

SELF-REPRESENTED LITIGANTS IN FAMILY LAW DISPUTES: VIEWS OF ALBERTA LAWYERS

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1.0 INTRODUCTION

The issue of access to justice for individuals involved in family law disputes has been receiving growing attention in recent years in Canada and internationally. Related to this is the apparent rise in the number of self-represented individuals in our family courts.¹ With an increase in the number of self-represented litigants comes the concern that these vulnerable people are not receiving the type of legal advice they need and questions arise regarding the effects of this on the outcome of their cases. Some governments and agencies have attempted to address this problem by increasing the availability of information and the number of services designed to assist self-represented individuals (e.g., Hilbert, 2009; Malcolmson & Reid, 2006; MacRae et al., 2009; Zorza, 2002). However, this may, in fact, lead to an increase in self-representation as some litigants may decide that with the information or services provided legal representation is not necessary to proceed through the family justice system. While self-representation may be a viable option for some parties involved in a relatively straightforward, low conflict separation or divorce, cases in which disputes regarding children or domestic violence are issues are likely to benefit from the advice and advocacy that can be provided by a legal professional who is trained and has experience in family law.

Very little empirical research has been conducted in Canada on the effects of an increase in self-representation on legal professionals, litigants, and costs to the justice system in general. One of the few recent studies in this area (Birnbaum & Bala, 2012; Birnbaum, Bala, & Bertrand, in press) examined the views of judges, lawyers, and litigants regarding self-representation in family law cases. Highlights of the findings of this study included:

- The majority of judges surveyed across Canada and lawyers in Ontario reported that there has been an increase in self-represented family law litigants over the past five years.
- Surveys of judges and lawyers suggest that in over 50% of the cases in the family justice system, one or both parties do not have a lawyer.
- The most common reasons for self-representation are inability to afford a lawyer and ineligibility for legal aid.

¹It has been argued by some authors and agencies (e.g., Law Society of Upper Canada, 2008) that a distinction should be made between “unrepresented” and “self-represented” parties. According to this argument, unrepresented litigants refer to those individuals who do not have legal representation because they have no choice, usually due to financial reasons, while self-represented litigants do not have legal counsel because they have made the choice not to. In reality, it is often difficult to distinguish between these two groups, and in this report, the term “self-represented” is used to describe litigants who do not have a lawyer for any reason (see Birnbaum, Bala, & Bertrand, in press for a discussion of this issue).

- The majority of Ontario lawyers reported that settlement is either less likely or much less likely if the other side is self-represented.
- Judges reported that if one or both parties is self-represented, the length of time to resolve or manage the case is substantially longer.
- The majority of Ontario lawyers believe that self-represented parties have worse outcomes in family law cases than those with legal representation, regardless of whether the case is settled or resolved by a judge.
- Almost one-half of judges believe that self-represented litigants achieve worse outcomes with regards to their children than individuals with representation and almost two-thirds believe that self-represented parties have worse outcomes with respect to economic matters.
- Litigants generally believe that they will have better outcomes if they have legal representation.
- Litigants with higher incomes are more likely to have lawyers, and also have a greater belief in the value of legal representation.
- Although most unrepresented litigants would prefer to have a lawyer, a significant portion of unrepresented litigants do not expect a worse outcome because they do not have a lawyer.

1.1 The Present Study

The current study modified the instrument in a survey by Birnbaum & Bala (2012) with Ontario lawyers to obtain the experiences with and opinions of Albertans regarding self-representation. The Survey on Experiences with Self-represented Litigants was a web-based survey that was conducted with a sample of family law lawyers in Alberta. The sample was compiled from various lists maintained by the Canadian Research Institute for Law and the Family (CRILF) and e-mail addresses were verified by individual lawyers' and law firms' web sites and the 2012-13 Alberta Legal Telephone Directory.

An initial invitation to complete the survey along with a link to the web site containing it was e-mailed to 174 family law lawyers across Alberta on June 13, 2012 with a request that they complete the survey by July 6, 2012. A reminder e-mail to the complete sample was sent on June 26th and the survey was closed to new responses on July 31, 2012. A total of 73 valid surveys were completed, resulting in a response rate of 42%.

The survey contained background questions regarding respondents' experience in the family law area in general, as well as their experiences with self-represented litigants in the family law area. In addition, participants were asked their views on

alternatives to the traditional family law model, their opinions of parenting education workshops, and their involvement in providing pro bono services in family law.

It should be noted that the results of this survey may not necessarily represent the views of all family law lawyers in Alberta.

2.0 SURVEY FINDINGS

This chapter presents the findings from the Survey on Experiences with Self-represented Litigants. The findings are grouped into the following six areas: (1) Background Information; (2) Experiences with Self-represented Litigants; (3) Alternatives to the Traditional Model of Family Law; (4) Parenting Education Workshops; (5) Provision of Pro Bono Services; and (6) Respondents' Concluding Comments. Supplementing the findings are write-in comments made by the survey participants, which elaborate upon the opinions expressed in the survey.

2.1 Background Information

A total of 73 surveys were received. Almost three-quarters of respondents were female (n=52; 71%), and participants had practiced law for an average of 17 years (range = 1 to 41 years). Respondents indicated that, on average, 84% of their practice is in family law and that 7% of their family cases are on legal aid.

2.2 Experiences with Self-represented Litigants

Family law lawyers were asked several questions regarding their experiences with self-represented litigants and their opinions regarding why some individuals do not have legal representation. When asked what percentage of their family law cases in the past year had a self-represented party for some of the family litigation process, respondents stated that this occurred in 20% of their cases; participants indicated that, in the past year, another 14% of their family law cases had a self-represented party for all of the family litigation process.

When respondents were asked whether they think that there has been a change in the number of self-represented litigants over the past five years, the findings were quite dramatic (see Figure 2.1). Almost all lawyers (92%) said that there are either much more or more self-represented litigants compared to five years ago. No one thought that there were fewer self-represented parties compared to five years ago, and 8% thought that the number of self-represented individuals had remained about the same.

Lawyers were asked why they think that family law litigants are self-represented, and their responses are shown in Table 2.1. A substantial majority of respondents (86%) said that parties are self-represented because they cannot afford a lawyer and are not eligible for legal aid or that they initially had a lawyer but could no longer afford representation (82%). Almost three-quarters of lawyers (73%) stated that self-represented persons think that they know enough family law to represent themselves as well as or better than a lawyer. Less than one-half of respondents said that individuals are self-represented because they want to directly confront their former partners themselves (43%) or that self-represented parties think that lawyers will increase the adversarial nature or complexity of the process (34%).

