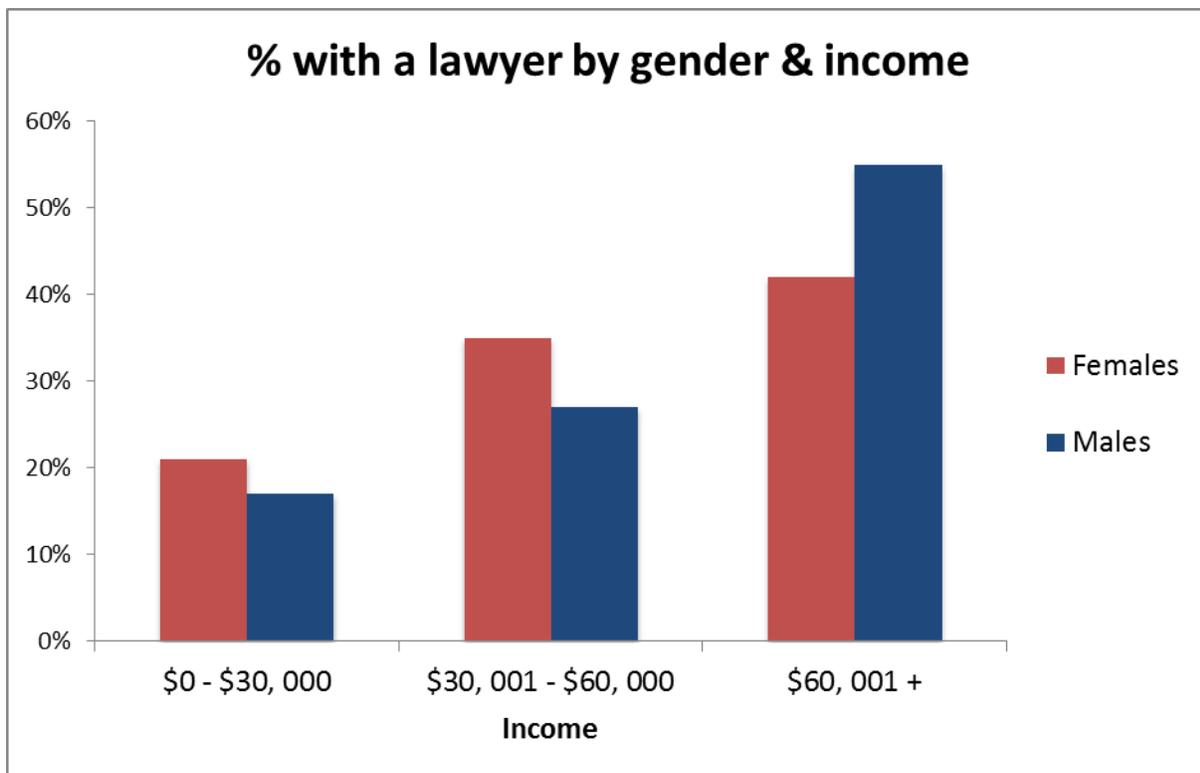
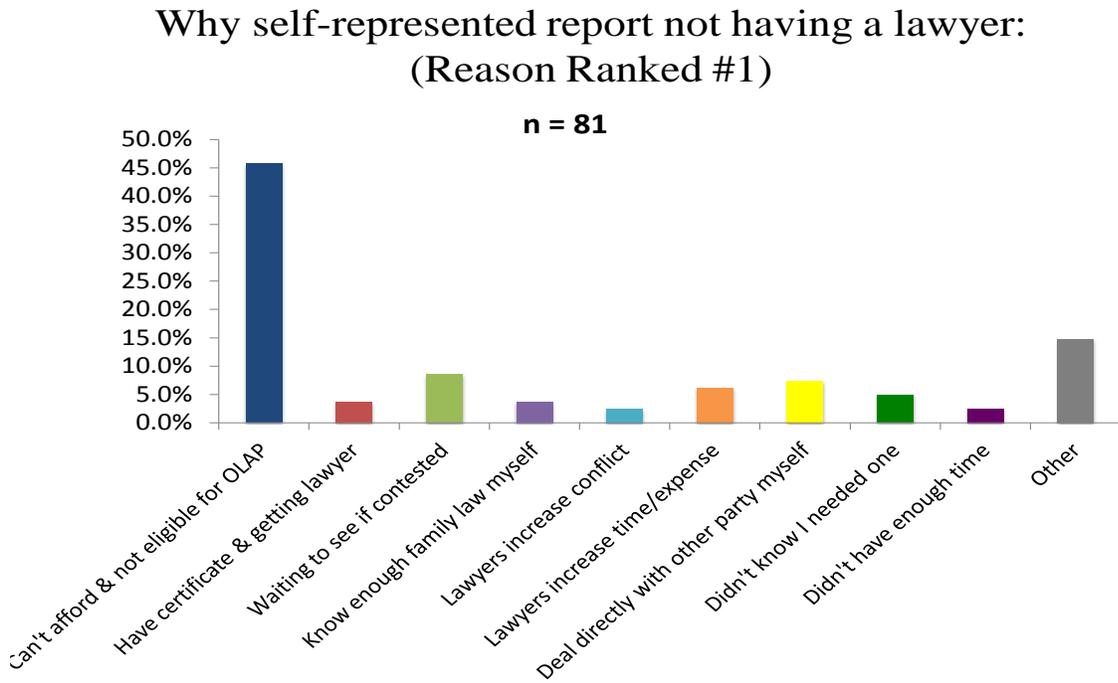


