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Reforming Ontario's Family Justice System: An Evidence-Based Approach

Noel Semple¹ & Nicholas Bala²

Abstract:

This Report summarizes research about justice system responses to family disputes, makes recommendations for government action based on that empirical evidence, and identifies some as yet unanswered system design questions requiring further study. This document is provocative as it is premised on a realistic appreciation of the nature of family disputes and the limits of government action, especially in the present fiscal environment, and the fact that there are issues related to family justice that research has not adequately addressed and hence development of public policy must be undertaken in the face of uncertainty.

There are interrelated challenges in addressing the problems in the family justice process, not only for governments, but also for the professionals who work in the justice system. There are issues related to laws, structures and policies that governments need to address, as well as issues of professional culture and practice that need to be addressed by legal educators, professional organizations and individual practitioners. There is, however, also a need for a realistic appreciation of what can be done to better resolve family disputes, both in terms of what any programs, policies or professionals can do to reduce the stress and suffering that is a common feature of these cases, and in terms of the resources that governments can and will commit to dealing with these issues given present fiscal realities.

This Report focuses on measures that governments, in particular in Ontario, should be undertaking to improve access to family justice and the functioning of Ontario's family justice system. The Report especially considers how empirical research informs how the government should respond to family relationship breakdown. Part 1 of the Report identifies the criteria by which the efficacy of separation-related interventions should be evaluated. It is argued that three processes are most clearly demonstrated to be effective in achieving these goals. These responses are then discussed in detail: enforced adjudication (Part 2); mediation (Part 3); and providing information to those involved in family disputes (Part 4). The Report considers each of these three responses, identifying evidence of their efficacy, alternative ways to provide them, ways to improve their delivery and their limitations.

Knowing that these three things work leaves several important questions unanswered, and Part 5 identifies and discusses these challenging issues. These are questions for which, to this point, research has not adequately determined clear answers. Should services be delivered under a triage model, or through tiers? To what extent should the state seek to consolidate and simplify separation-related services? In what circumstances should users be required to pay for family justice services? Should adjudicative functions and settlement-seeking/relationship-building functions be kept in separated spheres, or brought together?

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Reforming Ontario's Family Justice System: An Evidence-Based Approach

Noel Semple & Nicholas Bala

A number of recent reports document the increasing frustration and concern about the family justice system in Canada, and the growing awareness that lack of access to justice and effective family dispute resolution imposes huge human and social costs. A growing number of those involved in family disputes are self-represented litigants (SRLs). These SRLs often find the process deeply confusing and profoundly stressful, and many of them are vulnerable to outcomes that may not adequately protect their rights or properly meet the needs of their children. Those with lawyers also have concerns about delay, stress and expense, and in some cases complain of manipulation of the family justice process by the other party. The failure to deal adequately with family disputes has long term costs for parents and especially for their children, in many cases resulting in poverty and loss of positive parent-child relationships.

There are interrelated challenges in addressing the problems in the family justice process, not only for governments, but also for the professionals who work in the justice system. There must be changes not only in law, programs, structures and policies that must be addressed by governments, but also in professional culture and practice that need to be addressed by legal educators, professional groups and individual practitioners. There must, however, also be a realistic appreciation of what can be done to address family disputes, both in terms of what any programs, policies or professionals can do to reduce the stress, dislocation and suffering that are common features of these cases, and in terms of the limited resources that governments can and will commit to dealing with these issues, especially given present fiscal realities.

This Report addresses a central set of issues in family justice reform. What does research tell us about how the government should respond to family relationship breakdown? Among the many public sector processes and resource models deployed by governments in this policy context, which ones have the strongest demonstrated efficacy? This Report begins in Part 1 by identifying the criteria by which the efficacy of separation-related interventions should be evaluated. It then argues that three processes are most clearly demonstrated to be effective in achieving these goals. These are enforced adjudication (Part 2), mediation (Part 3), and providing information to those going through separation or family litigation (Part 4). The Report considers each of these three responses in turn, identifying evidence of their efficacy, alternative ways to provide them, ways to improve them and their limitations. We recognize that the typical path followed by those with separation-related problems is actually the opposite of our order of discussion, and that resolution of family disputes through adjudication is very rare compared to information-provision resulting in a mediated or negotiated resolution. However, adjudication is considered first because (i) it is the best-established and oldest form of state response to separation, and (ii) its strengths and weaknesses help explain the need for mediation and information-provision. This organization does *not* reflect a view about the priority that should be given to the three processes.³

³ For discussion of some of the Ontario data on the extent of use of different forms of family dispute resolution, see Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*. (Toronto: LCO, 2013), online: LCO <<http://www.lco-cdo.org/family-law-reform-final-report.pdf>> [Law Commission of Ontario, *Access to Family Justice*] at 17).

Knowing that these three responses are effective leaves several important issues unresolved, and Part 5 will identify and consider these challenging questions. Should services be delivered with a triage model, or through tiered approach? To what extent should the state seek to consolidate and simplify separation-related services? In what circumstances should users be required to pay for family justice services? Should adjudicative functions and settlement-seeking/relationship-building functions be kept in separated spheres, or brought together?

This Report's goals include identifying and discussing empirical research about responses of the justice system to family disputes, proposing government responses based on this empirical evidence, and identifying the as yet unanswered system design questions which still confront policy-makers, researchers and the justice system. While the literature reviewed in this Report is drawn from countries around the world, the consideration of its implications is set in the context of Ontario's institutional and constitutional framework. Much of the discussion, however, will be of interest to those in other jurisdictions, especially other Canadian provinces and territories, concerned with improving their family justice process.

1. Introduction

1.1 Scope and Goals of this Paper

The focus of this paper is state responses to family disputes, including disputes arising from divorce, the dissolution of intimate cohabitations, and issues related to children whose parents never cohabited.⁴ Although many family separations occur with minimal need for state intervention or response, many others require public sector bodies to take action.⁵ The state responds to family separation and disputes both through the court system and through other agencies.⁶

This paper touches only incidentally on the work of lawyers in private practice and legal services regulation.⁷ Further this Report does not address efforts to *prevent* family relationship breakdown. The premise of this report is that these separations are an inevitable -- and sometimes salutary-- element of modern family life.⁸

⁴ Other policy contexts sometimes associated with family courts, such as child protection or youth criminal justice, are not considered here.

⁵ Noel Semple, *Cost-Benefit Analysis of Family Service Delivery: Disease, Prevention, and Treatment*. (Toronto: Law Commission of Ontario, 2010), online: LCO <<http://www.lco-cdo.org/family-law-process-call-for-papers-semble.pdf>> at 28-9 [Semple, "Cost-Benefit Analysis"].

⁶ E.g., in Ontario, the Ministry of the Attorney General and Legal Aid Ontario.

⁷ Recent literature about the Canadian family justice system includes analysis of these topics. E.g. re private sector, see Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 79; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*. (Kingsville, Ontario: Representing Yourself in a Legal Process, 2013), online: RYLP <<http://www.representing-yourself.com/doc/report.pdf>> at 90-95 [Macfarlane, "National Self-Represented Litigants Project"], and Noel Semple and Carol Rogerson, "Access To Family Justice: Insights And Options" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 413.

⁸ Semple, "Cost-Benefit Analysis," *supra* note 5.

Recently, a number of important reports have analysed and made recommendations to improve the Canadian family justice system,⁹ and more broadly address issues of access to civil justice. The authors of this Report have relied significantly upon these efforts. One of the goals of this project, which may distinguish it from the others, is to review and directly incorporate knowledge from the published evaluation literature on family justice services from around the world. We also believe our Report is based on more realistic premises about the nature of family disputes and the limits of government action, especially in this present fiscal environment, than some recently released documents. While remaining attentive to Canadian specificities, this Report seeks to learn from public sector responses to family separation in other countries.

Relying upon evaluation literature in this policy sphere creates distinct methodological challenges. Randomized control trials of separation-related interventions are very rare, for ethical, political and resource constraint reasons.¹⁰ There are very few studies that measure long-term effects of different types of intervention. Programs subject to published evaluation often have unique characteristics,¹¹ which makes it difficult to predict from their findings whether a similar program will work in a different context.¹² An evaluation may compare intervention X to alternative Y, which is not entirely helpful to someone making a policy choice between X and Z.¹³ An evaluation of a program will often be undertaken by those who have a vested interest in its continuance, and the evaluation process itself can create a perverse incentive for service-providers to maximize the evaluated metric at the expense of others.¹⁴ Nonetheless, this Report seeks to identify robust and reliable findings in the evaluation literature by drawing on as broad a sample of studies as possible and remaining attentive to its limitations.

⁹ Four major reports prepared by various institutions and agencies were released in 2013. The Action Committee on Access to Justice in Civil and Family Matters released a Final Report (*Access to Civil & Family Justice: A Roadmap for Change*. Online: Canadian Forum for Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> (last accessed: 15 November 2013)), as well as a working group document focused on family court: Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: ACAJCFM, 2013), online: ACAJCFM <http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Report_of_the_Family_Justice_Working_Group.pdf> (last accessed: 15 November 2013) [ACAJCFM, Meaningful Change]. Also significant were Canadian Bar Association, *Reaching Equal Justice: A Invitation to Act – A Summary Report by the CBA Access to Justice Committee* (August 2013); and Law Commission of Ontario, Access to Family Justice, *supra* note 3.

¹⁰ James W. Bozzomo and Andrew Schepard, "Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts" (2003) 37 Family Law Quarterly 332 at 352-3.

¹¹ E.g. child custody evaluations in Ontario, which despite formally forensic goals often actually prioritize settlement-seeking: Noel Semple, *Getting it Right, or Getting to Yes? The Settlement Mission in Custody and Access Cases* (draft under review). (Toronto: Social Science Research Network, 2013), online: SSRN <<http://ssrn.com/abstract=2101819>>. [Semple, "Getting it Right."]

¹² See e.g. Noel Semple, "Judicial Settlement-Seeking in Parenting Cases: A Mock Trial." (2014) Forthcoming, *Journal of Dispute Resolution*. [Semple, "Mock Trial."] At IV.2(ii).

¹³ E.g. Nicholas Bala, "Reforming Family Dispute Resolution In Ontario: Systemic Changes & Cultural Shifts" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) [Bala, "Systemic Changes"] at 287: many studies compare mediation favourably to trials. However, "the real comparison for most cases is not between mediation and trial, but between mediation and a settlement negotiated by lawyers, or, for those without counsel, a settlement that a judge is likely to effect through the conferencing process. The systemic cost advantages are significantly reduced in such comparisons."

¹⁴ See e.g. Bozzomo & Schepard, *supra* note 10 at 352.

1.2 The State's Three Goals in Responding to Family Relationship Breakdown

The state pursues three fundamental policy goals when it responds to family relationship breakdown. First, it seeks to **advance children's interests**, hopefully by making them safer, better adjusted, properly economically supported and healthier.¹⁵ Children have a great deal at stake when their parents separate. First, inter-parental conflict has deleterious impacts on children, especially when it includes violence or when the children are directly exposed to the conflict.¹⁶ Second, children benefit from financial security and healthy relationships with parents and extended family members, and these things are put at risk by family separation.¹⁷

Thus, advancing the "best interests of the child" is not only a key doctrine of family law, but also a central policy goal for the state's separation-related programs and responses to family disputes, including the family justice system. Advancing a child's best interests may sometimes require a sacrifice of adult interests. For example, a parent might have to sacrifice discretionary income in order to pay child support. However, children's best interests are often advanced by developing a parenting plan that is consistent with the interests of their parents. Thus, in order to enable parental caregiving to children, the state may often need to meet important parental needs, such as the need for physical and financial security.¹⁸ It may also seek to improve inter-parental relationships as an indirect way to promote the best interests of the child.¹⁹

Second, the state seeks to **protect adults' rights** to equitable distributions of resources and to physical security. Adult rights are pursued in tandem with children's interests in cases involving parents. When childless adults separate, adult rights become the primary focus.

The premise of this paper is that while the state attends to the *interests* of children, it can realistically only concern itself with the *rights* of adults. The state is welfarist or

¹⁵ Bozzomo & Schepard, *supra* note 10 at 339.

¹⁶ Andrew Schepard, "Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective" (1998) 32 Family Law Quarterly 95 at 95; Joan B. Kelly and Robert E. Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives" (2003) 52 Family Relations 352; Erin Shaw, Family Justice Reform: A Review of Reports and Initiatives. (Vancouver: Family Justice Working Group of the Action Committee on Access to Justice In Civil and Family Matters, 2013), online: Canadian Forum on Civil Justice <<http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Family%20Justice%20Reform%20Review%20-%20April%2015%20Final.pdf>>.

¹⁷ Nicholas Bala and Nicole Bailey, "Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses" (2004) 23 Canadian Family Law Quarterly 1; Jennifer E. McIntosh, "Legislating For Shared Parenting: Exploring Some Underlying Assumptions" (2009) 47 Family Court Review 389 at 391; Patrick Parkinson, "The Idea Of Family Relationship Centres In Australia" (2013) 51 Family Court Review 195 at 211.

¹⁸ Juliet Behrens, "The form and substance of Australian legislation on parenting orders: a case for the principles of care and diversity and presumptions based on them" (2002) 24 Journal of Social Welfare and Family Law 401; Colmar Brunton Social Research, Family Relationships Services Program: Client Input Consultancy. (Canberra: Commonwealth of Australia, 2004), online: Pandora <[http://pandora.nla.gov.au/pan/44181/20050330-0000/www.facs.gov.au/internet/facsinternet.nsf/VIA/frsp_review/\\$File/frsp_client_input_consultancy_062004.pdf](http://pandora.nla.gov.au/pan/44181/20050330-0000/www.facs.gov.au/internet/facsinternet.nsf/VIA/frsp_review/$File/frsp_client_input_consultancy_062004.pdf)> at 28; Solangel Maldonado, "Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce" (2008) 43 Wake Forest Law Review 441.