Figure 2.1

Respondents' Opinions on Whether They Think There has Been a Change in the Number of Self-represented Litigants Now as Compared to Five Years Ago

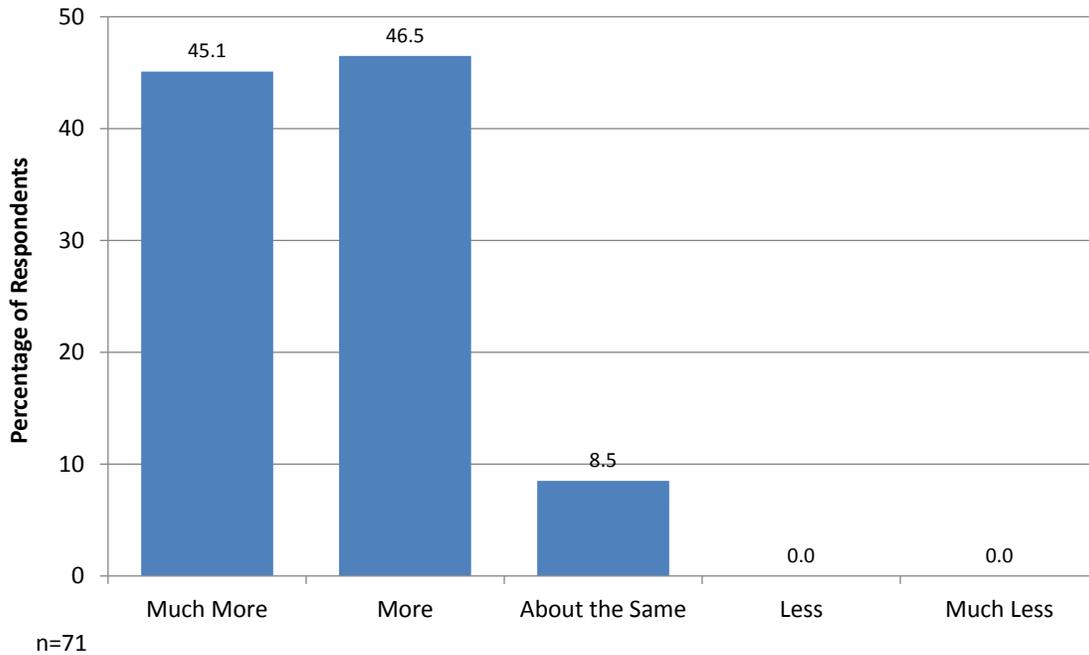


Table 2.1

Respondents' Opinions on Why Family Law Litigants are Self-represented

Reasons for Self-representation	N	%
They cannot afford a lawyer and are not eligible for legal aid	63	86.3
They initially had a lawyer but could no longer afford legal representation	60	82.2
They think that they know enough family law to do it as well or better themselves	53	72.6
They think that having lawyers will increase time/expense of resolution	43	58.9
They want to directly confront former spouses/partners themselves	31	42.5
They think that lawyers will increase the adversarial nature or complexity of the process	25	34.2
Other reasons	24	32.9

Total N=73
Multiple response data

When asked if there were any other reasons why family law litigants are self-represented, 17 respondents provided 19 comments. The most frequent comments were that the client is too difficult to maintain a client/lawyer relationship (29%), that the clients dislike/do not trust lawyers (18%), and the clients don't like what they're hearing from lawyers (18%). As one respondent stated, *"I believe many have a personality disorder whereby they believe that by speaking directly to the decision maker, their point of view will surely prevail."* Some lawyers indicated that some litigants might be self-represented by necessity rather than choice. One respondent said *"lawyers won't represent them because they have issues with personality or reality and have fired a few lawyers..."*, while another simply said, *"they can't find counsel to accept their ridiculous instructions."*

Respondents who provided more than one reason why litigants are self-represented were asked to rank them from most common to least common. By far the reason most likely to be ranked first was that they cannot afford a lawyer and are not eligible for legal aid (n=35). This reason was ranked second by an additional seven individuals. The second most common reason was that that they initially had a lawyer but could no longer afford representation, which was ranked first by 12 respondents and second by 22 individuals.

When asked if they think that men and women decide to be self-represented for different reasons, lawyers were almost evenly split in their responses, with 51% (n=36) saying they think that men and women decide to be self-represented for different reasons and 49% (n=35) indicating that they do not think that this is the case. Respondents who thought that men and women are self-represented for different reasons were asked to specify what these reasons are and 36 individuals provided 70 reasons. The most common reasons given are presented in Table 2.2. The two most frequently provided reasons were that women don't have the financial resources to have a lawyer (69%) and that men don't think that they need a lawyer (67%). Interestingly, 42% of the respondents to this question gave both these reasons together, as indicated by this respondent: *"Women generally cannot afford a lawyer and men often feel that they know enough to do it themselves and/or want to directly confront their former spouse."* One respondent elaborated on the gender differences:

I think that men have a greater degree of confidence in their ability to persuade decision-makers of their position. Men are more able and inclined to "bluff" than women, and that includes negotiating with the other lawyer on their own behalf, or putting positions forth in court which may not be real positions, but are used for strategic or leverage purposes. Women may well feel the need to hire counsel even where they have fewer resources than their spouses because of power imbalances, intimidation, abuse or the desire to ensure that they have a buffer between them and the other party....

When asked if it increases costs for their client when the other side is self-represented, almost all lawyers indicated that it does (97%; n=69).

Table 2.2

Respondents' Opinions Regarding the Reasons Why Men and Women Decide to be Self-represented