Figure 2 shows that almost half of the respondents (46%) without representation reported that their primary reason for not having a lawyer was that they did not have enough money and were not eligible for legal aid.

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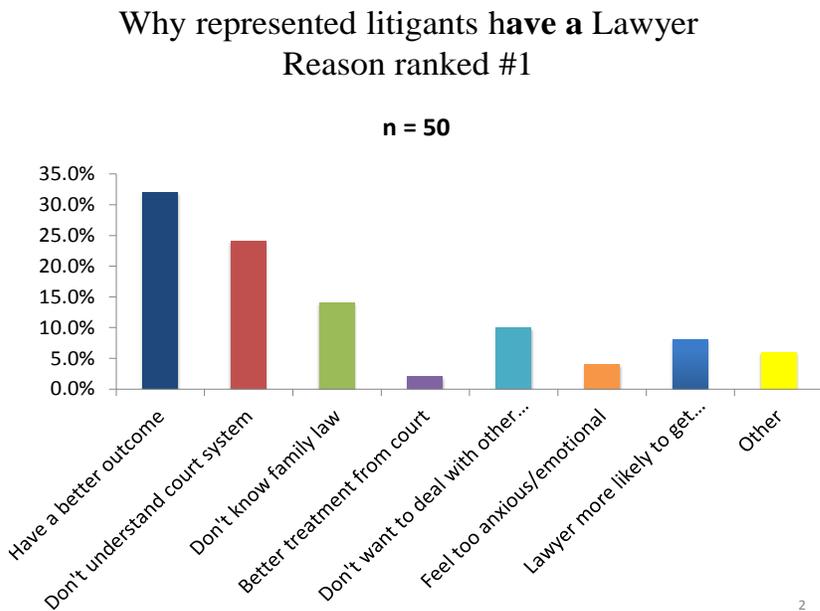
<sup>16</sup> There is a statistically significant difference in income between individuals who have a lawyer (M=6.40, SD=2.86: \$50,001-\$60,000) and those who do not (M=4.92, SD=3.36: \$40,001- \$50,000).