¹⁹ Bala, "Systemic Changes," *supra* note 13 at 280: "legal and social responses that improve relationships and communication between parents can result in children having better relationships with both parents and improve the child's social, emotional, and economic outcomes. This usually involves parental education or mediation."

paternalistic vis-à-vis children, in the family separation context as in other policy contexts. In custody and access cases, for example, consideration of the child's emotional adjustment is entirely relevant for the law.

Conversely, the state strives to uphold defined rights for adults – e.g. the right to receive a certain amount of financial support or the right to live free of violence – but it does not typically intervene with the goal of advancing adults' *interests* more broadly defined. For example, family judges often justify exercises of discretion on the basis of fostering children's emotional well-being, but not typically on the basis of fostering adults' well-being. This is a key point of departure between this Report and some other literature that sees an actual or ideal role for the state in responding to adults' broadly defined needs or interests in the wake of family separation.²⁰ Given pervasive resource constraints, we believe that the state has its hands full advancing children's interests and protecting adults' rights, without assuming this extra burden of identifying and furthering the interests of the latter group.

This definition of policy goals also avoids ascribing to the state an interest in protecting or serving "the family."²¹ While it is true that the interests and rights of former cohabitants and their children remain intertwined after a separation, it is problematic to presume that they are members of an on-going "family unit." At least one of them has decided to separate, and often for very good reasons.²²

Third, the state values **cost-effectiveness** in evaluating separation-related programs to advance children's interests and protect adults' rights. Although Ontario has increased its spending on family justice in recent years,²³ resources available for separation-related interventions are limited. This is especially true in the current climate of fiscal restraint and given the generally low priority that voters (and hence politicians) attach to family justice and separation-related programs.²⁴ Family litigation is very expensive and time-consuming for the publicly-funded court system, as well as for the individuals involved.²⁵ The state is therefore particularly interested in more affordable alternatives to litigation that fulfil the other two policy goals as well as or better than litigation does.

²⁰ e.g. Bozzomo & Schepard, *supra* note 10 at 339-40. See also Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 79, which proposes a "holistic" approach dealing both legal and non-legal ramifications of separation for adults.

²¹ E.g. Bozzomo & Schepard, *supra* note 10 at 339-40; Semple, "Cost-Benefit Analysis," *supra* note 5 at 4-5.

²² The state may also have an interest in preserving familial relationships and providing support and marital counseling; consideration of this issue is beyond the scope of this paper.

²³ Birnbaum and Bala report that "expenditures by the Ministry of the Attorney General on family justice support services more than doubled over the past few years." (Rachel Birnbaum and Nicholas Bala, "Views of Ontario Lawyers on Family Litigants without Representation" (2012) 63 *University of New Brunswick Law Journal* 99 at 102).

²⁴ Bala, "Systemic Changes," *supra* note 13 at 273.

²⁵ ACAJCFM, *Meaningful Change*, *supra* note 9 at 12: "Family law cases comprise about 35% of all civil cases. They take up a disproportionate amount of court time, with many more events per case, three times more adjournments, and twice as many hearings. At the same time, only 1% of divorce cases go to trial, suggesting that the greatest volume of work of family courts involves non-trial appearances and negotiated resolutions." (citing Statistics Canada, *Divorce Cases in Civil Court 2010/11* (Ottawa, March 2012), online: www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.htm#a1); Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 28: "In Canada, about 50 per cent of all cases remain in the system for more than one year and some considerably longer."

The call for more state funding for the family justice system has been voiced eloquently elsewhere.²⁶ In an ideal world, the state might fund personalized, one-on-one services from lawyers and other professionals for all people going through family separation, and thereby accomplish its other policy goals more effectively. However, at present, the prospects for substantial increases in government spending for family justice are not good.²⁷ Governments in Canada and many other countries are struggling to reduce deficits and cope with debt. Aging of the population is placing increasing demands on health and other services, and reducing the portion of the population in the labour force. The struggle for increased government funding for justice services, especially family justice services, in an increasingly tight fiscal environment is challenging. While there are strong social policy and political reasons to be concerned about the fate of children caught up in parental disputes, to the extent that the family justice system is seen as a battle ground for angry and vindictive former spouses, there is little political support for increased government funding in this area. There are good political, social and economic arguments for having individuals with family disputes pay at least a portion of the costs of dispute resolution, especially if they have more significant resources and the disputes relate to a division of assets.²⁸

This Report's proposals, therefore, do not assume significant new infusions of government resources. Indeed, one of the themes of this report is that the state and those responsible for family justice issues need to recognize and adapt to a world in which a key resource – the skill and expertise of family lawyers – is costly and will not be fully available in many cases.²⁹ As will be discussed, there are ways to make better use of this costly resource by encouraging and in some cases providing public support for limited legal advice as opposed to full representation. There are also steps that governments should take to reduce the costs and complexity of litigation, and hence make the cost of legal services for family cases. Although beyond the scope of this paper, there is also a need for lawyers to increase the efficiency (and lower the cost) of providing legal services.

1.3 Outcomes of Separations

Advancing children's interests and protecting adult rights in a cost-effective way is always desirable, but how do these policy objectives shape the state's goals in individual cases? The degree of success that is possible varies significantly from case to case. In a relatively small minority of separation cases, a 'home run' outcome is possible:

- Income and property are distributed equitably between the parents according to the law with adequate resources to support children above poverty levels;
- There is no violence;

²⁶ ACAJCFM, *Meaningful Change*, *supra* note 9 at 45: "Recommendation 18: Recognizing the scale of unmet family law need, the individual and social cost of failing to meet that need and the existence of programs and services that have demonstrated their value to separating families, that funding be significantly enhanced for all family justice programs and services."

²⁷ Bala, "Systemic Changes," *supra* note 13.

²⁸ See section 5.3, *infra*.

²⁹ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 53: "With some (important) exceptions, our system... is premised on the presence of lawyers who have specialized knowledge and training to shepherd lay people through the system"

- If they are parents, the separating adults develop a good "parenting partnership" which minimizes disruption and conflict in their children's lives;³⁰
- This on-going parenting partnership is flexible enough to adapt to inevitable change through on-going communication and compromise between parents;
- Despite this on-going parenting partnership, the adults are able to move on in their lives and find new sources of fulfilment, which in turn allow them to be better parents;
- The children's relationships with parents and extended family survive and thrive;
- The children are not exposed to significant inter-parental conflict.

Conversely, the worst possible outcome (or 'strike out') occurs if:

- Child support or spousal support is not paid despite a legal obligation, and the children face drastically reduced economic circumstances;
- There is severe domestic violence, which may endanger the life and health of the victim(s);
- Children are consistently exposed to violent inter-parental conflict;
- The parents do not communicate at all, or communicate only through lawyers, or by vituperative emails and court documents, or in court;
- The children are in the exclusive custody of one parent, never see the other parent, and are actively alienated from that parent by the custodial parent;
- The children are in sole custody of one parent but would have been better off in the sole custody of the other parent;
- The parties exhaust their financial and psychic resources litigating their separation to the extent that their ability to function as parents is seriously compromised.

The various attributes of each of the two scenarios are mutually reinforcing. For example, fulfilment of financial support obligations is positively correlated with contact between children and both parents.³¹ When adults are able to communicate and compromise, the child experiences less inter-parental conflict, and equitable resource-division is much more likely to persist despite changes in circumstance such as inadvertent job loss.

Most separations result in neither a home run nor a strike out; instead some intermediate level of success is achieved. Perhaps the child has an on-going but somewhat impaired relationship with the non-custodial parent, and child support is paid in full but not always promptly. Perhaps there were violent clashes that precipitated the separation but the perpetrator has apologized and divorce has allowed a business-like cooperation between parents to emerge. The outcome of a family separation depends largely on the behaviour of

³⁰ Re the parenting partnership concept, see Jana B. Singer, "Dispute Resolution And The Postdivorce Family: Implications Of A Paradigm Shift" (2009) 47 Family Court Review 363 at 365 and Cynthia Lee Starnes, "Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments" (2012) 54 Ariz. L. Rev. 197.

³¹ Rebecca Love Kourlis *et al.*, IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce. (Denver: Institute for the Advancement of the American Legal System, 2013), online: IAALS <http://iaals.du.edu/images/wygwam/documents/publications/Courts_and_Communities_Helping_Families_in_Transition_Arising_from_Separation_or_Divorce.pdf> at 21: "Non-custodial parent-child contact is positively associated with support order compliance. Higher parental conflict and lower rates of non-custodial parent-child contact following divorce significantly decreases the likelihood that parents will follow court orders." See also Office of Child Support Enforcement-- Administration for Children and Families, Noncustodial Parents: Summaries of Research, Grants and Practices. (Washington: United States Department of Health and Human Services, 2009), online: USDHHS <http://www.acf.hhs.gov/sites/default/files/ocse/dcl_09_26a.pdf> at 32. This program, which offered non-paying child support obligors legal support in resolving their access problems, significantly increased the rate of child support compliance.

the parties (and their lawyers, mediators or other professional advisors if they are fortunate enough to have them). However the policy choices of the state, and the actions of its agents, including the judiciary, also have powerful effects on the distribution of outcomes as between strike outs, home runs, and the various intermediate 'singles,' 'doubles,' and 'triples.'

The policies that maximize the potential of the best-positioned cases to achieve the best outcomes are not the same as the policies that maximize the potential for modest success in the worst-positioned cases.³² Only mediation and other settlement-promoting, relationship-building interventions promote the 'home run' outcomes. It is almost impossible for court orders to produce parenting partnerships and healthy post-separation relationships. This is due to both (i) the nature of the people whose conflict continues long enough to be adjudicated,³³ and (ii) the sharply limited ability of court orders to change human behaviour.

However, it is also true that settlement-promoting, relationship-building interventions like mediation usually have little or no impact in the most poorly-positioned cases. Mediation is unlikely to turn high-conflict cases into positive parenting partnerships, or extract spousal support from someone who is determined to not pay it and prepared to suffer their own economic consequences to inflict losses on the other party.³⁴ It often cannot effectively protect victims from abusive former partners or remedy parental alienation.³⁵ In many cases, only enforced adjudication can be relied upon to safeguard baseline needs of children and rights of adults. Thus, it is only by deploying multiple interventions in its response to separation that the state can maximize the likelihood and degree of success in as many different cases as possible.³⁶

According to the evaluation literature, there are three separation-related interventions that are most likely to cost-effectively serve children's interests and protect adult rights. They are (i) enforced adjudication; (ii) mediation; and (iii) the provision of information to people undergoing or contemplating separation. The Report will review the three interventions in this order.³⁷ The claim is not that these are the *only* things that can work,³⁸ but rather that

³² To follow the analogy, a batter who swings for the fences has the best chance of hitting a home run, but also the highest chance of striking out. A batter who bunts has no chance of hitting a home run, but a good chance of hitting the ball into fair territory.

³³ Noel Semple, "The Eye of the Beholder: Professional Opinions About the Best Interests of a Child" (2011) 49 Family Court Review 760. [Semple, "Eye of the Beholder."]

³⁴ Bala, "Systemic Changes," *supra* note 13 at 279.

³⁵ Re the often forceful legal responses necessitated by parental alienation cases, see Nicholas Bala *et al.*, "Alienated Children and Parental Separation: Legal Responses in Canada's Family Court" (2007) 33 Queen's Law Journal.

³⁶ This point has been acknowledged in the literature. See e.g. the Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the future for families experiencing separation*. (Sydney: Commonwealth of Australia, 2001) www.ag.gov.au/Publications/Pages/FamilylawssystemOutOftheMazeAugust2001.aspx, which called on the state to support multiple "pathways" to family dispute resolution and Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice: An Invitation To Envision And Act*. (Ottawa: CBA, 2013), online: CBA <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> ["Reaching Equal Justice"] at 14. See also Andrew Schepard, "The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management" (2000) 22 University of Arkansas at Little Rock Law Review 395; ACAJCFM, *Meaningful Change*, *supra* note 9 at 23.

³⁷ For the rationale for this organization, see text accompanying note 3, *supra*.

³⁸ The literature offers some support for interventions such as counselling (e.g. Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 33-4 and child custody evaluations (e.g. Semple, "Cost-Benefit Analysis," *supra* note 5 at 54). Colmar Brunton Social Research, *supra* note 18, shows participant enthusiasm for most programs offered in FRSPs.

they are the interventions that have the strongest basis in the evaluation literature in terms of the three policy goals identified above.

2. Adjudication Works

Adjudication is the imposition of a legal post-separation financial and/or parenting arrangement by a neutral third party such as a judge. Adjudication is often the only way to protect children's basic interests and adults' rights in the wake of separation. Settlement is the most common outcome of separation-related disputes and there is an understandable desire to focus state efforts on promoting it.³⁹ However, some cases *cannot* settle and some cases *should not* settle. Everyone who works in the family justice system has experience with cases in which a vulnerable or reasonable party simply needs to have their legal rights forcefully vindicated against a party who is exploitative or unreasonable.