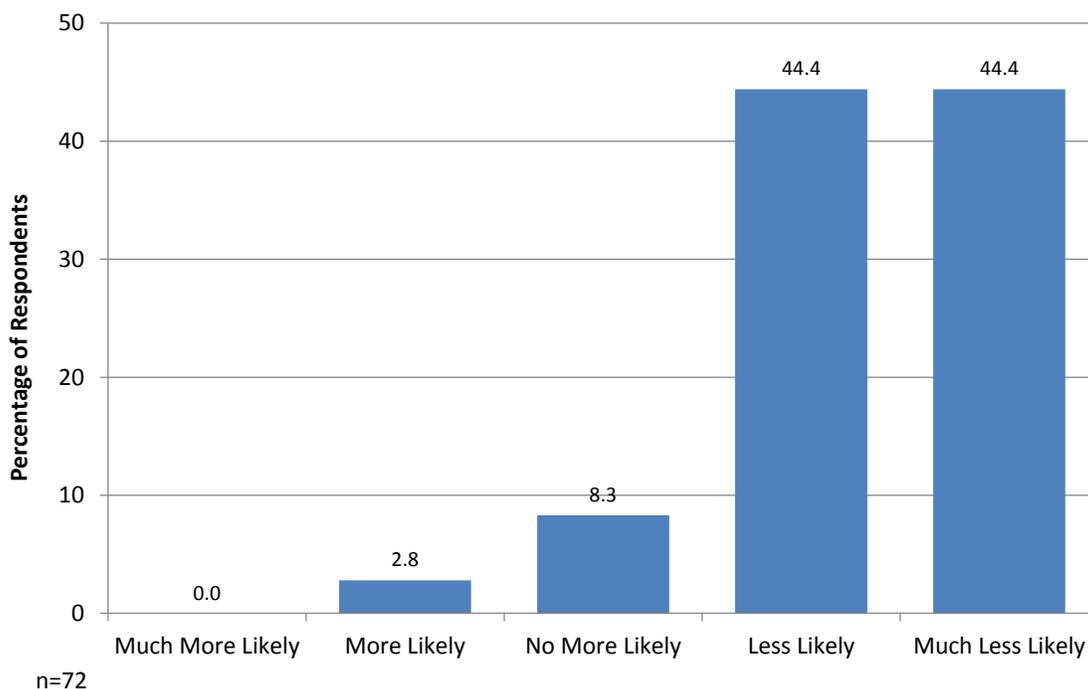
Reasons for Self-representation	n	%
Women don't have the financial resources to have a lawyer	25	69.4
Men don't think they need lawyers	24	66.7
Men want confrontation/want to control the process	11	30.6
Women want to be represented by a lawyer	3	8.3
Men think they can get a better deal negotiating with her	3	8.3

Total number of respondents providing comments = 36
Multiple response data

Family law lawyers were asked if settlement is more or less likely in cases where the other side is self-represented and their responses are provided in Figure 2.2. The substantial majority of respondents indicated that settlement is either less likely or much less likely when the other side is self-represented (89%). Only 3% of lawyers said that settlement is more likely in these cases, and 8% said that settlement is no more likely when the other party is self-represented.

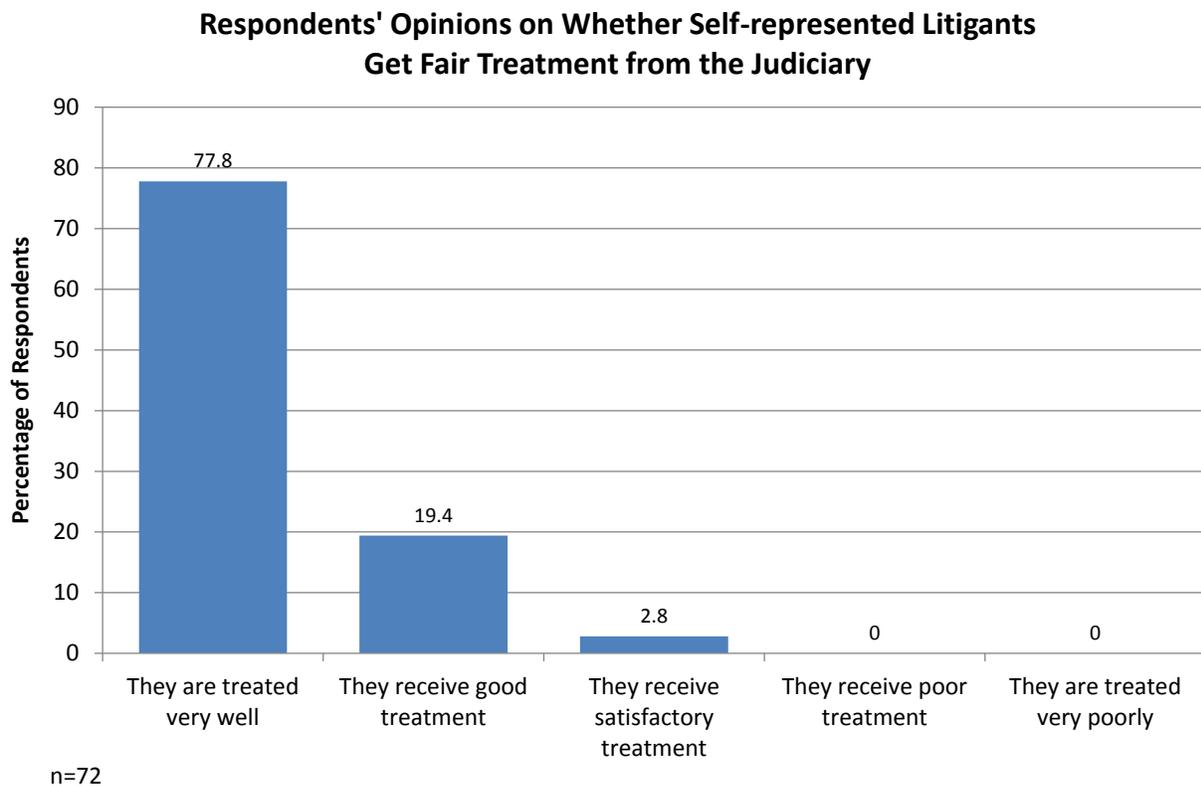
Figure 2.2

Respondents' Opinions on Whether Settlement is More or Less Likely if the Other Side is Self-represented



When asked if self-represented litigants are treated fairly by the judiciary, most respondents indicated that they are either treated very well (78%) or that they receive good treatment (19%) (see Figure 2.3). Only 3% of lawyers said that self-represented litigants receive satisfactory treatment from the judiciary, and no respondents said that they receive poor or very poor treatment.

Figure 2.3



Participants were asked a series of questions regarding whether they think that self-represented litigants achieve better or worse outcomes than represented parties with regards to plans for their children and economic issues. Responses are presented in Table 2.3. With respect to plans for children, just over one-half of lawyers (54%) said that there is no difference in outcomes for self-represented and represented individuals if the case is settled; 36% said that self-represented parties achieve worse outcomes in this situation and 10% thought that self-represented litigants achieve better outcomes. When asked to explain their answer, 34 respondents provided 37 comments. The most common comments were that: the outcome depends on the approach of the parties to negotiation (32%); self-represented parties achieve worse outcomes because the represented party is better informed and their counsel can foresee future issues and avoid pitfalls (29%); and self-represented individuals achieve worse outcomes because they are frustrated by the process and just want to resolve the matter (15%). Examples of comments from respondents who said it depends on the parties were: *“Many self-represented litigants are able to negotiate outcomes that are just as good as those with*

representation,” and “Parents talking about solutions is usually a better outcome, with representation or self-represented.” One lawyer said:

Whether an outcome is better or worse depends more on the approach of the parties to the negotiation, i.e., are they keeping the interests of the children uppermost, rather than who is doing the actual negotiating. An aggressive adversarial lawyer will not achieve any better outcome than an unrepresented person with a more balanced approach.