**Figure 2 Why Litigants Are Without Lawyers**



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**Figure 3 : Why Litigants Have Lawyers**



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Figure 3 shows that 32% of respondents with a lawyer reported “having a better outcome” as their number one reason for having a lawyer, while 38% reported lack of knowledge of the law or legal process, and 10% reported not wanting to directly deal with the other party as their primary reason.

### **Views About Lawyers: Self-represented**

Most of those who were self-represented (58%) reported that they were not planning on having a lawyer for the balance of the proceeding, though 21% of those without a lawyer indicated that they planned to retain counsel at a future stage, and 21% were undecided on this issue. Those without lawyers were asked whether they think that lawyers “make problems for self-represented persons worse than they need to be;” (24%) responded that they believe that this occurs always or usually, and a further 34% responded with sometimes. One comment made was:

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

In response to the question about the level of difficulty to navigate the family court system as a self-represented litigant, 64% reported of those who were unrepresented that it was difficult or very difficult; many of the self-represented believe that the lack of a lawyer made the process slower or much slower (48%), though a significant portion (25%) reported that they felt that lack of representation did not slow down resolution.

Some of the comments explain why those without lawyers feel comfortable representing themselves:

“There is enough information out there about family law, you just have to find it. For something like this lawyer can be waste of money when you find the same information online” [male]

“I have been through this process before and didn’t feel that I needed one—felt comfortable with the forms.” [female]

“The matters are simple, the law is clear on these issues. I can do it myself.” [male]

“For someone who isn’t familiar with the system, they make it easy. You walk through the door intimidated, but you leave self-assured. You may not get your outcome, but you feel looked after and that your concerns are being heard.” [female]

“Having all the information online and having someone to talk to in court to help you figure out how to navigate through the court system makes it easier to settle disputes without a lawyer.” [female]

Other unrepresented individuals expressed negative sentiments about having a lawyer:

“I distrust lawyers based on my past experiences.” [male]

“I feel that some lawyers have a political agenda—are more interested in financial gain. . . . .some lawyers should be more eager to find solutions because they don’t seem to act that way” [male]

Most unrepresented individuals, however, expressed concern about navigating the family court process without a lawyer:

“The forms you are given to fill out are extremely difficult to understand. They are designed for lawyers to fill out and not regular people presenting themselves.” [female]

“The court system is not fair; takes too long” [male]

“Can’t fill the forms, no one wants to help. . . . .tried to get lawyer and too much income..” [male]

“The court system is extremely biased and subjective. If you have a lawyer, you are more likely to win and if the other party has a lawyer and you don’t, you probably will not win. It is very difficult to qualify for legal aid, even if you cannot afford a lawyer. The system is very biased and subjective and hard to navigate alone. The lawyers try to stretch the time out as much as possible to get as much money as possible.” [male]

## **Views About Lawyers: Represented**

The vast majority of those with lawyers stated that they planned on continuing to retain their lawyer (86%), and reported that their lawyer was very helpful (55%) or moderately helpful (25%) with their family dispute; only 5% reported that their lawyer was not helpful. Most of those with lawyers also believed that they would obtain a better result with a lawyer (71%), and a significant number strongly agreed or agreed (36%) that the court process takes less time with a lawyer. In response to the question of whether those that had a lawyer believed that the judge listens to the lawyer more than the self-represented litigants, 27% reported definitely, 23% reported very likely and 21% reported likely. Their comments about their reasons for having a lawyer included:

“The court system is very complicated to navigate and I am glad that I have my lawyer with me. I wouldn’t even know where to begin if I didn’t have my lawyer.” [female]

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

“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]

## **Experiences With Government Services**

Both the self-represented and represented family litigants were asked about their experiences with the court based services in Ontario (i.e., mandatory information sessions, use of mediation (on site and off site), use of the internet (i.e., electronic forms and website, and how helpful they found the Legal Aid Duty or Advice Counsel, and the toll free legal aid phone line).