The dispute-resolution literature identifies functions that can be performed only by adjudication in a court. These may include the enunciation of public values and the imposition of the outcome required by law.⁴⁰ In some cases there is a novel and important point of law that should be determined in order to create precedent, or a law to be challenged on constitutional grounds.⁴¹ Reported adjudication can also cast a shadow that facilitates settlements in other cases.⁴²

The family separation context offers its own set of reasons why adjudication is necessary in many cases.⁴³ If backstopped by effective enforcement, adjudication has the power to assert and uphold the rights of family members to be free of violence and to receive the financial resources to which they are entitled by law.⁴⁴ "High-conflict" cases, e.g. those marked by significant communication difficulties between parties, domestic violence, or parental alienation,⁴⁵ typically require adjudication after multiple settlement efforts fail.⁴⁶

³⁹ OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, Family Law Process Reform: Supporting Families To Support Their Children. (Toronto: Ontario Association for Family Mediation, 2009), online: Ontario Association for Family Mediation <<http://www.oafm.on.ca/Documents/OBA%20AFM%20ADR%20Institute%20submission%20Apr%207%2009.pdf>> at 5: "non-adversarial options" should become the "primary framework for resolving family matters"; ACAJCFM, *Meaningful Change*, *supra* note 9 at 23: "we suggest that the balance on adversarial/consensual continuum should be adjusted to shift more deliberately and more fundamentally in the direction of CDR [consensual dispute resolution] processes."

⁴⁰ Owen Fiss, "Against Settlement" (1984) 93 Yale Law Journal 1073; David Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 Georgetown Law Journal 2619; Semple, "Mock Trial," *supra* note 12 at section II.1.

⁴¹ Bozzomo & Schepard, *supra* note 10 at 348.

⁴² Hon. Peter Boshier *et al.*, "The Role Of The State In Family Law" (2013) 51 Family Court Review 184 at 189: "alternative dispute resolution operates in the shadow of the law. That is to say that alternative dispute resolution is influenced by family law statutes and leading cases and the courts play a pivotal role in interpreting the law and providing a forum whose decisions are disseminated publicly. This is vital for the evolution of the law. "; Kourlis *et al.*, *supra* note 31; Semple, "Cost-Benefit Analysis," *supra* note 5 at 60.

⁴³ Lawrie Moloney *et al.*, "Evaluating The Work Of Australia's Family Relationship Centres: Evidence From The First 5 Years" (2013) 51 Family Court Review 234 245: "there is a risk associated with placing too much emphasis on mediation and relationship- focused processes in cases where families exhibit significant levels of dysfunctional behaviors... the "bottom line" in a percentage of cases must be that of enforceable judicial decisions."

⁴⁴ Kourlis *et al.*, *supra* note 31 at 26; Boshier *et al.*, *supra* note 44 at 189.

⁴⁵ Nicholas Bala and Rachel Birnbaum, "Toward The Differentiation Of High-Conflict Families: An Analysis Of Social Science Research And Canadian Case Law" (2010) 48 Family Court Review 403 at 404.

Even those who endorse a settlement-seeking, relationship-building approach to most cases make an exception for some high-conflict cases.⁴⁷

If a child has been alienated from a parent due to the actions of the other parent, multiple court orders are often necessary to right that wrong and address that situation. Feminist critics of family mediation emphasize the importance of enforced adjudication in cases of power imbalance or domestic violence.⁴⁸ Protecting people from violence must be a central part of the state's response to family relationship breakdown, and non-adjudicative responses have limited efficacy in cases with significant domestic violence.⁴⁹ For example, in a recent survey of Ontario lawyers, 56% said that domestic violence victims without lawyers don't get adequate protection when their cases are settled, but only 29% felt the same way about cases that are adjudicated.⁵⁰

2.1 Varieties and Alternatives in Adjudication

Varieties of adjudication have proliferated in modern family justice systems. In some jurisdictions, traditional procedural entitlements of civil litigants are limited in family cases in order to reduce costs and acrimony.⁵¹ For example, Australia's "Less Adversarial Trial" for child-related cases gives the judge the power to curtail the presentation of evidence, speak directly to the parties, and call on neutral expert evidence.⁵² This innovation reflects the widespread belief that adversarial procedure is inappropriate for family court cases,

⁴⁶ Bala, "Systemic Changes," *supra* note 13 at 277- 279.

⁴⁷ E.g. Barbara Landau *et al.*, Home Court Advantage: Creating a Family Law Process That Works (Final Report and Recommendations from The Home Court Advantage Summit). (Toronto: Ontario Bar Association, 2009), online: OBA <http://www.oba.org/en/pdf/011-0022_Family%20Law%20Process%20Reform%20Report_final_web.pdf> at 8; OBA Family Law Section *et al.*, *supra* note 39 at 5.

⁴⁸ E.g. Lisa G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 Harvard Women's Law Journal 57; Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale Law Journal 1545 ; Penelope E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 Buffalo Law Review 441. See also Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24 Canadian Journal of Women and the Law 207 at 218-219 [Semple, "Feminist Critique"] and Kourlis *et al.*, *supra* note 31 at 6.

⁴⁹ Nancy Johnson, Dennis Saccuzzo, and Wendy Koen, "Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect" (2005) 11 Violence against Women 1022 at 1025; Semple, Mandatory Family Mediation, *ibid.* at 227. However, not everyone agrees that mediation is inappropriate in all cases of violence: see e.g. Mary Adkins, "Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases" (2010) 22 Yale Journal of Law & Feminism 97 at 125 and Desmond Ellis and Noreen Stuckless, "Domestic Violence, DOVE, and Divorce Mediation" (2006) 44 Family Court Review 658 at 658.

⁵⁰ Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants" (2013) 91 Canadian Bar Review 67 at 89.

⁵¹ An argument for increasing judicial control and reducing party control in custody and access cases is found in Noel Semple, "Whose Best Interests? Custody and Access Law and Procedure" (2010) 48 Osgoode Hall Law Journal 287 at 329 *et seq.*

⁵² Jennifer E. McIntosh, Hon Diana Bryant and Kristen Murray, "Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia" (2008) 46 Family Court Review 125.

especially those involving children.⁵³ Similarly, case management may replace party freedom to determine the pace of litigation with a court-imposed procedural schedule. Case management has many proponents in the family law context, especially for high-conflict cases.⁵⁴ Junior judicial officials (often deputized lawyers) are sometimes enlisted to hear procedural disputes in family cases. Ontario examples include Ottawa's Family Case Manager project and many courts now use First Appearance Clerks.⁵⁵

One measure that has very broad support among family justice system scholars and professionals is the appointment of specialized judges to hear family separation cases.⁵⁶ In principle, judges with family-specific training and experience should reach better decisions, or at least resolve cases more quickly. Specialized judges are a common feature of the Unified Family Courts, which have been established in some parts of Ontario as well as elsewhere in Canada.⁵⁷

However judicial specialism is a potential source of inefficiencies, insofar as it can restrict judicial mobility and prevent those senior members of the judiciary responsible for court administration from assigning judicial resources to the cases that most urgently need to be heard.⁵⁸ In areas where small communities lack sufficient family cases to occupy a full-time specialist judge, a commitment to judicial specialization might require the judge to waste time travelling between communities. Further, there is value in having more than one judge authorized to hear family cases in a community so that one judge can manage a case while another is available for trials. Thus, there is a minimum size of community for a viable specialist Family Court.⁵⁹

⁵³ E.g. Janet Weinstein, "And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System" (1997) 52 *University of Miami Law Review* 79; Clare Huntington, "Repairing Family Law" (2008) 57 *Duke L.J.* 1246.

⁵⁴ Hon Arline S. Rotman, "Commentary on 'Empirical and Ethical Problems with Custody Recommendations'" (2005) 43 *Family Court Review* 242; New York County Lawyers' Association Task Force on the Family Court, July 2010 Initial Report. (New York: New York County Lawyers' Association, 2010), online: New York County Lawyers' Association <http://www.nycla.org/siteFiles/News/News135_1.pdf>; Nicholas Bala, Rachel Birnbaum and Donna Martinson, "One Judge For One Family: Differentiated Case Management For Families In Continuing Conflict" (2010) 26 *Canadian Journal of Family Law* 395; Landau *et al.*, *supra* note 47 at 7.

⁵⁵ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 31; *Case Management Masters*, O Reg. 535/96. Online: Canlii <http://canlii.ca/t/1ntb>; Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 61.

⁵⁶ ACAJCFM, *Meaningful Change*, *supra* note 9 at 50-51; Semple, "Cost-Benefit Analysis," *supra* note 5 at 57; OBA Family Law Section *et al.*, *supra* note 39 at 19: "we wholeheartedly support the concept of a specialized court to deal with only family cases.: See also Landau *et al.*, *supra* note 47 note 6 at 5 and Harvey Brownstone, *Tug Of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009).

⁵⁷ Evaluation Division: Office of Strategic Planning and Performance Management, *The Unified Family Court Summative Evaluation Final Report*. (Ottawa: Department of Justice (Canada), 2009), online: DOJ <<http://www.justice.gc.ca/eng/pi/eval/rep-rap/09/ufc-tuf/ufc.pdf>>.

⁵⁸ The Superior Court of Justice's reason for resisting judicial specialism is explained in the recent Law Commission Report as follows: "it is necessary that Superior Court judges be able to preside over all matters addressed by the Superior Court which is a generalist court dealing with civil, family and criminal." (Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 30.)

⁵⁹ There may also be value in having cases that raise domestic violence issues related to family breakdown dealt with in a single court. Although there is a need for careful evaluation, the Toronto pilot project Integrated Domestic Violence Court (IDVC) has the potential to improve the efficiency and effectiveness of response to cases with concurrent family law and criminal law proceedings due to a violent family breakdown. However, the IDVC is at the Ontario Court of Justice level, and some institutional issues will have to be addressed to have do criminal

The most viable solution is to have Unified Family Courts in all centres where the population is sufficiently large, and expect the judges sitting in these courts to have significant family law experience and training, while allowing them the administrative flexibility to hear other cases as well.⁶⁰ This recommendation would clearly see significant expansion of Unified Family Courts to most parts of Ontario, including all larger centres.

Another modification of traditional civil justice principles which has the support of many family justice professionals is a "one-family-one-judge" approach.⁶¹ Effective adjudication in family matters requires the judge to be familiar with the litigants and their interpersonal dynamics; such familiarity cannot be developed by a judge who only presides over one among many motions or appearances in a case. Having the parties re-explain facts and gain familiarity at each appearance to a new judge is a source of stress for self-represented litigants, many of whom express enthusiasm for one-family-one-judge.⁶² Further, judicial continuity may increase prospects for a judicially facilitated settlement, improve compliance with court orders and reduce costs.

Typically proponents of the one-family-one-judge principle call for a previously-uninvolved judge to hear the trial, if one is necessary, in order to ensure impartiality.⁶³ Like judicial specialism, one-family-one-judge holds out the promise of more knowledgeable adjudication, at the potential expense of flexibility and some loss of administrative efficiency. Both systems can increase delay, insofar as they prevent family cases from being heard by the first available judge. The authors are unaware of any evaluation literature comparing traditional judicial allocation to specialization or one-family-one-judge, but the views of experienced family judges and lawyers clearly support these approaches, and clearly suggest that the increased efficiency and effectiveness of judicial specialization and case management for family cases outweigh any costs in terms of loss of administrative flexibility.

One idea which has generated significant support in recent years is triage: a process whereby separation-related cases are assessed at an early stage to determine what interventions should be applied to them. Triage can be used to refer cases to adjudication or

and family cases dealt with a Unified Family Court. See Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 31.

⁶⁰ Semple, "Cost-Benefit Analysis," *supra* note 5 at 59. See also Alfred A. Mamo, Peter G. Jaffe and Debbie G. Chiodo, *Recapturing and Renewing the Vision of the Family Court*. (Toronto: Ministry of the Attorney General (Ontario), 2007), online: Centre for Research & Education on Violence against Women and Children <<http://www.learningtoendabuse.ca/sites/default/files/Family%20Court%20Study%202007.pdf>>. This document proposes that judges be assigned to hear family cases exclusively for terms of six months.

⁶¹ ACAJCFM, *Meaningful Change*, *supra* note 9; Bala, "Systemic Changes," *supra* note 13 at 299; Warren Winkler, "Remarks to the County of Carleton Law Association Annual Institute of Family Law 2011" Ottawa, Canada, [unpublished] <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/2011-Annual-Institute-Family-Law-CCLA.htm>> : "we should be striving towards a principle of "one family, one judge." This would assist with prompt disclosure. It is more difficult for a party to delay disclosure, when that person has to face the same judge every time."

⁶² Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 99: "There were many complaints about the difficulty of appearing before multiple judges, especially in family matters. As one SRL put it, "Its like a box of chocolates – you never know what you are going to get." Some family SRL's complained that they felt as if they had to begin afresh each time they saw a new judge – in part by reviewing the facts but also, crucially, in developing a relationship with the judge and establishing their own credibility. Occasionally a SRL found themselves in a case management system that meant that they saw the same judge several times over. This was always highlighted and welcomed. Aside from the practical efficiency, this continuity was extremely important in creating a sense of confidence in the system and reducing anxiety."

⁶³ E.g. Bala, "Systemic Changes," *supra* note 13 at 398.

non-adjudicative interventions, such as mediation, but it can also be used to prioritize cases within the queue for adjudication. For example, triage might prioritize judicial attention to cases where there is a significant risk to children or domestic violence. The case for triage will be evaluated in section 5.1 of this report.

Not everyone believes that traditional adversary adjudication is inappropriate for family court. In her recent article, Glenna Goldis denounces "freestyle judging" and calls for renewed "adversarialism" in child-related family court cases.⁶⁴ She argues that family court judges should be less informal and inquisitorial, and more attentive to procedural rights and the rules of evidence.⁶⁵ At least in cases in which a child welfare agency or non-parent (like a grandparent) seeks custody of a child from the parents, Goldis decries the tendency to have an indefinite series of temporary and informal court appearances with children out of the care of their parents, instead of a trial. Having faster access to adversarial trials she argues, would reduce the number of "capricious" and biased interim custody orders, reduce tolerance for the admission of impressionistic and often misleading or irrelevant evidence, and discourage delay.⁶⁶

2.2 Making Adjudication Work Better

Given that adjudication will remain the state's most effective intervention in some cases, how can it be made to work more effectively?