Respondents who commented that self-represented parties achieve worse outcomes said “[they have] less nuanced outcomes. More issues are left unresolved, which often leads to extra conflict later and could have been avoided.” Similarly, other respondents said “I believe that self-represented litigants are less likely to explore a variety of options for custody/access, or to approach a more nuanced order,” and “They are unaware of different methods or options available and generally accept one of the options presented from the opposing counsel.”

Table 2.3

Respondents’ Opinions Regarding the Outcomes for Self-represented Litigants Compared to Litigants with Legal Representation by Whether the Case is Settled or Decided by a Judge

	Outcome							
	Better		No Difference		Worse		Total	
	n	%	n	%	n	%	n	%
Outcomes Regarding Plans for Children								
- if the case is settled	7	10.1	37	53.6	25	36.2	69	100.0
- if the matter is resolved by a judge	15	22.4	23	34.3	29	43.3	67	100.0
Outcomes Regarding Economic Issues								
- if the case is settled	6	9.1	34	51.5	26	39.4	66	100.0
- if the matter is resolved by a judge	13	19.7	26	39.4	27	40.9	66	100.0

Total N=73

If the matter is resolved by a judge, 22% of respondents said that self-represented litigants achieve better outcomes than represented individuals with regards to plans for their children, while one-third (34%) said that there was no difference and 43% thought that self-represented individuals achieve worse outcomes. When asked to explain their opinion, 43 individuals provided 45 comments. The most common comments were that self-represented litigants do not understand what should be presented to the court (44%) and self-represented litigants receive much more accommodation with respect to rules (26%). The disparate responses to this question are explained nicely in the following comments:

On the one hand, self-represented litigants receive much more accommodation with respect to the rules and process to the detriment of the other party. On the other hand, self-represented litigants often don't understand what is important for the court to consider, and what should be presented to the court. Therefore, sometimes it works to their advantage and sometimes it doesn't. It is more difficult for the party who is represented because the process is often more unpredictable.

Difficult question – judiciary generally follow the rules for orders; if there is a grey area, I think they err on the side of the self-represented (to ensure there is no bias due to self-representation) – however, they are treated much better than the represented client on procedural issues such as longer adjournments or numerous adjournments. The judiciary bends over backwards to make sure that the self-represented is on the same level playing field.

Examples of comments from respondents who thought self-represented litigants achieve worse outcomes in regards to plans for their children if the matter is resolved by a judge said:

My experience with unrepresented parties is that they rarely provide the court with the proper evidence, especially in chambers applications. This makes it very difficult for a judge to make balanced decisions. They have to base their decisions on the evidence before them. Unrepresented parties tend to suffer because they do not know what type of evidence is needed to support their position. Applications take longer due to adjournments so evidence can be submitted – it wastes time and money, and causes frustration for those involved.

Self-represented litigants often take unreasonable positions in parenting disputes so their expectations are typically unrealistic and thus the outcome is less than what they expect. Without counsel to temper their expectations and educate them on what the court might see as children's best interests, they often put their interests ahead of the children and therefore are not successful before the court.

With regard to economic outcomes, one-half of lawyers (52%) stated that there was no difference in outcomes between self-represented and represented parties if the case is settled; just over one-third (39%) thought that self-represented litigants achieve worse economic outcomes and 9% thought that they achieve better outcomes. When asked to elaborate on their answer, 30 participants provided 33 comments. The most common comment was that self-represented parties are not properly informed about support issues (33%). As one respondent put it, “*Self-represented litigants are not aware of nuances in the law that may favour better financial outcomes for them. When they negotiate, they do not advocate those nuances.*” The next most common comment was the need for transparency when dealing with a self-represented party (23%). One

lawyer said, *“I can’t speak for other lawyers, but I constantly worry about a settlement being overturned with an unrepresented party. I often feel there is more of a need to be transparent when dealing with a self-rep.”* Another said, *“There is a thin line between being someone’s adversary and taking advantage of an unrepresented litigant. I would say that self-represented litigants that settle matters, in my cases, are treated fairly but I am sure that there are some that are taken advantage of and achieve worse outcomes....”*

In cases where the matter is resolved by a judge, 20% of respondents thought that self-represented parties achieve better economic outcomes than represented individuals, 39% thought that there was no difference between self-represented and represented litigants, and 41% thought that self-represented individuals achieve worse outcomes. When asked to explain their opinion, 29 lawyers offered 32 comments. The most common comment was that self-represented people are not properly informed which could result in a financial loss (28%). As one respondent said, *“I am merely surmising that a self-rep might miss technicalities in the law which, if the court does not feel it should act as his/her lawyer, could result in a financial loss.”* Another respondent commented, *“Judges do not necessarily know what the economic issues are because they have not been properly disclosed.”*

Other common comments made by respondents were: judges tend to ensure that the law is followed (24%); and that the court tends to sympathize with self-represented litigants (24%). One lawyer said, *“Judges will review financial issues carefully and ensure that they protect the interests of self-reps.”* Another commented:

Usually they will get the “typical result” as if they had a lawyer in spite of themselves. They may even end up ahead if the judge doesn’t award the costs that he/she should as a result of the extra effort counsel invariably had to expend to get the matter to trial (you end up doing a lot of the work for both sides such as putting together exhibit books, agreed statement of facts, etc.).

Participants were asked a series of questions regarding whether they thought there are added challenges in cases with a self-represented litigant on the other side (see Table 2.4). When asked if additional challenges occur because the self-represented party has unrealistically higher outcome expectations, almost all respondents thought that this was always or usually the case (90%). No respondents thought that this was rarely or never the case. When asked if additional challenges are faced because the self-represented party is less likely to settle, three-quarters of lawyers (75%) stated that this is always or usually the case, while 24% thought that this is sometimes the case; only one respondent said that this is rarely the case.

Table 2.4

Respondents' Opinions Regarding Whether There are Additional Challenges in a Case with a Self-represented Litigant on the Other Side for Various Reasons

Reasons	Always		Usually		Sometimes		Rarely		Never		Total	
	n	%	n	%	n	%	n	%	n	%	n	%
Self-represented party has unrealistically higher outcome expectations	19	28.4	41	61.2	7	10.4	0	0.0	0	0.0	67	100.0
Self-represented party is less likely to settle	8	11.9	42	62.7	16	23.9	1	1.5	0	0.0	67	100.0
Self-represented person looks to lawyer for other party for information and advice	11	16.9	33	50.8	18	27.7	3	4.6	0	0.0	65	100.0
Client is upset about judge appearing to favour self-represented party	13	20.3	30	46.9	19	29.7	2	3.1	0	0.0	64	100.0
Client is upset about higher costs due to other party being self-represented	31	46.3	26	38.8	9	13.4	1	1.5	0	0.0	67	100.0
Need to more carefully document communication with the self-represented individual	58	86.6	8	11.9	0	0.0	1	1.5	0	0.0	67	100.0

Total N=73

Lawyers were asked if there are additional challenges because the self-represented party looks to the lawyer for the other side for information and advice and over two-thirds thought that this was always or usually the case (68%). An additional 28% said that this was sometimes the case and only 5% indicated that this is rarely the case. When asked if they faced additional challenges because their client is upset about the judge appearing to favour the self-represented party, 67% of respondents said that this is always or usually the case, almost one-third (30%) thought that this is sometimes the case, and only two lawyers said that this is rarely the case.