Court-connected information and education programs have been established in many jurisdictions for individuals with family disputes.<sup>17</sup> These programs typically provide 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.<sup>18</sup> They also provide an introduction to the family justice process for the growing number of family litigants without lawyers.<sup>19</sup> However, in Ontario these programs are only based on a single 2 hour session, and appropriately are referred to as "information" not "parenting education."

Of the 33% of respondents who attended the two hour Mandatory Information Program sessions, 50% reported that it was very helpful or somewhat helpful for learning about the family justice process, while 55% believed the sessions were very helpful about learning more about alternatives to court. The comments about the Mandatory Information Program include:

"I feel like it covered a lot of things that I already knew, it didn't cover much about the steps like case conferences. It was just the basics of support and access and most people know that." [male]

"They [at the Mandatory Information] Program didn't say anything about that [mediation]. When I asked my lawyer, all I was told was that I have to pay for mediation. I wanted a mediator." [female]

"My kids have already been through counselling. It is a waiting game for kids that are going into counselling. It is still not helping the kids out. They give information out but it

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<sup>17</sup> For a review of programs in Alberta, see Joanne J Paetsch et al, *High Conflict Intervention Programs in Alberta: A Review and Recommendations* (Canadian Research Institute for Law and the Family, Alberta Justice, 2007). For proceedings in British Columbia, the Alberta Court of Queen's Bench (a 6-hour course) and the Family Division of the Supreme Court of Nova Scotia, attending the parenting education program is mandatory for separating and divorcing parents prior to receiving a court order.

<sup>18</sup> 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.

<sup>19</sup> *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, vol 1 (1997).

is not helping the kids. This is why a lot of kids give up; there is a lot of stuff out there but not enough time for the kids.” [female]

Of the 13% who used mediation services, 56% reported that it was very helpful or somewhat helpful, but of the 87% who had not used mediation, most (88%) indicated that they did not intend to do so. The comments about mediation include:

“Helpful, but too late in the process” [male, mediation]

“The mediator was more there for [my former partner rather] than myself. The mediator was biased.” [female, mediation]

All respondents were also asked if they used the Ontario Ministry of Attorney General (MAG) website. Almost half (45%) reported that they had used the website; of those, 24 % reported that it was very helpful and another 73% reported that it was somewhat helpful. An example of the positive comments about the internet based MAG materials is:

“Having all the information online and having someone to talk to in court to help you figure out how to navigate through the court system makes it easier to settle disputes without a lawyer.” [female, MAG website]

Some of the concerns expressed by a few (2%) who did not find the internet MAG website helpful. Comments about the online forms and website include:

“The website did not answer any questions directly. It was hard to find a definite answer to anything” [male, MAG website]”

“Very frustrated, don’t know where to turn....no one willing to help.” [female, on-line forms]

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

“Some online forms were not very convenient. Some issues with page layout template, very inconvenient...[female, online forms]

Respondents were also asked the brochures and pamphlets at the Family Law Information Center (FLIC) at the courthouse. Of the 40% who reported that they used these materials; 17% reported that they were very helpful, 44% somewhat helpful and 29% reported they were moderately helpful. However, comments were also made about the difficulty in understanding the print materials, such as:

“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]

“Some words are too big, especially for people that have disabilities.” [female]

All respondents were asked if they made use of the Ontario Legal Aid 1-800 number. There were 36% who indicated that they called the toll free line; of these, 28% believed it was very helpful, 26% reported it was somewhat helpful and 9% reported it was moderately helpful; 37% reported that it was not helpful at all. Some of their comments explain why the Ontario Legal Aid toll free line was *not* helpful:

“Confusing language” [female]

“They hung up on me. Legal aid was very unhelpful and unfriendly. I felt distressed about after the phone call. They wouldn’t refer me to anybody and didn’t provide me with other resources that I could consult.” [female]

“Felt that she insulted me, and were not interested in my case.” [male]