Adjudication is of little value if not accompanied by effective enforcement procedures. Custody and access orders and detailed parenting plans are notoriously difficult to enforce, especially when they involve complex schedules with multiple transfers of children between adults, and some form of shared decision-making. Making use of parenting coordinators – court-appointed professionals who mediate and arbitrate minor parenting disputes – are one response.⁶⁷ The recently enacted *Family Law Act* in British Columbia authorizes the court to order appointment of a parenting co-ordinator (for parents who can afford this), allowing for a skilled professional to help implement a parenting plan that the court has established. Although more research is needed, this approach has the potential to be less expensive for the state by reducing court applications for enforcement of orders in high conflict cases, and in the long term reducing costs for parents and stress for children whose parents are unable to effectively co-parent.

Enforcement of child and spousal support orders also creates significant challenges. Only one third of Canadians entitled to child support received the entire amount they were owed over a 12 month period in 2007/2008.⁶⁸ In her study of 283 self-represented litigants (SRLs) in Canada's civil justice system, Julie Macfarlane found:

⁶⁴ Glenna Goldis, *Freestyle Judging: Why Family Courts Should Be More Adversarial*. (Lowell, MA: SSRN, 2013), online: SSRN <<http://ssrn.com/abstract=2308564>>.

⁶⁵ *Ibid.*, at 44-45; 55.

⁶⁶ Goldis, *supra* note 64 at 43 to 48.

⁶⁷ AFCC Task Force on Parenting Coordination, "Parenting Coordination: Implementation Issues" (2003) 41 *Family Court Review* 533; Christine A. Coates *et al.*, "Parenting Coordination for High-Conflict Families" (2004) 42 *Family Court Review* 246.

⁶⁸ Paul Robinson, *Profile of Child Support Beneficiaries*; Catalogue no. 85-002-X; March 2009: *Juristat* Vol. 29, no. 1. (Ottawa: Statistics Canada, 2009), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2009001/article/10784-eng.htm>>.

many disappointed and frustrated expectations regarding the post-trial process, especially regarding collections. Many SRL's assumed that having secured an order (this was particularly the case was the order was for the payment of monies) that the court would take responsibility for ensuring the money was paid. Instead, they were often appalled to learn that they now had to take further steps to collect the money themselves. 'What's the point of the judge giving orders if no one is going to enforce them?'⁶⁹

To improve enforcement of child and spousal support obligations, governments increasingly rely upon maintenance enforcement programs such as Ontario's Family Responsibility Office. These programs garnish wages and seize property from support obligors (among other techniques), and provide the funds collected to support recipients.⁷⁰ These programs operate without charge to recipients, in part because governments recognize that effective enforcement reduces the need for social assistance. There are continuing concerns about the lack of effectiveness of Ontario's Family Responsibility Office,⁷¹ and some recipients (those with greater resources) choose to pursue private enforcement. However, government enforcement is generally an efficient use of resources and helps assist those who are economically vulnerable (most often mothers).

Enforcement challenges in separation-related disputes begin before adjudication even occurs: obtaining disclosure of financial information from parties is a major difficulty for family lawyers and judges.⁷² Some call for more aggressive imposition of costs consequences on those who fail to disclose or otherwise delay proceedings.⁷³ There is clearly a role for such an approach, for example in cases where there is wilful non-disclosure. However, the prevalence of self-represented litigants and parties of limited means will limit the implementation of this approach. A person who never had a lawyer or judge clearly explain disclosure or other procedural obligations may not deserve a punitive costs award. Judges are likewise reluctant to make significant costs awards against people who have difficulty providing for their children.

Adjudication's value is also significantly undermined by the shortage of judges and the consequential systemic delay which litigants experience.⁷⁴ Increasing the number of judges is an obvious solution,⁷⁵ but the state's interest in cost-effectiveness should also lead to scrutiny of how judicial time is currently being spent. For example, Ontario Chief Justice Warren Winkler has suggested that it would be more efficient to relieve judges of "time-consuming mechanical or administrative duties," such as applying support guideline formulae or dealing

⁶⁹ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 54; footnotes removed.

⁷⁰ *Family Responsibility and Support Arrears Enforcement Act* 1996 (Ontario), S.O. 1996, c. 31.

⁷¹ E.g. Andre Marin, *It's All in the Name*. (Toronto: Ombudsman Ontario, 2006), online: Ombudsman Ontario <http://www.ombudsman.on.ca/media/3286/its_all_in_the_name_20060809.pdf>; Ombudsman Ontario, "Made to Pay," online: <<http://www.ombudsman.on.ca/Investigations/Selected-Cases/2012/Made-to-pay.aspx>>.

⁷² Winkler, *supra* note 61; Bala, "Systemic Changes," *supra* note 13 at 297.

⁷³ Landau et al., *supra* note 47 at 7; OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, ; Bala, "Systemic Changes," *supra* note 13 at section II(f).

⁷⁴ Linda Diebel, "Family Court Crisis; Shortage of Judges is Running up Costs, Putting Lives on Hold" *Toronto Star* (December 9, 2007) A1; Andrew Schepard and Theo Liebmann, "Ending 3.5-Minute Justice in New York's Family Court" *N. Y. Law Journal*, (November 13, 2009); Susan Pigg, "Breaking Up: Family Courts in Crisis" *Toronto Star* (Oct. 3-7, 2009).

⁷⁵ ACAJCFM, *Meaningful Change*, *supra* note 9 at Recommendation 18 ; Mamo et al, *supra* note 60.

with consent divorces.⁷⁶ Although having judges perform administrative or quasi-administrative tasks may uphold the principle of judicial independence, it can also be considered an inefficient use of expensive and specialized human resources.

Judges spend a significant amount of time trying to convince litigants, especially family litigants, to settle their cases, primarily in the pre-trial conferences required by Ontario's *Family Law Rules*.⁷⁷ In a forthcoming article, Semple argues that settlement-seeking efforts in contested parenting cases would be better assigned to non-judges.⁷⁸ In addition to being problematic as facilitative mediators (which is what custody and access cases often need), judicial labour is very expensive and trained specifically for adjudication. To use this scarce human resource wisely, it can be argued that it would be appropriate to focus judicial efforts solely on adjudication; this is an issue further explored later in this paper.⁷⁹

Australia's Less Adversarial Trial (LAT) is a promising innovation for family law cases involving children.⁸⁰ The governing legislation provides that, in all such cases, "the first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings."⁸¹ Effect is given to this principle by granting judges more power (e.g. to make interim findings of fact), relaxing the rules of evidence, and introducing evidence from neutral expert "family consultants."⁸² The LAT has been described as a move towards a more inquisitorial model reminiscent of civil law systems.⁸³ Evaluation of a pilot study found that parents participating in LAT had significantly higher levels of satisfaction, lower levels of conflict, and better post-separation relationships.⁸⁴

Inquisitorial models have significant appeal, especially in the context of pervasive self-representation. A judge who is willing and able to take an activist role is arguably better positioned to get the information necessary to make good decisions, especially when counsel are not available to provide that information. On the other hand, inquisitorial justice is quite different from the traditional adversarial model, and may not be easily embraced by the Ontario judiciary.⁸⁵ In 2010, the Ontario government amended the *Children's Law Reform Act* to require judges to scrutinize mandatory affidavits produced by the parties before granting custody and access orders on consent.⁸⁶ A group of 12 family judges wrote a letter opposing this change, which they considered inconsistent with the "basic rules of procedural justice."⁸⁷

⁷⁶ Winkler, *supra* note 61. See also Judith Resnik, "Managerial Judges" (1982) 96 Harvard Law Review 374 at 435: "scarce judicial resources should be conserved and employed only when judges' special skill - adjudication - is required."

⁷⁷ *Family Law Rules* O. Reg. 114/99, R. 17.

⁷⁸ Semple, "Mock Trial," *supra* note 12.

⁷⁹ See section 5.4, *infra*.

⁸⁰ *Family Law Act 1975* (Cth) (Australia), Part VII, Division 12A.

⁸¹ *Ibid.*, s. 69ZN(3).

⁸² *Ibid.*, ss. 69ZR, 69ZT, and 69ZS.

⁸³ Family Court of Australia, *Less Adversarial Trial Handbook*. (Sydney: FCA, 2009), online: FCA <<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Papers/Papers+and+Reports/LAT>> at 17.

⁸⁴ *Ibid.*, at 8-9. It is not clear from this report of the evaluation whether the judges participating in the LAT pilot project were randomly selected.

⁸⁵ See e.g. Goldis, *supra* note 64 and accompanying text.

⁸⁶ *Family Statute Law Amendment Act, 2009* S.O. 2009, c. 11 ("Bill 133").

⁸⁷ Justice Marion Cohen *et al.*, "Re: Bill 133 Submission. A letter addressed to Katch Koch, Clerk of the Standing Committee on Public Accounts of the Ontario Legislative Assembly. Read into the record of the Ontario

They argued that the core problem of self-representation would be better addressed through expanded legal aid or more ready availability of investigation and report by the Office of the Children's Lawyer.⁸⁸

2.2.1 Coming to Terms with Self-Representation

In order to work better, the family justice system needs to come to terms with the prevalence of self-represented litigants in our system.⁸⁹ Although precisely determining rates of self-representation is methodologically challenging,⁹⁰ it is clear that litigants without lawyers now outnumber those *with* lawyers in many family courts in Canada. Nevertheless, the rules and processes of the family courts are still largely premised on legal representation of the parties.⁹¹

While family lawyers often provide extremely valuable services for their clients, and many of their cases settle without even commencing litigation, the reality is that in the family courts, only a shrinking number of separating people have the benefit of legal representation. Since the level of financial eligibility for Legal Aid was last set in Ontario in 1995, there has been substantial inflation, and fewer than 7% of all Ontarians are now eligible for legal aid certificates. There have been many pleas and proposals for an increase in levels of legal aid eligibility in Ontario. There are strong arguments in terms of protection from family violence and provision of economic support for the most needy and vulnerable to increase eligibility for services from Legal Aid Ontario in the province to at least the poverty line. Many in the lowest income group have language, educational, literacy and disability challenges and have the greatest need for assistance. Accordingly we support an increase in eligibility for family services from Legal Aid Ontario, though as discussed later in this paper, increasing entitlement for family legal aid should be accompanied by some rethinking of how services are provided. However, even if eligibility family legal aid services in Ontario is increased to the poverty line, high rates of self-representation in the family courts, especially for lower and middle income individuals, should realistically be considered the "new normal." Birnbaum et al. suggest that the proliferation of free legal information on the internet and the rise of a "do-it-yourself" culture have resulted in self-representation in family cases reaching a "tipping point." Self-representation is now broadly perceived by many family litigants as a legitimate and viable option, and it must be recognized and facilitated by governments.⁹²

What reforms to the family justice system would make it easier for SRLs to use the process? Some ideas are quite simple and potentially cost-saving. Allowing filing of documents by email or secure web form would remove the challenge which many SRLs face in printing, collating, and physically filing forms and documents, as well as reducing costs for

Legislative Assembly by Mr. Garfield Dunlop, Member of Provincial Parliament for Simcoe North, May 6, 2009," online: <<http://hansardindex.ontla.on.ca/hansardeissue/39-1/1146.htm>> at 1.

⁸⁸ *Ibid*, at 4.

⁸⁹ Birnbaum, Bala and Bertrand, *supra* note 49 at 75; Evaluation Division: Office of Strategic Planning and Performance Management,; *supra* note 57; Macfarlane, *supra* note 7 at 32-34.

⁹⁰ Some courts record representation status at the time of filing; others record it at the time of court appearance. Neither method is entirely accurate, insofar as representation status often changes during the life of a dispute. Moreover there is no data about the representation status of those who separate without filing in court.

⁹¹ Jane C. Murphy, "Revitalizing the Adversary System in Family Law" (2010) 78 U. Cin. L. Rev. 891 at 924-5; Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 53.

⁹² Birnbaum, Bala and Bertrand, *supra* note 49 at 71.

those with representation.⁹³ If many businesses and even government agencies find it cost-effective to use electronic filing and payment, why is the court system unable to change?⁹⁴

Local courthouses are allowed some leeway in establishing their procedures and interpreting the Rules.⁹⁵ As a result, local practices reflect local bar and judicial cultures and, ideally, what works best for the repeat users (lawyers) and administrators in the area. However local courthouse procedural variance can also makes it more difficult for SRLs to learn about the system by reading legal information (which is not typically region-specific). There should be procedural consistency across the province's courthouses to facilitate understanding of the process by SRLs .

Rules which prioritize lawyers' interests over others' interests should also be scrutinized and potentially reformed. Lawyers have their matters called first in court, taking precedence over both licensed paralegals and SRLs.⁹⁶ The organization of the Family Court Rules should be simplified for the benefit of occasional and one-time users. A small example of reform to facilitate use by lay persons would be renumbering them after new additions and hyperlinking to definitions.

Macfarlane's research shows that many self-represented litigants believe that Family Court Judges and court staff are hostile to, dismissive of, or biased against those who appear without lawyers.⁹⁷ One "very consistent theme" which she found in the SRL accounts of their experiences is that "many judges seemed to view SRL's as a nuisance and an irritation."⁹⁸ Those who work in the justice system must appreciate that SRLs have the same entitlement to procedural and substantive justice as represented parties do; those appointed to the judiciary need to be aware that working with SRLs in is an essential part of the judicial role in family court.