When asked if additional challenges are faced because their client is upset about higher costs due to the other party being self-represented, the substantial majority of respondents thought that this was always or usually the case (85%). Only one lawyer said that this was rarely the case. Finally, when asked if additional challenges arise because of the need to more carefully document communication with the self-represented party, all but one respondent said that this is always (87%) or usually (12%) the case.

2.3 Alternatives to the Traditional Model of Family Law

“Limited scope retainers” (or “unbundling”) in the family law area is a topic that is receiving much attention recently as a potential mechanism for individuals who cannot afford the traditional “full retainer” model of legal assistance to receive some legal advice. Respondents were asked in what percentage of their family law cases they provide unbundled legal services. Twenty-nine respondents (40%) indicated that they never provide unbundled services. Of lawyers who do provide unbundled services, their responses indicated that they do so in an average of 12% of their family law cases.

When asked if they support licensed paralegals being permitted to provide limited services in family law cases, three-quarters of respondents (75%) stated that they do not support this while 25% indicated support for this practice. Participants were asked to provide examples of the types of services they thought that paralegals could provide and 37 respondents made 61 comments. The most frequently provided comments are shown in Table 2.5.

Table 2.5

Respondents’ Opinions on What Types of Family Law services Could be Provided by Paralegals or Why Paralegals Should Not be Allowed to Provide Family Law Services

Comments	n	%
Paralegals should not be allowed to provide family law services because they are not lawyers and do not have the education or experience to advise people	15	40.5
Paralegals could draft documents	8	21.6
Paralegals should not be allowed to provide family law services because there are Family Law Information Centres and information is available on the Internet or provided by Dispute Resolution Officers	5	13.5
Paralegals should not be allowed to provide family law services because their work needs to be corrected and they give misinformation	5	13.5
Paralegals should not be allowed to provide family law services because there is no code of conduct or accountability and consequently liability issues	3	8.1
Paralegals could prepare and file Statements of Claim for Divorce	3	8.1
Paralegals could organize and prepare financial disclose for exchange between counsel	3	8.1
Paralegals should not be allowed to provide family law services because there is a concern they would overcharge for services that could be provided inexpensively by a lawyer	3	8.1

Total number of respondents providing comments = 37

Multiple response data

Most comments were quite negative regarding the use of paralegals. The most common comment was that paralegals should not be allowed to provide family law

services because they do not have the education or experience to provide legal advice (41%). One respondent said, “*It is important for clients to understand the role of a lawyer. Allowing paralegals to provide some legal services for family law clients would undermine the value of that role.*” Another said, “*Lawyers went to school for a reason – if the paralegals wish to practice law, they can go to law school. We are in court far too often correcting agreements and parenting/support orders done by mediators (paralegals or social workers).*”

A few respondents thought that paralegals could be tasked with drafting documents (22%), preparing and filing Statements of Claim for Divorce (8%), or organizing and preparing financial disclosure materials (8%). One lawyer said:

I would support it if it was supervised by a lawyer. One concern is that the paralegals may overcharge for services that could be provided inexpensively by lawyers because people have the perception that lawyers will charge significantly more or will promote litigation. However, I do think there is room for more legal services to be provided by paralegals, including appearances for Consent Orders, requests for disclosure, drafting simple documents, etc.

Another respondent expressed this opinion:

Firstly, I would support licensed paralegals who have actually been through the proper training, i.e., the full two-year program that has been offered at Olds College (Alberta), St. Clair College and Fanshawe (Ontario) for over 30 years. Those programs offer in-depth training in both the substantive and the practical areas of law. Secondly, paralegals could assist with document preparation – the clients may still need some limited scope representation for legal advice – and they could also assist in preparing the clients for court – providing schematics of who the players are in the courtroom, proper courtroom decorum, expectations re: professionalism to the members of the bar, etc.

2.4 Parenting Education Workshops

Alberta Justice developed the Parenting after Separation (PAS) workshop which is intended to provide separating or divorcing parents with information about the divorce process, its effects on their children, techniques for improving communication, legal issues, and to encourage the use of mediation and parenting plans. Attendance at a PAS workshop is mandatory for most parties involved in proceedings in the Court of Queen’s Bench and voluntary for parties in Provincial Court proceedings, unless ordered by the Court. Alberta Justice has also developed the Parenting after Separation for Families in High Conflict (PASHC) workshop in Calgary and Edmonton which is available on a voluntary basis to all parents who have already completed PAS. Participants in the present survey were asked several questions regarding PAS and PASHC and their responses are presented in Table 2.6.

Table 2.6

Respondents' Opinions Regarding Alberta's Parenting After Separation (PAS) and Parenting After Separation for Families in High Conflict (PASHC) Workshops

	Yes		No		Don't Know		Total	
	n	%	n	%	n	%	n	%
Do you believe that your clients generally find PAS useful?	64	95.5	1	1.5	2	3.0	67	100.0
Do you believe that your clients generally seem more likely to settle as a result of their participation in PAS?	23	34.3	26	38.8	18	26.9	67	100.0
Do you believe that PAS is valuable for self-represented litigants, but not useful for your clients?	1	1.5	60	89.6	6	9.0	67	100.0
Do you believe that your clients generally find PASHC useful? ¹	32	74.4	3	7.0	8	18.6	43	100.0
Do you believe that your clients generally seem more likely to settle as a result of their participation in PASHC? ¹	11	25.6	15	34.9	17	39.5	43	100.0
Do you believe that PASHC is valuable for self-represented litigants, but not useful for your clients?	0	0.0	36	53.7	31	46.3	67	100.0

Total N=73

¹24 respondents stated that they have not had any clients attend PASHC

Almost all respondents (96%) said that their clients find PAS useful; only one individual said their clients do not find PAS useful and two stated that they do not know. However, when asked if they think that their clients are more likely to settle as a result of their participation in PAS, responses were close to evenly split between Yes (34%) and No (39%); 27% stated that they did not know if attendance at PAS increased the likelihood of settlement. When asked if they thought that PAS is valuable for self-represented litigants but not for their clients, the substantial majority of respondents said No (90%).