“Denied me. Said the issue had nothing to do with children’s safety and was denied legal aid.” [female]

“It took 4 phone calls to finds out I needed to phone FLIC” [female]

Of the 30% who reported that they spoke to Advice Counsel at the Family Law Information Center at the courthouse, 71% reported that they found the lawyer was very helpful or somewhat helpful, but of those who had not used this service, 69% reported that they were not

planning on speaking to Advice Counsel.<sup>20</sup> Of the 38% who reported receiving help from Duty Counsel for the court process, 67% reported that these lawyers were very helpful or somewhat helpful, but 13% reported that these lawyers were not helpful. The comments about these lawyers were mixed:

“Duty counsel are amazing.” [Litigant beginning the process.]

“They [Duty Counsel] just went for lunch, and now I have to wait around for an extra hour.”

“They [Advice Counsel] redirected me to Duty Counsel who redirected me to Advice Counsel, so I was very frustrated, and wasted a day coming to court” [advice counsel]

“Lost documents for court [duty counsel]”

### **Perceptions of Treatment of Self-represented Litigants**

All respondents were asked if self-represented litigants get fair treatment from the court staff and judges.

Of the self-represented, 55% of males reported that they were treated very well or had moderately good treatment from court staff, 59% of self-represented females reported that they felt treated very well or had moderately good treatment from court staff. Some concerns about poor treatment from court staff included:

“Depends on the particular staff working” [male]

“They take us less seriously, and we are pushed around” [male]

“Court staff thinks of regular people as incompetent in the field of law” [female]

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<sup>20</sup> Legal Aid Ontario employs Duty Counsel to provide summary advice and assistance to those who have a matter in court on the day that a person attends; Duty Counsel may go into court with a person, but they cannot be involved in trials and generally cannot be involved in contested motions. Legal Aid Advice Counsel provides summary assistance at the courthouse to those with documents to file with the court or questions about the process. The provision of the services of Duty Counsel and Advice Counsel is limited to lower income individuals, but there is somewhat more flexibility in assessing inability to afford legal representation in this context than for provision of a Legal Aid certificate to allow retaining a lawyer for representation.

“They look down upon unrepresented people” [female]

Of male litigants who were self-represented, 44% reported that that self-represented litigants are treated very well or receive moderately good treatment from judges. Of females who were self represented, 59% reported that they thought that self-represented litigants are treated very well or receive moderately good treatment from judges. Comments from those that were unrepresented expressing 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]

Some comments from the represented reflected similar concerns about the possibility of poor treatment of the unrepresented by judges, and this may have influenced their decisions to seek representation:

“... probably not treated too well. My friend was in court before and she didn’t have 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]

## **Expected Outcomes Regarding Children and Financial Matters**

All respondents were asked whether they believed that having a lawyer would make a difference with respect to child related and financial matters, taking account of whether the case settles or is decided by a judge.

Of the males who were self-represented, 40% reported that they believed that that having a lawyer would give them a better outcome for child related matters if the case were decided by a judge, though 16 % reported that having a lawyer would give them a worse outcome with respect to custody or access decisions by a judge, and 19% expected no difference. Unrepresented men had similar expectations for the effect of lack of representation of financial matters, with 17% expecting a worse outcome if they had a lawyer and 30% expecting the same outcome.

Unrepresented men had a little more concern about the effect of lack of representation on settlements, especially as regards children, with 52% expecting a worse outcome because they did not have a lawyer, compared to the 40% who expected a worse outcome if a judge resolved their case. These results suggest that while many men without lawyers expect worse outcomes because of their lack of representation, a significant minority expect the same or even better outcomes. The results also suggest that men without lawyers may be less inclined to settle a case without judicial involvement, for fear that they may have a worse outcome and evidently expect that the judge will in some way protect their interests.

Of the females who were self-represented, 30% reported that they believed that having a lawyer would give them a better outcome for child related matters if the case were decided by a judge; none expected having a lawyer would give them a worse outcome with respect to custody or access decisions by a judge, and 33% expected no difference.