Of course, many SRLs may not appreciate the very significant constraints and challenges that judges and court staff must address. Neutrality is integral to adjudication, and neutrality is difficult to reconcile with supporting or showing leniency to a SRL. Judges are often under significant time constraints, and must get the legally relevant information as quickly as possible. It is very difficult for someone without legal training to concisely identify the legally relevant facts within a personal narrative, which may explain why judges cut SRLs short and turn to lawyers for the other party to get the information.

⁹³ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7: "Some SRL's describe struggles with accessing computers and more describe not having access to a printer or a photocopier."

⁹⁴ See e.g. "Judge calls on colleagues to embrace trials," *Law Times*, July 8, 2013.

⁹⁵ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 30; OBA Family Law Section *et al.*, *supra* note 39 at 15: "Different Family Courts use different Forms. These Forms should be harmonized to lessen confusion and simplify the system." See also Semple, "Cost-Benefit Analysis," *supra* note 5 at 59.

⁹⁶ Yamri Taddese, "Two Decisions Consider Status of Paralegals Versus Lawyers" *Law Times* (July 8, 2013), online: *Law Times* <<http://www.lawtimesnews.com/201307083322/headline-news/two-decisions-consider-status-of-paralegals-versus-lawyers>> (last accessed: 15 November 2012). See also Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 101-2 re SRL perception that the system is biased against them and in favour of lawyers.

⁹⁷ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 97 to 103 and 124.

⁹⁸ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 103. See also Julie Macfarlane, "Legitimate public concern – or lawyer-bashing? Blog entry posted July 3, 2013," online: <<http://drjulieMacfarlane.wordpress.com/2013/07/03/legitimate-public-concern-or-lawyer-bashing/>>: "respondents in my study told me that they were frequently treated as if they were nothing but a nuisance by judges and opposing counsel, who did not take them seriously in their efforts to speak for themselves. Some told stories of chilling hostility and abrasiveness from particular counsel and judges."

While many of those who are self-represented in the family justice process clearly cannot afford legal representation, the further a case goes through the process, the more likely it is that an SRL is rejecting information, advice and services that promote settlement. While some SRLs may be pressured into settling too early and resolving their cases on unfair terms, and perhaps terms that place themselves or their children at risk, others who go to trial, often after repeated conferences with judges, may have unrealistic expectations. For cases that go to trial, there are often good reasons for taking a fairly aggressive approach to imposing costs sanctions on a family litigant, including a SRL, who has imposed costs on the other party by taking an unreasonable position, rejecting a reasonable settlement offer, or unjustifiably prolonged proceedings or failing to properly disclose assets. Of course, it is important for litigants, especially SRLs, to be aware in advance that their tactics may result in cost consequences. While more research is required to fully understand the causes and effects of self-representation in the family justice system, it is possible that a disproportionate number of SRLs who take cases to trial in Canada have not taken a reasonable approach to their cases. More information and advice may help them, but some of them may well have become self-represented because they have chosen to reject the advice of their counsel to settle and decided to proceed as a SRL.

In the long run, making adjudication work better in the era of growing, or at least continuing, self-representation may require appointing and training family judges in a different way.⁹⁹ Dealing with SRLs requires special skills and judicial temperament. Neither law school nor the current judicial selection process selects for or teaches, these skills. These skills include concrete abilities such as perceiving and responding appropriately to literacy problems and mental health problems,¹⁰⁰ as well as a more general willingness to bridge the conceptual gap between the legal system and the lived reality of the people who appear before it.¹⁰¹

The family justice process may be more efficient and effective if judges dealing with SRLs take a more activist or inquisitorial stance, which may require some consideration to the judiciary rethinking its role, perhaps studying the Australian experience with family judges having a “less adversarial trial,” which in practice means more judicial direction about what evidence will be heard and how the proceedings will be conducted.¹⁰²

2.2.2 Supporting Adjudication: the Office of the Children's Lawyer

⁹⁹ Court Improvement Committee (Colorado), *Colorado Courts' Recommendations for Family Cases: An Analysis of and Recommendations for Cases Involving Families*. (Denver: Colorado Courts, 2001), online: Colorado Courts <http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Standing_Committee_on_Family_Issues/recommendations_1.pdf> at 2. Making a similar point regarding court staff, see Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 71: "staff who have been hired specifically to work with SLR clients tend to be more engaged and willing to interact with this client group (compared to some staff who have worked at the registry counter for several decades and are now required to adjust their expectations)"

¹⁰⁰ Valerie Mutton, "Frozen moment of judicial compassion" (*The Lawyers Weekly*, Vol. 31, No. 26: November 11, 2011).

¹⁰¹ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 107: "Judicial appointment and education needs to reflect the new reality – especially in family court – that judges now deal with SRL's on a daily basis. This is a huge change from 20 years ago and an unwelcome one for some judges. Discussing a matter with trained professionals is a completely different process – and one that judges have been well trained to undertake – than communicating with an (often) emotional and overwhelmed SRL."

¹⁰² See notes 80 to 84, *supra*, and accompanying text.

Adjudication of child-related cases can give rise to a paradox. In these cases the law requires decisions to reflect the best interests of the child. However, the adversary system traditionally leaves the adult parties in control of the procedure and the evidence.¹⁰³ Efforts have been made to address this paradox by incorporating the "voice of the child" in adjudication.¹⁰⁴ Doing so is consonant not only with the United Nations *Convention on the Rights of the Child* and legal precedent,¹⁰⁵ but also with social science research about the benefits to children of being involved when important decisions are made about their future.¹⁰⁶ Evidence about children can include both the views and desires of the child him- or herself, as well as expert opinions about what would be in the child's interests.¹⁰⁷ In Australia's Less Adversarial Trial model discussed above, neutral government-paid Family Consultants are involved in cases from the initiation of a case in the system and provide reports about the interests and wishes of the children involved.¹⁰⁸

In some Ontario cases, the parties pay for an expert assessments of their children's needs under s. 30 of the *Children's Law Reform Act*,¹⁰⁹ although this is an expensive process. Although still not frequently used in the province, the practice of judicial interviews of children is becoming more common.¹¹⁰ The views and perspectives of the child are most frequently heard in Ontario family courts through the Office of the Children's Lawyer (OCL), a government funded service. The OCL can play one or both of two roles in separation-related cases: providing a lawyer to represent the child, or conducting a clinical investigation and preparing a report about the child's interests.¹¹¹ The OCL employs both lawyers and social workers to provide these services, sometimes with the two types of professionals collaborating.¹¹² Courts confronted with challenging decisions in child-related cases eagerly welcome OCL services.¹¹³ Empirical studies have produced good evidence that lawyers for the parties consider the OCL's presence in a case to be helpful,¹¹⁴ as do the child clients of Office.¹¹⁵ Drawing on their interviews with these child clients, Bala and Birnbaum suggest

¹⁰³ Semple, "Whose Best Interests?" *supra* note 51.

¹⁰⁴ Nicholas Bala, Victoria Talwar and Joanna Harris, "The Voice of Children in Canadian Family Law Cases" (2005) 24 Canadian Family Law Quarterly 221.

¹⁰⁵ *United Nations Convention on the Rights of the Child* UNGA Resolution, November 20, 1989, UN Doc A/RES/44/25, Art. 12; *Gordon v Goertz* 2 S.C.R. 27, 19 R.F.L. (4th) 177.

¹⁰⁶ Rachel Birnbaum and Nicholas Bala, "The Child's Perspective On Representation: Young Adults Report On Their Experiences With Child Lawyers" (2009) 25 Canadian Journal of Family Law 11 at 22-25 [Birnbaum & Bala, "Child's Perspective"].

¹⁰⁷ Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings*. (Ottawa: Department of Justice (Canada), 2002), online: Department of Justice (Canada) <dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf>; Christine D. Davies, "Access to Justice for Children: The Voice of the Child in Custody and Access Disputes" (2004) 22 Can. Fam. L.Q. 153; Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43 Alberta Law Review 845.

¹⁰⁸ Family Law Act 1975, (Cth) (Australia), s. 55A.

¹⁰⁹ *Children's Law Reform Act* R.S.O. 1990, c. C.12; Nicholas Bala, "Assessments for Postseparation Parenting Disputes in Canada" (2004) 42 Family Court Review 485.

¹¹⁰ Rachel Birnbaum and Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24 International Journal of Law, Policy, and the Family 330.

¹¹¹ *Courts of Justice Act* R.S.O. 1990, c. C.43, ss. 89 and 112.

¹¹² Rachel Birnbaum and Dena Moyal, "How social workers and lawyers collaborate" (2003) 21 C.F.L.Q. 379.

¹¹³ Cohen et al, *supra* note 87; Brownstone, *supra* note 56 at 89.

¹¹⁴ Rachel Birnbaum, "Examining Court Outcomes in Child Custody Disputes: Child Legal Representation and Clinical Investigations" (2005) 24 Canadian Family Law Quarterly 167 at 176.

¹¹⁵ Birnbaum & Bala, "Child's Perspective," *supra* note 106 at 61.

that OCL lawyers should, at least in the case of older children, "generally adopt a traditional advocacy approach, guided by the child's express wishes" instead of opining about the child's interests.¹¹⁶

The appropriate role for the OCL in a resource-constrained system may require reconsideration. Semple found that OCL social worker recommendations in custody and access cases are accepted by judges only 52% of the time, a low rate of concurrence in comparison to studies of expert assessments in these cases from other jurisdictions.¹¹⁷ The most likely reason for this low rate of concurrence seems to be systemic delay. When the OCL conducts an investigation in a case and recommends a parenting plan, often many months pass before that recommendation is judicially considered. Changing facts render the OCL's reports stale.¹¹⁸ Thus, we see the value of OCL work being undermined by the delay which is endemic to Ontario family courts. Indeed, the OCL's own processes contribute to delay: it takes an average of 39 days to decide whether or not to accept a case, and many weeks to assign cases to staff after they have been accepted.¹¹⁹

Over 40% of judicial requests for OCL involvement in child custody and access cases are denied, typically due to resource constraints.¹²⁰ According to 2007 data, the OCL is involved in only 9% of child-related family court cases.¹²¹ Providing these services is not inexpensive, given the cost of specialized lawyer and social worker labour and the need for the OCL to conduct careful screening and due diligence in selecting and working on cases.

Is it equitable for these services to be provided in a minority of cases and denied in some cases where the parents and judge want them? Are the cases which the OCL accepts significantly more amenable to productive contributions from that office than those which it rejects? Or is there an element of arbitrariness whereby many cases must be rejected simply because the Office cannot afford to staff them? Should the resources allocated to the OCL be reallocated to more focussed and affordable interventions to a larger group of people? These are issues that the government of Ontario should be addressing, based on appropriate empirical research. OCL and other adjudication support services which the government provides must also be attuned to the basic realities of family courts today, including pervasive self-representation and systemic delay.

While a full assessment or an OCL clinical investigation will provide the most complete report on a child's views and preferences, these reports are expensive and take time to prepare. In some Canadian jurisdictions, an alternative to an assessment is a "views the child report." There are programs to allow for these reports in British Columbia¹²² New Brunswick¹²³ and Saskatchewan.¹²⁴ These are much shorter and more focused reports. These reports are usually prepared on consent, though they can be ordered without the consent of the parents. While the parents are usually required to pay, they are much less expensive than

¹¹⁶ Birnbaum & Bala, "Child's Perspective," *supra* note 106 at 22.

¹¹⁷ Semple, "Eye of the Beholder," *supra* note 33 at 764.

¹¹⁸ Semple, "Eye of the Beholder," *supra* note 33 at 766-7.

¹¹⁹ Auditor General of Ontario, "Office of the Children's Lawyer" in 2011 Annual Report (Toronto: Office of the Auditor General of Ontario, 2011) at 220: "once a case was accepted, it took more than eight weeks to assign almost 50% of cases to staff or an agent before work could commence" (relying on 2011 data).

¹²⁰ Auditor General of Ontario, *ibid.*, at 220.

¹²¹ Mamo *et al*, *supra* note 60 at 82.

¹²² *Meaningful Child Participation in Family Court Processes*, <http://www.iicrd.org/familycourt/>

¹²³ http://www.legal-info-legale.nb.ca/en/index.php?page=court_ordered_evaluations_support

¹²⁴ See e.g. *Bruce v Bruce*, 2005 SKQB 325

a full assessment or OCL report, as only a few hours or professional time is required. A lawyer or social worker with some special training interviews the child and prepares a report for the court about what the child said. The interviews will take from 30 minutes to a couple of hours, and a report can be quickly prepared. There is generally only one interview, and there is no other information provided about the child, let alone a recommendation. Although more research is required into the most effective ways to bring the child's views before the courts and parents, allowing for use of "views of the child" reports in Ontario would add a flexible, affordable option for courts and parents.

2.2.3 Administrative Alternatives

Adjudication – defined as the imposition of a legal outcome by a neutral third party -- is not the exclusive preserve of judges. Administrative bodies have the potential to make certain types of family dispute decisions in a less expensive way than the courts and may have other advantages as well.¹²⁵ Maintenance Enforcement Programs such as the Family Responsibility Office provide a limited form of administrative decision-making in the family justice system, with staff making decisions about how to enforce support obligations.¹²⁶

The establishment in Ontario of an administrative process to recalculate child support obligations would be another modest, but important, step in this direction. Such a process would be less expensive for parents and the government than use of the courts. The Ontario legislature has anticipated the greater use of administrative processes, with 2009 *Family Law Act* amendments (still unproclaimed) which would authorize recalculation of child support by a "child support service."¹²⁷ The 2009 "Four Pillars" report endorsed the creation of such a service, with direct access to parties' income data from the Canada Revenue Agency.¹²⁸

A much more dramatic reform would be to create an administrative tribunal for all separation-related disputes. Decision-makers could be selected with the specific skills needed to deal with modern family problems, such as willingness to work with SRLs and use quasi-investigative techniques. Some have argued that mental health professionals should be adjudicators, especially in child-related disputes.¹²⁹ Beyond the possibility that they might have a better skill set and background, it might be possible to pay them less than judges and thus hire more of them with existing budgets, allowing for a reduction in delay.