Three-quarters of respondents (74%) who had had clients attend PASHC reported that the clients find the workshop useful. However, 35% of respondents indicated that their clients are not more likely to settle their cases as a result of their participation in PASHC; 26% said that their clients are more likely to settle and 40% said that they do not know. When asked if PASHC is valuable for self-represented parties but not for their clients, 54% of lawyers said No and 46% said that they did not know; no participants responded Yes to this question.

Lawyers were asked if they had any additional comments regarding PAS and/or PASHC and 28 respondents made 33 comments. The most frequently provided

comments were that: PAS is a very important and useful course that provides good information (46%); the course helps those with an open mind (14%); and the course needs more information on collaborative law and mediation (11%). As one respondent put it, “[It’s] very useful. I have many clients attend even when not required and get much feedback about how useful it was.” Another said, “I think it’s very useful and it does allow some clients to objectively view their role in the high conflict. It’s not magic, though, and some clients would require magic.” One respondent offered the following suggestion: “Making it mandatory before filing applications is unnecessary – most times we need to attend court immediately for safety or financial reasons and getting an exemption is an additional cost. I do agree it should be mandatory before final orders/divorces are done.”

2.5 Provision of Pro Bono Services

In an attempt to determine the extent to which Alberta lawyers provide pro bono services in family law cases, the survey contained a number of questions related to respondents’ pro bono activities. When asked if they have provided pro bono services in the family law area within the past year, 75% of respondents indicated that they had. Respondents who had done pro bono work were also asked approximately how many hours of pro bono services they provide in an average month: the number of hours ranged from 1 to 30, with an average of 8 hours per month.

Lawyers were asked whether the amount of pro bono work in family law they currently perform has changed compared to last year. The majority of participants said that the amount of pro bono services they provide has stayed the same as last year (56%); 21% stated that their pro bono work has increased compared to last year, 10% indicated that their pro bono work has decreased and the remaining respondents said that they do not provide pro bono services in family law.

Respondents who stated that they had performed pro bono family law work in the past year were asked if they had done so through a structured program and 25% said yes. When asked to provide the name of the program through which they conduct pro bono work, the most common responses were Calgary Legal Guidance (27%), Lawyer Referral Service (27%), and Women’s Centre (27%).

Lawyers who undertake pro bono work in family law were also asked what services they provide and their most common responses are shown in Table 2.7. The most frequently provided services were verbal advice/consultations (33%), followed by reduced or no fees for clients in need (27%). One respondent said they provide “Everything. Negotiation, disclosure, pleadings, interim hearings on all issues, and most recently an annulment hearing!!”

Table 2.7

Type of Pro Bono Services Provided by Respondents

Types of Services	n	%
Verbal advice/consultations	15	33.3
Reduced or no fees for clients in need	12	26.7
All types of services/a variety	8	17.8
General information on law regarding support, property division, legal process	7	15.6
Child support calculations	4	8.9
Meet with clients and provide advice/referrals	4	8.9
Attendance in court	4	8.9
Assistance in drafting orders and agreements	4	8.9

Total number of respondents providing comments = 45
Multiple response data

Finally, respondents were asked what they think are the greatest impediments to providing pro bono services in family law and their responses are shown in Table 2.8. The most common impediment provided by three-quarters (74%) of respondents was lack of time, followed by increased risk of burn out (45%), and increased likelihood of complaints to the Law Society (27%). Lawyers who indicated that there were other impediments to the provision of pro bono services in family law were asked to specify what these are and 24 participants provided 30 responses. The most common response was that they still need to pay the bills and operate their practice (50%). Lawyers offered the following comments:

Cases are very time consuming. Taking cases on a pro bono basis is difficult in operating a practice from a cost point of view. Also, there is a lack of control of the client. When that client pays for the legal service, it provides the lawyer with an ability to encourage the client to settle rather than go to court over matters that are emotional and/or not significant to the issues to be resolved.

I believe all lawyers would work on pro bono files if the government provided us with some sort of tax break for the hours worked. Lawyers must get paid to pay the bills and often money is a factor for volunteering. I believe that lawyers are the most giving profession and yet probably most misunderstood.

Most firms do not like family law lawyers to provide pro bono services because of all the reasons checked off above AND because family law clients are often demanding, hyperbolic in their needs, unrealistic about their role in their family problems.

I do not earn enough revenue in my practice to fund pro bono files.... Also, I find it preferable to use any non-work hours time for volunteer work in areas unrelated to my job to achieve balance and respite from my “day job.” Practicing family law is very demanding and draining and we are prone to compassion burnout so one must be vigilant about respite time and pursuits.

Table 2.8

Respondents’ Opinions Regarding the Impediments to Providing Pro Bono Services in Family Law

Impediments to Providing Pro Bono Services	n	%
Lack of time	54	74.0
Increased risk of “burn out”	33	45.2
Increased likelihood of complaints to the Law Society	20	27.4
Increased insurance costs	8	11.0
Other impediments	25	34.2

Total N = 73
Multiple response data

2.6 Respondents’ Concluding Comments

Finally, respondents were asked if they had any concluding comments regarding self-represented family law litigants or access to family justice and 31 participants provided 58 comments. The most frequently offered comments were that in cases with self-represented parties, the cost is borne by the represented party and that courts should be more willing to put costs against the self-represented party if their applications are without merit (32%), and courts often favour self-represented litigants to the detriment of the represented party (26%). As one respondent commented:

I suggest that court be granted the discretion to make orders for litigants who do not retain legal counsel to share in the cost of the proceedings. As a full-time legal aid lawyer, I often represent clients of extremely limited means (to qualify for Legal Aid a single person must have an annual income of less than \$16,170) while the other party may earn \$100,000 per year and choose not to hire a lawyer. The entirety of the cost of the litigation falls on the shoulders of the person most financially vulnerable and in the worst position to pay.

Respondents also commented on how time consuming self-represented litigants are (10%), and the lack of civility displayed by self-represented litigants (10%). One lawyer said:

It is not touched on in this survey, but my biggest issue when dealing with self-representeds is the lack of civility or any obligation on the self-represented party to act ethically or – often – with the Rules of Court. All these things – courtesy, ethics, general compliance with the Rules without the necessity of applications grease the wheels of justice, so to speak, and when a lawyer is taken out of the equation, all of this often goes too (but not always), and the wheels completely fall off. Parties can still ultimately settle in these situations, but the process to that point is still very painful.

Some respondents offered advice to deal with self-represented family law litigants:

I think self-represented litigants are here to stay. Self-representation was virtually unknown when I started 23 years ago, and has gradually increased every year, for no doubt a variety of reasons – economic reasons, changes in societal attitudes and access to legal and other information on line. I think the addition of duty counsel to family morning chambers is very helpful and increasing access to various other programs to assist people to resolve their family issues would be of assistance too. I am thinking about the provincial family court resolution programs, and perhaps something like that could be initiated in Court of Queen’s Bench as well.