Unrepresented women had somewhat greater concerns about the effect of lack of representation of financial matters as opposed to child related issues resolved by a judge, with 40% expecting a worse outcome because of the lack of representation. Like men, unrepresented women also had more concern about the effect of lack of representation on settlements, especially as regards children, with 46% expecting a worse settlement because they did not have a lawyer, compared to the 30% who expected a worse outcome if a judge resolved the case. These results suggest that women generally have greater concerns about the effect of lack of representation; further while a minority of men expect to do better because they are representing themselves, in particular in regard to child related issues, no women were of this opinion.

Compared to those without lawyers, those with lawyers generally had significantly greater belief of the positive effects of having representation in terms of outcomes for both child related and financial matters, whether resolved by a judge or settled by the parties. For example, 63% of women with lawyers expected that representation would result in better outcomes in settlements as regards children, compared to only 46% of women without lawyers who expected that having a lawyer would result in a better outcome. As one female litigant who had a lawyer stated: “Custody of my children is an important matter and I would not trust myself if I had to be self-represented.”

### **Perceptions of Outcomes Regarding Domestic Violence**

All respondents were all asked if domestic violence concerns were a part of the dispute. One quarter of males (25%) who were self-represented reported that domestic violence was a part of the dispute, while only 12% of men with lawyers reported that domestic violence was an issue. Among women, whether represented or not, one third reported domestic violence issues.

Although this study did not deal with “matched pairs” of litigants, the higher rates of reporting that domestic violence is an issue by women may reflect differences in the perception of this issue, with women substantially more likely to see this as a matter to be addressed.

All respondents were also asked if their views about the effect of lack or 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. Of males who were self-represented, 37% 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, 34% reported that they agreed or 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 those with lawyers generally expected better outcomes as regards children and financial matters because they had lawyers, they generally believed that legal representation made less difference in regard to domestic violence issues. For example 20% of the women with lawyers had expressed concern about the lack of representation or protection for victims of family violence, compared to the 34% 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 domestic violence than in regard to economic or child-related issues, presumably because there is an expectation that judges will intervene more in domestic violence cases.

## Experiences with the Family Justice System

All respondents were asked to comment generally about their experiences with the family court system. Comments varied depending on the stage of the litigation process, and expressed a range of concerns:

“Because of my income, which was over the eligibility mark by a small amount, duty counsel could only give me 20 minutes of time, and I felt that because of this, I couldn’t explain the full scope of the situation to get proper advice. So I wasn’t equipped with the information I needed, and I wasn’t feeling very confident to go before a judge.”  
[Variation]

“It’s been frustrating and stressful all along. Stress and depression. Sleepless nights. Difficult struggling on your own, with kids, working, coming home. Nobody ever married to be separated or divorced. I don’t think they [Legal Aid] are that supportive... I mean look at the time [Legal Aid lawyer is late for appointment].” [First Appearance]

“I thought having a lawyer would speed up the process, but so far it hasn’t and that is frustrating. The process takes too long and takes a huge toll on you financially and emotionally.” [Interim order]

“This is just all so messy and I hate being here. I only come here when my lawyer tells me to.” [Interim order]

“Lack of individuality to the case - I feel as if very specific circumstances of a specific case may not get taken into consideration - lawyers and judges don't make allowances for what I find important because it's a routine case for them - I find that to be shocking - There's a lot of stress in financial situation (custody battles especially) - maybe the process shouldn't be so focused on how much the other party is making when taking into account the welfare of the child - focus on the morals and values of the people as opposed to their pay stubs when awarding custody and access.” [Settlement conference]

“The family court system allows parties to cause a lot of delay in the process. This specific dispute has gone on for more than seven years because of consistent delays from the other party trying to prolong dispute resolution. There should be safeguards in the system to protect against this.” [Trial]