However, a family law tribunal would encounter the same difficulty as the Unified Family Courts – the division of powers in the Canadian constitution renders it impossible without federal-provincial cooperation. Moreover, dealing effectively with domestic violence and contempt of court requires that family adjudicators have strong legal powers, including

¹²⁵ See e.g. Michael Cochrane, "The Flaw in Family Law (Published in The Mark, May 04, 2009)," online: <<http://www.themarknews.com/articles/153-the-flaw-in-family-law>>, proposing a "Family Relations Tribunal" which would be more multidisciplinary and conciliatory than family courts.

¹²⁶ *Supra* notes 70 and 71 and accompanying text.

¹²⁷ *Family Law Act* (Ontario), R.S.O. 1990, c. F.3, s. 39.1.

¹²⁸ Landau et al., *supra* note 47 at 17-18.

¹²⁹ Michael Cochrane, cited in Special Joint Committee on Child Custody and Access, *For the Sake of the Children*. (1998) Ottawa: Senate and House of Commons. Location of file:

<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=147&Lang=1&SourceId=36230>. See also Andrew S. Watson, "The Children of Armageddon: Problems of Custody Following Divorce," 21 *Syracuse L. Rev.* 55 (1969-1970) at 79.

the possibility of imposing incarceration. Complex post-separation financial arrangements sometimes necessitate advanced legal reasoning. These factors are among the reasons why judges are likely to remain the central decision-makers in our system.

2.3 Limitations of Adjudication

The limitations of adjudication in the family separation context are generally appreciated by policy-makers and practitioners.¹³⁰ Adjudication is extremely expensive for the state and parties, due to the high cost of judicial and lawyer labour and the requirements of due process. The preparation of court documents and adversarial encounters tend to increase tension and often exacerbate conflict and unhappiness among adults, which is deleterious to children's interests.¹³¹ Even "final" orders in family court cases are often merely waypoints in on-going litigation.¹³² It is very difficult for adjudication to produce anything more than a static or temporary resolution of a case, and almost impossible for it to create a positive post-separation parenting partnerships.¹³³ These 'extra base' outcomes can usually only be accomplished through consensual forms of dispute-resolution.¹³⁴ In the family separation sphere as in others, non-coercive resolutions are not only less costly and stressful, but can also be more substantively just and durable.¹³⁵

Most separation-related cases should settle, and most of them *do* in fact settle. The state's policy interests include the speed and cost of resolution (earlier in the life of a case and lower costs are better, *ceteris paribus*) and the justness and effect of settlement terms on children and vulnerable parties, along with increasing the proportion of cases that settle. Many family cases or parts of cases are simply abandoned by a party, often because that party's financial or psychological resources have been exhausted. This outcome saves process costs, but usually means significant sacrifices in children's wellbeing and adults' rights. Resolution through settlement should be distinguished from, and preferred to, resolution through abandonment of a case.

Many cases settle through bipartite negotiation, especially if the parties are represented by lawyers. Negotiated settlement is a cost-effective, flexible, and non-invasive way of resolving family conflict. Unlike other options, it does not require people to secure time off work and/or childcare at a particular fixed time in order to deal with a separation-related problem.¹³⁶ Parents who negotiate settlement to their separation-related conflict employ a dispute-resolution technique to which they will be able to return over the course of a long co-parenting relationship, even when they lack access to resources. Negotiated

¹³⁰ ACAJCFM, *Meaningful Change*, *supra* note 9: "Within less than 20 years of the advent of no fault divorce however, most jurisdictions were concluding that the tools of litigation were poorly suited to the needs of separating spouses and their children."

¹³¹ Shaw, *supra* note 16; Semple, "Whose Best Interests?," *supra* note 103; Rebecca Aviel, "Why Civil Gideon Won't Fix Family Law" (2013) 122 Yale Law Journal 2106 at 2116.

¹³² Nicholas Bala and Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2012) 30 Canadian Family Law Quarterly 271 at 276.

¹³³ *Supra*, section 1.3. ("Outcomes of Separations").

¹³⁴ ACAJCFM, *Meaningful Change*, *supra* note 9 at 5-6.

¹³⁵ Christine Parker, *Just lawyers: regulation and access to justice* (New York: Oxford University Press, 1999) at 51.

¹³⁶ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 49: "One's hours of work or flexibility in obtaining "time off" may make it more difficult to attend the MIP in some areas in person, for example, or to attend a mediation or court. The need to pay for childcare in similar situations may also be a difficulty."

settlements can reflect the views of the children, either speaking directly or through jointly retained experts.¹³⁷ Collaborative family law protects the virtues of negotiated settlement, and may have the added benefit of neutral expert support.¹³⁸

Good lawyers facilitate negotiated settlement by advising people about their rights and obligations, by making appropriate referrals to non-legal services, and by acting as agents for separated people who cannot or should not communicate directly.¹³⁹ (Less good lawyers, on the other hand, can increase conflict and costs without improving outcomes).¹⁴⁰ Among those who are self-represented, bipartite negotiated settlement of significant separation-related conflict is more challenging to achieve. Birnbaum and Bala report that most family lawyers find that their cases are less likely to settle if there is a self-represented litigant on the other side.¹⁴¹ Macfarlane notes that only 27% of the SRLs in her sample "were coded as having given consideration to alternatives before litigation, including mediation, private arbitration and counselling, and other efforts at settlement with the other side."¹⁴²

3. Mediated Settlement Works

How can the government encourage good settlements? It can promote bipartite negotiation by providing information about the law and about how to negotiate, precedents for resolution agreements or parenting plans, or safe space and opportunity for parties to talk. Further, there is substantial evidence that many people can negotiate settlement only with the assistance of a neutral, non-adjudicative third party— a mediator. After a significant Ontario government financial commitment under the 2011 Four Pillars reforms, non-judicial mediation services are now available in or through every Ontario family court on a subsidized basis for low and middle income individuals, as well as limited access for free "court day" mediation services.¹⁴³

¹³⁷ Birnbaum & Bala, "Child's Perspective," *supra* note 106.

¹³⁸ Semple, "Cost-Benefit Analysis," *supra* note 5 at 55.

¹³⁹ Lynn M. Mather, Craig A. McEwen and Richard J. Maiman, *Divorce lawyers at work: varieties of professionalism in practice* (Oxford ; New York: Oxford University Press, 2001) ; Rosemary and Gary Skoloff and Robert J. Levy, "Custody Doctrines and Custody Practice: A Divorce Practitioner's View" (2002) 36 Fam. L.Q. 79; Rosemary Hunter, "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156. Julie Macfarlane is among those who identify differences among lawyers in terms of adversarialism and collaboration. (Julie Macfarlane, "Will Changing the Process Change the Outcome? The Relationship Between Procedural and Systemic Change" (2005) 65 La. L. Rev. 1487 and Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008) .

¹⁴⁰ Marsha Kline Pruett and Tamara D. Jackson, "The Lawyer's Role during the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys" (1999) 33 Family Law Quarterly 288; Aviel, *supra* note 131 at 2117-8.

¹⁴¹ Birnbaum, Bala and Bertrand, *supra* note 49 at 81: "A majority of lawyers report that in their experience, if the other side is self-represented, settlement is less likely (Ontario: 54%; Alberta: 46%) or much less likely (Ontario: 24%; Alberta: 43%)."

¹⁴² Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 37.

¹⁴³ Ministry of the Attorney General (Ontario), Court Services Division Annual Report 2011-2012. (Toronto: Queen's Printer for Ontario, 2012), online: Ministry of the Attorney General (Ontario) <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_11/Court_Services_Annual_Report_FULL_EN.pdf> at 41.

In making formal family mediation widely available, Ontario has joined most North American jurisdictions.¹⁴⁴ Informal mediation efforts are also frequently made by social workers (clinical investigators) and lawyers from the Office of the Children's Lawyer, and by judges in pre-trial conferences.¹⁴⁵ State support for mediation is logical, because it is supported by evidence whose quantity and quality exceeds that supporting the alternatives by an order of magnitude.¹⁴⁶

The best-documented effect of mediation is in helping to achieve consensual settlements.¹⁴⁷ Ontario's family court mediation programs produce full or partial settlement in almost 80% of the cases referred to them.¹⁴⁸ In so doing, they keep cases out of court and save the government a great deal of money,¹⁴⁹ as well as reducing costs for the parties. The Ontario settlement rate from mediation is relatively high compared to other jurisdictions -- the percentage of mediated separation-related cases producing some form of agreement in other North American courts ranges from 46% to 94%.¹⁵⁰ A recent study from Australia's mediation program found that only 39% reached full agreement at the time of the intervention. The mandatory nature of mediation in that jurisdiction may account for the lower settlement rate.¹⁵¹

While some of the cases which settle in mediation would have settled without mediation, there is evidence that mediation leads to agreements in some cases that would otherwise be adjudicated. A random-assignment divorce mediation study conducted by Emery et al. in Virginia found that only 11% of mediated cases in the sample ever appeared before a judge, compared to 72% of the control cases that were not offered mediation ending up before a judge.¹⁵²

Australia introduced nationwide mandatory family mediation in 2006. The total number of child-related family law court applications fell from 19,188 in 2004-5 to 14,549 in 2008-9. A comprehensive evaluation conducted after this reform concluded that the 24% drop in court filings was largely attributable to the adoption of mandatory mediation.¹⁵³

¹⁴⁴ Bozzomo & Schepard, *supra* note 10 at 336: there is significant variations in services, but also American states have some type of court connected mediation with some services available on a free or subsidized basis for at least some types of issues (typically child related issues.)

¹⁴⁵ Semple, "Getting it Right," *supra* note 11.

¹⁴⁶ Bozzomo & Schepard, *supra* note 10 at 348: "If mediation does provide significant benefits to families, it should be available to all, regardless of income."

¹⁴⁷ Text in Section 3 is adapted from Semple, "Mock Trial," *supra* note 12.

¹⁴⁸ Ministry of the Attorney General (Ontario), *supra* note 143 at 31.

¹⁴⁹ Bala, "Systemic Changes," *supra* note 13 at 284.

¹⁵⁰ Snapshot Study 2008: Summary Findings. (San Francisco: Children & the Courts (California) Center for Families, 2010), online: CFCC <<http://www.courts.ca.gov/documents/Snapshot2008SummaryFindings.pdf>> at 18; Joan B. Kelly, "Family Mediation Research: Is There Empirical Support for the Field?" (2004) 22 Conflict Resolution Quarterly 3 at 10 and 16. For other reported settlement rates within this range, see Desmond Ellis, *Family Mediation Pilot Project*. Toronto: Attorney General of Ontario, 1994, cited in Kelly, *Family Mediation Research*, at 22; C. J. Richardson, Court-Based Divorce Mediation in Four Canadian Cities: An Overview of Research Results. (Ottawa: Department of Justice (Canada), 1988); Robin H. Ballard *et al.*, "Factors Affecting The Outcome Of Divorce And Paternity Mediations" (2011) 49 Family Court Review 16;; Robert E. Emery, David Sbarra and Tara Grover, "Divorce Mediation: Research and Reflections" (2005) 43 Family Court Review 22 at 26.

¹⁵¹ Moloney et al, *supra* note 43.

¹⁵² Emery, Sbarra & Grover, *supra* note 159 at 25.

¹⁵³ Rae Kaspiew *et al.*, Evaluation of the 2006 family law reforms. (Melbourne: Australian Institute of Family Studies, 2009), online: Australian Institute of Family Studies <<http://www.aifs.gov.au/institute/pubs/fle/>> at 305.

People who participate in family mediation are generally more satisfied by the experience than those who litigate, according to another robust set of evaluation data.¹⁵⁴ Participant satisfaction rates after mediation are consistently in the 60-80% range according to one meta-analysis.¹⁵⁵ Even stronger results are reported by California's mediation program, where 87% of participants agree that "mediation is a good way to come up with a parenting plan" and 88% express willingness to recommend it to friends.¹⁵⁶ Mediation scores particularly well in terms of satisfaction when it is compared to divorce litigation.¹⁵⁷

What is it about family mediation that satisfies its participants? Unsurprisingly, people who manage to settle in mediation report greater satisfaction than those who do not settle and go on to litigate.¹⁵⁸ However, other factors also contribute to participant satisfaction.¹⁵⁹ In the California study, for example, the rates of satisfaction far exceed the rates of settlement.¹⁶⁰ Process-related benefits, such as the ability to tell one's story and be heard by the other party and the mediator, seem to be important contributors to mediation's success.¹⁶¹

Family mediation may also produce benefits which are deeper and more long-term than just settlement and satisfaction, although the evidence for these claims is more less clear. Some studies have found that mediation increases compliance with child support and parenting obligations,¹⁶² although others have found no such effect,¹⁶³ or that the effect is only short-term in nature.¹⁶⁴ One evaluation concluded that inter-parental conflict was reduced during the two-year period following the mediation.¹⁶⁵ Thereafter, the conflict level was no longer reduced by the earlier mediation, although the participants' interactions showed some beneficial improvements.¹⁶⁶ The quality of the couples' post-separation interactions is also improved by mediation, according to a quantitative meta-analysis of mediation studies conducted by Lori-Ann Shaw.¹⁶⁷

¹⁵⁴ Colmar Brunton Social Research, *supra* note 18 at 64 *et seq*; Lori Anne Shaw, "Divorce mediation outcome research: A meta-analysis" (2010) 27 Conflict Resolution Quarterly 447.