I do believe that the financial limits to legal aid should be expanded. Many people do not qualify for legal aid, but can’t afford to retain a lawyer either.

If there were more resources available to parties of limited means, for example expanding the Do It Yourself Divorce Clinic at Calgary Legal Guidance and mandatory mediation in the Court of Queen’s Bench. [By] expanding the DRO process to ensure the mediation is meaningful we could reduce the number of self-represented parties clogging up the courts with ridiculous applications. Maybe a mandatory case management program with self-represented parties to meet with a case worker (not a judge) to ensure the matter is moving along would help too.

I believe it is important to promote the role of lawyers in the justice system and the value of legal advice. Legal representation should be readily accessible through private retainers, legal aid and pro bono services. Public education should be undertaken to create awareness of options for legal services such as limited scope retainers, collaborative law, mediation, judicial dispute resolution and court processes other than full trial.

3.0 SUMMARY AND CONCLUSIONS

The Survey on Experiences with Self-represented Litigants asked family law lawyers in Alberta questions regarding their experience in the family law area in general, as well as their experiences with self-represented litigants in the family law area. In addition, participants were asked their views on alternatives to the traditional family law model, their opinions of parenting education workshops, and their involvement in providing pro bono services in family law. This chapter presents a summary of the survey findings, as well as conclusions that can be drawn from the findings and recommendations for further research.

3.1 Summary of Survey Findings

3.1.1 Demographic Characteristics

- Almost three-quarters of the 73 survey respondents were female.
- Participants had practiced law for an average of 17 years and, on average, 84% of the practice was in family law.

3.1.2 Experiences with Self-represented Litigants

- Lawyers indicated that 20% of their cases in the past year had a self-represented party for some of the family litigation process; another 14% of their cases in the past year had a self-represented party for all of the litigation process.
- Almost all respondents indicated that there are more self-represented litigants in family law cases now than there were five years ago.
- Participants thought that the most common reasons why parties are self-represented are that: they cannot afford a lawyer and are not eligible for legal aid; they initially had a lawyer but could no longer afford representation; and self-represented persons think that they know enough family law to represent themselves as well as or better than a lawyer.
- One-half of lawyers said that men and women decide to be self-represented for different reasons. The two most frequently provided reasons were that women don't have the financial resources to have a lawyer and that men don't think they need a lawyer.
- Almost all participants said that costs for their client are increased when the other side is self-represented.
- A substantial majority of lawyers indicated that settlements are much less likely when the other side is self-represented.

- Almost all respondents thought that self-represented litigants are either treated very well or receive good treatment by the judiciary.
- Just over one-half of respondents thought that there was no difference in case outcomes for self-represented and represented individuals with respect to plans for children if the case is settled, while just over one-third thought that self-represented litigants achieve worse outcomes.
- If the matter is resolved by a judge, almost one-half of lawyers stated that self-represented persons achieve worse outcomes than represented parties with regard to plans for their children, while one-fifth thought that they receive better outcomes.
- Just over one-half of respondents thought that there was no difference in case outcomes for self-represented and represented individuals with respect to economic outcomes if the case is settled, while just over one-third thought that self-represented litigants achieve worse economic outcomes.
- If the matter is resolved by a judge, two-fifths of lawyers stated that self-represented persons achieve worse outcomes than represented parties with regard to economic outcomes, while one-fifth thought that they receive better outcomes.
- Almost all respondents thought that there are usually or always additional challenges in cases with a self-represented party because the self-represented person has unrealistically higher outcome expectations, and three-quarters of lawyers said that there are usually or always additional challenges because the self-represented party is less likely to settle.
- Over two-thirds of participants stated that there are usually or always additional challenges because the self-represented party looks to the lawyer for the other side for information and advice, and a similar proportion thought that there are usually or always additional challenges because their client is upset about the judge appearing to favour the self-represented party.
- A substantial majority of lawyers thought that there are usually or always additional challenges because their client is upset about higher costs due to the other party being self-represented, and almost all respondents thought that there are usually or always additional challenges because of the need to more carefully document communication with the self-represented person.

3.1.3 Alternatives to the Traditional Model of Family Law

- Respondents indicated that they provide unbundled legal services in less than one-tenth of their family law cases.

- Three-quarters of lawyers said that they do not support licensed paralegals being permitted to provide limited services in family law cases.

3.1.4 Parenting Education Workshops

- Almost all participants said that their clients find Alberta's Parenting after Separation (PAS) workshop useful; however, equal proportions of lawyers thought that their clients were and were not more likely to settle as a result of their participation in PAS.
- Three-quarters of respondents who had had clients attend Alberta's Parenting after Separation for Families in High Conflict (PASHC) workshop said that they find the workshop useful, and one-third indicated that their clients are not more likely to settle as a result of attending PASHC, while one-quarter thought that they are more likely to settle.

3.1.5 Provision of Pro Bono Services

- Three-quarters of lawyers said that they had provided pro bono services in family law within the past year; respondents stated that they provided an average of eight hours of pro bono work per month.
- The majority of participants said that the amount of pro bono work they perform has stayed the same as in the previous year, while one-fifth said that their pro bono work has increased.
- One-quarter of lawyers who engage in pro bono services said that they do so through a structured program.
- The most common pro bono services provided by respondents were verbal advice/consultations and reduced fees or no fees for clients in need.
- When asked what are the greatest impediments to providing pro bono services, the most common responses were lack of time, increased risk of burn out, and increased likelihood of complaints to the Law Society, though a number noted a concern that clients who are not paying for legal services may be less likely to settle.

3.2 Conclusions and Recommendations

Access to justice in family law cases is a topic that has generated considerable discussion and concern in recent years. This is due, in part, to a perceived increase in the number of individuals proceeding in family law cases without legal representation. This increase in the number of self-represented litigants has led to concerns that these individuals may not be achieving appropriate outcomes for their cases while, at the

same time, contributing to the stress on an already over-burdened legal system. Governments and agencies have attempted to address these issues by developing programs and services designed to assist self-represented parties in navigating the justice system. However, concerns still exist regarding whether these individuals can adequately represent themselves in the legal arena.

Empirical research regarding the issue of self-representation in family law cases is sparse. The present study is one step towards addressing this gap and involved surveying a sample of family law lawyers in Alberta regarding this issue. In addition to asking about their experiences with self-represented family law litigants, the survey asked lawyers about alternatives to the traditional model of family law, the efficacy of parenting education workshops, and their experiences with providing pro bono services in family law.