“Some individuals are more helpful than others in explaining content for how to proceed with a matter on your own. The process is very time consuming. If you don’t have the time then it is feasible to acquire a lawyer because it does take a lot of time but you have

to be able to afford a lawyer. Some people in the centre are helpful but some are not. Many don't have patience when you ask a question. There is basically inconsistent help across the board for what is supposed to be a helpful service provided to self-represented litigants.” [Variation]

“Length of the process is too long should be shortened; really hard if you have a lawyer and you're paying for each visit; and you go in and pay lawyer but nothing happens because it's a 'check-up' date; very easy to go bankrupt.” [Variation]

### **Comments and Concerns**

A final question was open ended, asking for general comments about the family justice process. While many litigants, both those with lawyers and without lawyers, reported that the court based services were generally satisfactory, significant concerns were expressed by those with visual and literacy challenges. Written and web-based materials being developed for the self represented must take into account differing levels of vision impairment and language fluency.<sup>21</sup> Many comments reflected concerns about language difficulties, and some reported difficulty in printing the online materials.

One of the recurring themes in the comments of men was a perception that the family court system is biased against them. Comments made by men were:

“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”

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<sup>21</sup> 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." Mutton, V. "Frozen moment of judicial passion" in the *Lawyers Weekly*, 31(26) November 11, 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".

“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.....”

“The court system is extremely biased and subjective. If you have a lawyer you are more likely to win and if the other party has a lawyer and you don’t, you probably will not win.”

“The 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 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.....”

“As a woman I feel more secure about the family law system will protect me.....”

“...Even if a woman is earning more the family court system should still protect a woman because of her unique vulnerable position as compared to the man.”

“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.”

### **Limitations of this Report**

This is only a preliminary report; much data is still to be collected and more analysis of patterns and inter-relationships is required. The quantitative data reported here must be considered with caution as the number of respondents is not yet sufficient to allow for rigorous statistical comparisons by gender, age, stage of proceeding, and whether or not respondents were

represented. In addition, even when the study is completed and more data obtained, the individual responses are based on one point in a process, and the views of respondents may change as their cases progress.

## **Conclusions**

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”.<sup>22</sup> This paper provides preliminary results of a study of an important set of questions related to self-representation in Ontario’s family courts. While data collection is ongoing, a complex picture is emerging. It is clear that there are a range of causes and effects of self-representation, and that there needs to be a range of responses by different institutions, agencies and professionals to self-representation.

This preliminary report confirms the view of many Ontario lawyers<sup>23</sup> that 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. Many of those without lawyers are being helped by the expanding range of government services, and some feel reasonably comfortable dealing with the family justice process without retaining a lawyer. For those with a low conflict separation, adequate education and literacy skills, and relatively simple financial affairs, the lack of representation may not present a large problem, at least for the 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 decision (though these litigants are imposing costs on the justice system and government).

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<sup>22</sup> Zorza, 2009, p. 519.

<sup>23</sup> Birnbaum & Bala, forthcoming

There is, however, also a very significant portion of unrepresented 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 preliminary results indicate that for about one half of unrepresented litigants, the primary reason for not having a lawyer was that they did not have enough money to pay 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 jurisdictions, the Ontario government is trying to deal with this growing problem by providing self-help online forms, information programs and counsellors, toll free phone lines access to Duty and Advice counsel at courts, and Family Law Information Centers. The information and brief advice provided to the self represented litigant cannot 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. Clearly, more needs to be done to provide access to legal services for the vulnerable unrepresented litigant, if not by the shrinking legal aid scheme, then perhaps by an expansion of services provided by limited scope retainers and more use of law students, and by efforts to reduce the cost of legal services.

This study 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 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, law societies and bar associations to educate 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 all or at least a substantial portion of the costs imposed on the other party, and should be warned by judges at settlement conferences and at other occasions that this may well occur.

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