¹⁵⁵ Connie J. Beck and Bruce Dennis Sales, *Family Mediation: Facts, Myths, and Future Prospects*, 1st ed. (Washington, DC: American Psychological Association, 2001) at 77. Similarly, Joan Kelly reviewed three other mediation studies, and found satisfaction rates which were between 66% and 76%: Kelly, *supra* note 150 at 14, 17, and 22.

¹⁵⁶ Center for Families, Children, and the Courts, *supra* note 150 at 21. See also Randall W. Leite and Kathleen Clark, "Participants' Evaluations of Aspects of the Legal Child Custody Process and Preferences for Court Services" (2007) 45 Family Court Review 260, reporting a survey which compared satisfaction rates with various family court services, including mediation.

¹⁵⁷ Emery, Sbarra & Grover, *supra* note 150 at 28.

¹⁵⁸ Beck & Sales, *supra* note 155 at 77-8; Kelly, *supra* note 150 at 7-8.

¹⁵⁹ A "consistent finding in the mediation research [is that] participants like the process and view it as fair, regardless of whether a settlement was reached." (Frank E.A. Sander, "Some Concluding Thoughts" (2002) 17 Ohio State Journal on Dispute Resolution 705 at 706-7).

¹⁶⁰ Center for Families, Children, and the Courts, *supra* note 150.

¹⁶¹ Beck & Sales, *supra* note 155 at 27; Robert A. Baruch Bush, "What Do We Need a Mediator For? Mediation's Value-Added for Negotiators" (1996) 12 Ohio State Journal on Dispute Resolution 1 at 17.

¹⁶² Kelly, *supra* note 150 at 14-15 and 23; Emery, Sbarra & Grover, *supra* note 150 at 27; Adkins, *supra* note 49 at 127.

¹⁶³ Richardson, *supra* note 150 at 33.

¹⁶⁴ Beck & Sales, *supra* note 155 at 96.

¹⁶⁵ Kelly, *supra* note 150 at 18.

¹⁶⁶ Kelly, *supra* note 150 at 18.

¹⁶⁷ Shaw, *supra* note 154 at 460.

Does family mediation make children's lives better post-separation? An impressive 89% of California family mediation participants agreed that the mediator helped keep them "focused on our children's interests."¹⁶⁸ Shaw's meta-analysis base identified moderate overall positive effects of family mediation on parents' understanding of their children's needs.¹⁶⁹ Non-custodial parents who had mediated remained significantly more involved with their children 12 years after divorce than non-custodial parents who had litigated, according to Robert Emery's Virginia mediation study.¹⁷⁰ Importantly, Emery found that this increased level of contact was *not* correlated with increased inter-parental conflict.¹⁷¹

However these findings about compliance, improved relationship quality, and parenting behaviour have not been consistently replicated.¹⁷² Claims that family mediation reduces inter-parental conflict or improves long-run child adjustment and that it is salutary to children's adjustment in the long run are not supported by most of the research evidence.¹⁷³ After reviewing a large database of evaluation literature for their book on the topic, Beck and Sales concluded that mediation has little or no effect on the long-term ability of separated couples to communicate, especially in high-conflict cases.¹⁷⁴ Inconsistency between different evaluation studies may indicate that the specific nature of family court mediation programs – especially factors such as how much mediation time is funded per case and the quality of the mediators – are important determinants of its long-term success.¹⁷⁵

3.1 Varieties and Alternatives in Separation-Related Mediation

Mediation is not as flexible as bipartite negotiated settlement, and it is potentially more expensive than a negotiated settlement, especially if parties are self-represented. The parties' schedules must be coordinated in order for them to attend together. Someone must pay the mediator, and, depending on the case, provide independent legal advice and draft an agreement. However, mediation is much more flexible and affordable than adjudication. For example, adjudication must abide by substantive and procedural law, but mediation can be practiced in a culturally- or religiously-aware form if that is appropriate for the parties. Mediation can be practiced online or via telephone to address geographic or safety issues.¹⁷⁶

There are three in principle three types of mediation: facilitative, evaluative, and transformative.¹⁷⁷ *Facilitative* mediation begins with the premise that the best resolutions to

¹⁶⁸ Center for Families, Children, and the Courts, *supra* note 150 at 21.

¹⁶⁹ Shaw, *supra* note 154 at 460.

¹⁷⁰ Emery, Sbarra, & Grover, *supra* note 150 at 30.

¹⁷¹ Emery, Sbarra, & Grover, *supra* note 150 at 31. C.J. Richardson found a similar phenomenon in a sample of divorce mediation participants from Montreal, but not in a sample from Winnipeg. (Richardson, *supra* note 150 at 39.)

¹⁷² See for example Richardson, *supra* note 150 at 38-9.

¹⁷³ Beck & Sales, *supra* note 155 at Chapter 5; Kelly, *supra* note 150 at 18; Donald T. Saposnek, "Commentary: The future of the history of family mediation research" (2004) 22 Conflict Resolution Quarterly 37 at 48.

¹⁷⁴ Beck & Sales, *supra* note 150 at 67-8. Studies of California's mediation programs have also found a marked drop-off in satisfaction levels when participants are surveyed two years after the experience: Kelly, *supra* note 150 at 8.

¹⁷⁵ Richardson, *supra* note 150 at 45 identifies other possible explanations for differential success.

¹⁷⁶ Simon Fodden, "B.C. to Have Official Online Dispute Resolution (Slaw.ca, May 10th 2012)," online: <<http://www.slaw.ca/2012/05/10/b-c-to-have-official-online-dispute-resolution/>>

¹⁷⁷ L. Randolph Lowry, "Evaluative Mediation" in Jay Folberg, Ann Milne & Peter Salem eds., *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 72.

human conflicts are those generated by the parties themselves. Mediators using this approach seek to give the parties the opportunity to create their own solutions.¹⁷⁸ Facilitated resolutions reflect the parties' own pragmatic and moral judgments, and not necessarily those of legal authorities or those that would be imposed by a court.¹⁷⁹ This principle, known as "self-determination" or "party empowerment," is at the core of facilitative mediation doctrine.¹⁸⁰

An *evaluative* mediator proposes solutions, analyses parties' positions based on external criteria, in particular expected adjudicated outcomes. Simon Roberts observes that the archetypal facilitative mediator "establishes communication *between* the parties," while the archetypal evaluative mediator "establishes communication *with* each of the parties."¹⁸¹ This analysis is consistent with the fact that facilitative mediators typically work with the parties together in one room;¹⁸² evaluative mediators are much more likely to separate the parties in "caucus" sessions.

Transformative mediation pursues the goals of party empowerment and mutual recognition. Transformative mediators see settlement as a positive but not essential outcome of successful mediation. They are also distinguished by their ambition to transform human interaction and advance public values in doing their work.¹⁸³

Within the context of family separation, other innovative mediation variants have developed.¹⁸⁴ A purely facilitative mediator might, in principle, be indifferent to the consequences of possible settlements for the parties' children. In family separation mediation, a bias towards the best interest of the child is generally considered a necessary departure from pure neutrality.¹⁸⁵ A further step in this direction is child-inclusive mediation, in which a "child consultant" reports to the adult parties about the child's views,¹⁸⁶ or the child meets

¹⁷⁸ Jay Folberg, Ann Milne and Peter Salem, "The Evolution of Divorce and Family Mediation: An Overview" in Jay Folberg, Ann Milne & Peter Salem eds., *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 1 14; Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (1996) 1 *Harvard Negotiation Law Review* 7; Bernard S. Mayer, "Facilitative Mediation" in Jay Folberg, Ann Milne & Peter Salem eds., *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 29.

¹⁷⁹ Kimberlee K. Kovach and Lela P. Love, "Mapping Mediation: The Risks of Riskin's Grid" (1998) 3 *Harvard Negotiation Law Review* 71

¹⁸⁰ Nancy A. Welsh, "Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation" in Jay Folberg, Ann Milne & Peter Salem eds., *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 420 at 422.

¹⁸¹ Simon Roberts, "Institutionalized Settlement in England: A Contemporary Panorama" (2002) 10 *Williamette Journal of International Law & Dispute Resolution* 17.

¹⁸² Zena Zumeta, "Styles of mediation: Facilitative, evaluative, and transformative mediation. (Published in the National Association for Community Mediation Newsletter, Fall, 2000)," online: <<http://www.mediate.com/articles/zumeta.cfm>>

¹⁸³ Robert A. Baruch Bush and Joseph P. Folger, *The promise of mediation : the transformative approach to conflict (2d ed.)*, Rev. ed. (San Francisco: Jossey-Bass, 2005) at 9; Robert A. Baruch Bush, "Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation" (1989) 3 *Journal of Contemporary Legal Issues* 1.

¹⁸⁴ See also Semple, "Mock Trial," *supra* note 12 at section V.2.

¹⁸⁵ Bala, "Systemic Changes," *supra* note 13 argues that we need people whose primary objective [is] helping parents achieve a child-focused, non-adversarial restructuring of their relationship," and who "recognize their responsibilities not only to the adults ... but also to the children who are absent but who are profoundly affected by the process."

¹⁸⁶ Daniel B. Pickar and Jeffrey J. Kahn, "Settlement-Focused Parenting Plan Consultations: An Evaluative Mediation Alternative To Child Custody Evaluations" (2011) 49 *Family Court Review* 59 and Parkinson, *supra* note 17: " In child-inclusive mediation, a process developed by Dr. Jenn McIntosh, a specialist practitioner trained

with the mediator so that the mediator can learn about the child's perspective and share this with the parents.

An important variant of evaluative mediation is Early Neutral Evaluation (ENE). In ENE, a judge or other legal professional provides an assessment of the merits at an early stage in the process, and facilitates a resolution within the range of likely outcomes of a litigated resolution. Some American states have formalized Early Neutral Evaluation by a judge, other than the one who will deal with the case at trial.¹⁸⁷ In Ontario, there are places where volunteer senior lawyers (Dispute Resolution Officers) provide this type of mediation for child support variation cases.

A significant portion of the judicial work at case and settlement conferences in Ontario's family justice system is, in effect, evaluative mediation by a judge. While this is often an effective way to resolve disputes, it may not be the most efficient use of relatively costly and scarce judicial time.¹⁸⁸ There are some individuals who will only settle a case if they hear from a judge that the proposed resolution is fair and within the likely range of outcomes from court proceedings; in these situations, one or both parties may have already heard from their lawyers or a mediator that a proposed settlement is fair, but they need to hear this from a judge before they will settle. There are, however, at present many cases in Ontario, especially involving self-represented litigants, where mediation is only conducted by a judge because the parties have not had significant prior efforts to resolve with a mediator; these cases could be resolved with less expense if there were more use of mediation.

Confidentiality was originally a defining element of family mediation – the mediator would not reveal anything said within the process, and would not be involved in the subsequent litigation if no resolution was reached.¹⁸⁹ However “open” or “recommending” mediation is now common in some court-adjunct mediation programs in the United States.¹⁹⁰ In this model, if no settlement is reached, the mediator writes a report, which often includes outcome recommendations.¹⁹¹ This report is available to the court, and may be quite

in this work talks to the children privately with the parents' consent... He or she is known as a child consultant. Children's 'voices' may be communicated through a range of media such as drawings, stories and emotion cards. The needs, perceptions and attachments revealed in these interactions are discussed with the children, and decisions are jointly made about what can be appropriately and safely shared with each parent. The child consultant then meets with the parents to give feedback from the children's session, helping the parents to reflect upon their children's needs."

¹⁸⁷Jordan Leigh Santeramo, "Early Neutral Evaluation in Divorce Cases" (2004) 42 Family Court Review 321; Yvonne Pearson *et al.*, "Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota" (2006) 44 Family Court Review 672; Kourlis *et al.*, *supra* note 31 at 22.

¹⁸⁸ See section 2.2, *supra*, and section 5.4, *infra*.

¹⁸⁹ Craig A. McEwen, Nancy H. Rogers and Richard J. Maiman, "Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation" (1995) 79 Minn. L. Rev. 1317 at 1325.

¹⁹⁰ Peter Salem, "The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?" (2009) 47 Family Court Review 371 at 378 and see the description of California's "recommending" mediation system in Kelly, at 5. Open mediation is now a mainstream practice, accepted within the applicable standards: American Bar Association, "Model Standards of Practice for Family and Divorce Mediation" (2001) 35 Fam. L. Q. 27 at Standard VII.

¹⁹¹ Ontario's *Children's Law Reform Act* allows the parties to decide, before commencing the mediation, whether "(a) the mediator is to file a full report on the mediation, including anything that the mediator considers relevant to the matter in mediation" or "(b) the mediator is to file a report that either sets out the agreement reached by the parties or states only that the parties did not reach agreement on the matter." (*Children's Law Reform Act* R.S.O. 1990, c. C.12 at s. 31(4).)

influential. One consequence of open mediation is to give the mediator some of the authority which settlement-seeking judges have – the ability to “punish” recalcitrance with a negative report, and the ability to predict the adjudicated outcome by writing a recommendation which will influence that outcome.

Timing of mediation is another live issue. There is evidence that mediation is most likely to succeed in the early stages of a dispute.¹⁹² However, in the immediate aftermath of a separation, parties may not yet understand their own needs and legal entitlements. Such awareness, which may come only with time, is arguably a necessary precursor to a just and durable compromise.