There is no question that family law lawyers in Alberta who responded to the survey view the number of self-represented litigants in family law cases as an issue: almost all reported that they had experience with self-represented parties in their practice within the past year and almost all thought that there are more self-represented litigants in family cases now than there were five years ago. Furthermore, most respondents thought that the primary reason parties are self-represented is financial: they cannot afford a private lawyer and are ineligible for legal aid. This suggests that the number of individuals without legal representation is not likely to change in the foreseeable future. However, the survey findings also suggest that there may be gender differences in the reasons why people are self-represented: one-half of lawyers thought that men and women are self-represented for different reasons. A substantial proportion of these respondents thought that women are self-represented because they cannot afford a lawyer, while many thought that men choose to be self-represented because they think that they do not need a lawyer and/or they want to confront their former spouses and attempt to control the process. This suggests that efforts to deal with the issue of self-represented litigants may need to address the circumstances and perspectives of men and women differently.

One disturbing finding that emerged from the survey is that respondents thought that settlement of family law cases where one party is self-represented is substantially less likely than when both sides have legal counsel, imposing added stress of prolonged litigation on litigants and their children, as well as on the family justice system. Further, a substantial number of lawyers thought that outcomes regarding plans for children and economic issues are worse for self-represented parties than for individuals with counsel.

Further research is needed to determine the extent to which these perceptions are shared by others in the justice system and, if so, what can be done to address this problem. This additional research also needs to look at cases where both parties are self-represented. Ideally, this work would look at these issues from the perspective of all groups involved including lawyers, judges, and the parties themselves.

Further underscoring the problems caused by an increasing number of self-represented individuals was the perception of survey respondents that the presence of a self-represented party causes increased challenges in these cases. These challenges included self-represented parties being less likely to settle, the self-represented person looking to counsel for the other party for information and advice and the need to more carefully document communication with the self-represented individual. These challenges point to another consequence of self-representation in family law cases: the additional time required of lawyers in cases with self-represented parties is likely to increase legal costs for those with counsel.

Most respondents thought that their clients find Alberta's Parenting after Separation (PAS) and Parenting after Separation for Families in High Conflict (PASHC) workshops useful. However, a substantial number of lawyers expressed the opinion that their clients are not more likely to settle their cases as a result of participating in these workshops. Further research to examine any differences in the trajectories of these clients' cases in comparison to individuals who do not attend these workshops and to determine whether clients who attend these seminars are less likely to end up in litigation would be useful.

Lawyers were asked their opinions of alternatives to the traditional family law model that might serve to enhance access to justice for parties who otherwise would be self-represented. "Limited scope retainers" (or "unbundling") is a means of providing some legal advice to individuals as an alternative to the traditional "full retainer" model. With unbundled services, lawyers provide assistance with some aspects of a case, with the litigant handling other aspects of the case on their own. While this model has been receiving considerable attention in recent years, respondents to the present survey indicated that they provide unbundled services in a very small percentage of their cases.

Another potential way to address the issue of self-represented litigants is to allow licensed paralegals to provide limited services in family law cases. Three-quarters of survey respondents were not in favour of this practice, most commonly because they thought that paralegals do not have the education and experience to provide adequate legal advice and services for family cases. However, some respondents voiced support for paralegals if they have completed a two-year program of study and the services they provide are limited and supervised. This suggests that guidelines and standards for paralegal services may be desirable.

The legal profession has a long history of providing pro bono services to disadvantaged clients in addition to its traditional paid work. The provision of pro bono services may be viewed as another way to ease the burden on the legal system of self-represented litigants by providing some legal advice and representation to family law clients who cannot afford to hire private counsel. The survey asked lawyers if they have provided pro bono services in family law within the past year and three-quarters indicated that they have; the majority responded that the amount of pro bono work they perform has remained about the same as last year. The most common types of pro

bono services provided are verbal advice and consultations and reduced or no fees for clients in need. While respondents to the survey were, in large part, clearly involved in pro bono work, they also provided an indication of the impediments to doing so. The most common impediments were a lack of time and an increased risk of “burn out.” While it is clearly unreasonable to place the onus on lawyers to reduce the numbers of self-represented litigants by providing free services, perhaps if incentives were available to recognize pro bono work, lawyers would be more encouraged to do so. As one respondent suggested, offering lawyers a tax break for the hours spent on pro bono cases could be a motivation to provide these services.

There is clearly no easy fix to the issue of self-represented family law litigants in the justice system. This is a complex issue with many different reasons accounting for its apparent increase. Clearly, one of the major contributing factors to self-representation is financial – many individuals simply cannot afford traditional legal representation. Increasing eligibility guidelines for legal aid would no doubt help the problem somewhat, but this may be unrealistic given the current pressures on legal aid schemes. It is, however, also apparent that a significant portion of individuals who are choosing to represent themselves are doing so for non-financial reasons, including a desire to deal directly with the other party, a belief that they can do an adequate job of representing themselves, a distrust of lawyers, and mental health issues.

Alternatives to the traditional “full retainer” model of legal services may be one promising way of dealing with the issue of self-represented parties. Unbundling legal services or using trained, supervised paralegals to provide limited legal services might make legal advice available to many individuals who otherwise would be self-represented. Public education regarding alternatives to the traditional legal model would be beneficial. In addition, further research examining the effectiveness of various procedures and programs designed to help self-represented litigants should be conducted.

3.2.1 Recommendations

A number of recommendations for addressing the issue of self-represented litigants in the family law system arose from the Survey on Experiences with Self-represented Litigants. These recommendations are as follows:

- Given that the survey suggests that men and women may be self-represented for different reasons, efforts to further study this issue are needed and, if confirmed, policies and professional education should acknowledge and address these gender differences.
- Given that the survey found that lawyers believe that the settlement of cases is less likely when one party is self-represented, further research should be conducted to determine if this is, in fact, the case and, if so, what can be done to address this problem.

- Given that few of the lawyers responding to the survey indicated that they provide unbundled services to their family law clients, the Legal Education Society of Alberta should undertake professional education regarding the potential benefits and challenges of this model of delivery of legal services. In addition, research to determine the effectiveness of providing unbundled services in family law cases is needed.
- Given that few lawyers were in favour of licensed paralegals providing limited services in family law cases, further research into the experiences of other jurisdictions in this area should be conducted to determine whether guidelines and standards for paralegal services should be developed for Alberta.
- Given the impediments to providing pro bono legal services voiced by survey respondents, the development of incentives to recognize pro bono work could be beneficial in encouraging lawyers to provide these services.
- Given that one of the major contributing factors to self-representation is that many individuals cannot afford traditional legal representation, Legal Aid Alberta should examine the possibility of expanding legal aid coverage or adopting a reduced fee model for family law litigants.
- Given that alternatives to the traditional court-based model of family dispute resolution are receiving greater attention in recent times, further research is needed to determine the effectiveness of these alternatives in the family law area.

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