3.2 Making Mediation Better

Whether or not mediation should be mandatory for family disputes is the subject of a lively debate, which this Report will consider in Part 5.1. However, so long as this dispute-resolution option remains voluntary, the government should take more aggressive steps to ensure that parties are aware of it and have the opportunity to use it. Julie Macfarlane's study found that many SRLs reported that they had not been offered the opportunity to mediate, and were unaware of its availability.¹⁹³ One advantage of triage-type programs is their ability to make parties more fully aware of non-court alternatives like mediation.¹⁹⁴

Between the facilitative, evaluative, and transformative alternatives, which type of mediation best advances children's interests and protects adult rights in a cost-effective manner? The evaluation studies that produce such impressive evidence of mediation's success in producing settlement and satisfaction (reviewed above) do not typically identify what style of mediation was being used. There is not much evidence that transformative mediation is widely practiced in this context, largely because the state has not been willing to accept its higher costs and its less total commitment to settlement-seeking.

Evaluative mediation is widespread for family as other legal disputes, especially when authority figures like judges or senior lawyers are acting as mediators. In a separation case without child custody or access issues, evaluative mediation may be a very efficient way to bring about a just resolution. Legal entitlements to support and property division can in many cases be readily calculated by an expert mediator. Telling the parties what payments a judge would probably require may allow them to quickly settle on those or similar terms and then move on with their lives.

However, in cases involving minor children, there is significant reason to believe that facilitative mediation is more appropriate. Family separation cases with custody and access issues are distinguished by:

¹⁹² Parkinson, *supra* note 17: "There is ample evidence from the history of counselling ... that the earlier parents can be involved in negotiating a compromise to their disputes, the more likely it is that the dispute will be resolved."

¹⁹³ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 73-4. As noted, this is a study of both family and civil SRLs. It may be that some of the SRLs in the study were eligible for government subsidized mediation services and were offered access in some way, what is significant is that when interviewed, they could not recall being offered these services.

¹⁹⁴ R.A. Malatest & Associates Ltd., Evaluation of the Family Justice Registry (Rule 5) Pilot Project: Summary. (Victoria: Attorney-General (BC), 2002), online: AG (BC) <<http://www.ag.gov.bc.ca/justice-services/publications/fjsd/registry/Summary.pdf>> at 8.

1. the prospective and relationship-focused nature of the inquiry;¹⁹⁵
2. the likelihood that the parties will have on-going interaction, ideally in a "parenting partnership;"¹⁹⁶ and
3. the fact that the *quality* of this inter-parental relationship is relevant to the child's interest.

These attributes all offer reasons to support facilitative mediation in child-related family separation cases. Disputes with on-going relationships between the parties are often recognized in the literature as good candidates for facilitative mediation.¹⁹⁷ Carrie-Menkel Meadow, for example, identifies cases in which "direct communication between the parties... may be more important than the substantive outcome" as ones in which facilitative approach is best.¹⁹⁸ This is true of many if not most parenting disputes, where the details of the parenting plan are less important to the child's interests than the nature of the parties' subsequent interactions with each other and the child.¹⁹⁹

The presence of "common or complementary interests" in a given dispute also augurs well for facilitative mediation.²⁰⁰ By contrast to a money-related dispute, parents in a child custody or access dispute often have very significant complementary interests, even if they need help to recognize them. Most obviously, they almost invariably have a mutual interest in their child's health and happiness.²⁰¹ Moreover, most adults want to spend part of their waking hours doing something other than caring for a child, which creates a complementary interest in sharing childcare responsibilities.

The superiority of facilitative mediation in parenting disputes has some empirical support. An American research team led by Dean Pruitt studied mediation sessions at a community clinic.²⁰² The researchers placed observers within the mediation sessions. One of the phenomena that they were looking for was "joint problem-solving." This was defined as discussions in which "disputants ... define the problems underlying their conflict, examine alternative ways of solving these problems, and make a mutual decision among these alternatives."²⁰³ Such discussions are a central part of facilitative mediation doctrine as described above. In follow-up studies 4-8 months later, for the respondents in the disputes,

¹⁹⁵ Singer, *supra* note 30 at 364 (2009).

¹⁹⁶ *Supra* section 1.3, *supra*.

¹⁹⁷ Labour relations disputes share this characteristic with custody and access disputes. Facilitative mediation had become widespread in North American labour relations significantly before it was applied to other civil disputes. (Colleen M. Hanycz, "Whither Community Justice - The Rise of Court-Connected Mediation in the United States" (2007) 25 Windsor Y.B. Access Just. 167 at 180-186).

¹⁹⁸ Carrie Menkel-Meadow, "For And Against Settlement: Uses And Abuses Of The Mandatory Settlement Conference" (1985) 33 University of California at Los Angeles Law Review 485 at 511.

¹⁹⁹ Deborah R Hensler, "Suppose It's Not True: Challenging Mediation Ideology" (2002) 2002 Journal of Dispute Resolution 81 at 82. For the argument that precisely determining the "right answer" in a parenting dispute is not particularly important to the child, see Semple, "Whose Best Interests?," *supra* note 103 at 319-21. Likewise, Frank Sander suggests that facilitative process more readily allows a focus on the future of an on-going relationship, while adjudication or evaluative mediation are primarily about the past.: Frank E.A. Sander, "A Friendly Amendment" (1999) 6 Dispute Resolution Magazine 11.

²⁰⁰ Robin N. Amadei and Lillian S. Lehrburger, "The World of Mediation: A Spectrum of Styles" (1996) 51 Dispute Resolution Journal 62 at 64-5. This article specifically mentions "divorcing parents" as good candidates for the "process-oriented mediation style," which appears to be synonymous with facilitative mediation.

²⁰¹ Mayer, *Facilitative Mediation*, *supra* note 178 at 38.

²⁰² D.G. Pruitt *et al.*, "Long-term success in mediation" (1993) 17 Law and Human Behavior 313 at 317. Some, but not all of the cases mediated were family matters.

²⁰³ *Ibid.* at 315.

there was a significant correlation between the presence of joint problem solving in the mediation sessions and the reported improved relationship quality, but there was no relationship for the applicants.²⁰⁴ Pruitt et al conclude that

One road to relationship improvement, in community mediation as in marital therapy, is to get the disputants to engage in joint problem solving about the issues that divide them. This provides supervised experience in a skill that is likely to be subsequently useful.²⁰⁵

Because it involves authoritative suggestions about appropriate settlement terms from the mediator, the evaluative approach is less likely to foster joint problem-solving than the facilitative approach.

The work of an English research team led by Liz Trinder and Joanne Kellett bolsters support for facilitative mediation for improving parenting. These researchers studied “conciliation” programs at different English family courts, examining the mechanisms by which they encouraged settlement. They identified a “high-judicial control” model of settlement-seeking in London, with the judge leading the discussions, and lawyers typically speaking for the parties.²⁰⁶ In Essex, by contrast, the court deployed a “low-judicial control” model, similar to facilitative mediation. Under this model, before any judge is involved, a court worker leads a joint meeting in which the parties are encouraged to speak to each other directly.²⁰⁷ Other courts were identified with intermediate levels of judicial control.²⁰⁸

The three courts were evaluated in terms of the number of agreements reached on child visitation disputes, as well as on measures of party satisfaction. The high-judicial control court did significantly worse than the others on these measures.²⁰⁹ The low-judicial control court also had noticeably higher participant satisfaction rates than did the intermediate courts.²¹⁰ This study provides an intriguing hint that the self-determinative mode of facilitative mediation may indeed have demonstrable advantages over evaluative mediation in child-related disputes.

3.3 Limitations of Mediation

As noted above, mediation has limited potential to improve outcomes for some of the worst-positioned cases.²¹¹ If parties are high-conflict, and one or both are totally unreasonable, or there are serious abuse issues or concerns about compliance with an agreement, then adjudication will probably be the necessary or best form of resolution.

While mediation's affordability and cost-effectiveness are central to its appeal, the best results may come from the most resource-intensive versions of mediation.²¹²

²⁰⁴ *Ibid.* at 323-4 and 327. There is no explanation offered for why this held true only for the respondents, and not the complainants in the disputes.

²⁰⁵ *Ibid.* at 373.

²⁰⁶ Liz Trinder and Joanne Kellett, *The longer-term outcomes of in-court conciliation*. (London: Ministry of Justice (UK), 2007), online: Ministry of Justice <<http://www.justice.gov.uk/docs/211107.pdf>> at 20-21.

²⁰⁷ *Ibid.* at 17.

²⁰⁸ *Ibid.* at 22-24.

²⁰⁹ *Ibid.* at 41.

²¹⁰ *Ibid.* at 50.

²¹¹ Section 1.3, *supra*.

²¹² Bala, "Systemic Changes," *supra* note 13 at 288.

Jurisdictions that have curtailed the number of hours that mediators may spend on each case have in some cases found that the benefits of the programs dissipate.²¹³ Indeed, Peter Salem argues that mediation that achieves “self-determination” is not realistically possible in the straitened resource environment of today's family court annexed publicly funded mediation programs.²¹⁴ Mandatory mediation has significant process costs and drawbacks,²¹⁵ and even voluntary mediation can be used strategically by a party to delay a case and exploit the other, more vulnerable party (most often the female partner).²¹⁶

3.4 Conclusions on Mediation

As further discussed below, information about the value of mediation and access to local mediation services should be made available to all of those with family disputes, even before litigation is commenced. Access to government subsidized mediation services should be extended so that all parties who want to resolve their disputes by mediation have sufficient opportunity to do so, and form effective co-parenting relationships. Provision of more information about mediation and extension of family mediation services should result in less demand for expensive court time and judicial mediation in settlement conferences. For child-related disputes there should be an emphasis on facilitative mediation – helping parents to develop a better relationship – though for economic issues, the emphasis should be on evaluative mediation.

These two different types of mediation require different skill sets and knowledge, though one properly trained professional can do both. Mediators require appropriate education and training, and on-going supervision and support. There must continue to be education programs for mediators to ensure that they adequately screen for domestic violence and appropriately address manipulative or exploitative behaviour during mediation.²¹⁷

At present in Ontario, family mediation is not a regulated profession. There are concerns that some private mediators may lack the skills and knowledge to be effective, and in some cases may even do harm.²¹⁸ To a significant extent, the Ontario government provides a degree of control and quality assurance by only allowing certified mediators who take annual education programs to provide subsidized and court-connected mediation.²¹⁹ If government

²¹³ Beck & Sales, *supra* note 155 at 27-8 and 80; Nancy A. Welsh, "Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation" in Jay Folberg, Ann Milne & Peter Salem eds., *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 420 at 425; Joan B. Kelly, "Family Mediation Research: Is There Empirical Support for the Field?" (2004) 22 Conflict Resol. Q. 3 at 23.

²¹⁴ Salem, *supra* note 190 at 377.

²¹⁵ See section 2.1., *infra*

²¹⁶ Semple, "Mock Trial," *supra* note 12; Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 30.

²¹⁷ Hilary Linton, Domestic Violence Screening. (Toronto: Riverdale Mediation, 2010), online: Riverdale Mediation <<http://www.riverdalemediation.com/2010/10/family-lawyers-and-counsellors-read-this/>>; Semple, "Feminist Critique," *supra* note 48.

²¹⁸ Peggy English and Linda C. Neilson, "Certifying Mediators" in Jay Folberg, Ann Milne & Peter Salem eds., *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 483; Linda Diebel, "Unqualified mediators prey on broken families" Toronto Star (January 14, 2008) A1.

²¹⁹ E.g. RFP - Family Mediation And Information Services (Toronto: Ministry of Government Services (Ontario), 2010), online: MERX

<http://www.merx.com/English/SUPPLIER_Menu.asp?WCE=Show&TAB=1&PORTAL=MERX&State=7&id=2045

subsidized and supported mediation is extended to cover all litigants who wish to utilize it, direct regulation of mediation may not be necessary, but if this is not done, there should be regulation of this profession.

4. Providing Information Works

Making legal and child-related information available to individuals involved in a family dispute or concerned about the possibility of being in one is a proven strategy that is and should continue to be part of the state's response to family relationship breakdown. Publicly-funded bodies in Ontario have made significant investments in this area in recent years. Expanded information-provision was the first of the "Four Pillars" of family law reform introduced by the Attorney-General in 2010.²²⁰ Julie Macfarlane observes that information-provision has been the centrepiece of the state's response to the self-representation phenomenon in Canada's family courts.²²¹

Information-provision *works* in a number of ways, and for a number of reasons. Most basically, it can inform people about the legal and non-legal issues that they will face in the separation process. More ambitiously, it can empower people to protect their own rights and advance their children's interests.²²² Accessing information is not only a prelude to more intensive efforts to deal with separation-related problems. It is also something that people continue to do as long as the issues remain unresolved, and can use in the future if circumstances change and there is a need for variation.²²³

Good lawyers provide separation-related information much more effectively and comprehensively than impersonal sources. However, for some of the self-represented, good state-funded information sources can be a useful alternative to having a lawyer. Further, government funded information-provision has value for many of those with lawyers. Family lawyers find that it is increasingly common for clients to refer to information they have found on the internet, or to bring printed website pages into consultations. It is becoming less common for clients to rely exclusively on the lawyer to learn everything they need to know about a case. Many good family lawyers provide clients with brochures, access to a "lending library" of books and DVDs, and information about useful websites. Being able to refer clients to recorded sources allows lawyers to spend less time explaining basic information, which in turn reduces clients' legal bills.

72&src=osr&FED_ONLY=0&ACTION=NEXT&rowcount=2000&lastpage=200&MoreResults=&PUBSORT=0&CLOSESORT=0&hcode=p3x1jqy%2B52piWOkcKTPzzaA%3D%3D>.

²²⁰ Chris Bentley, Access to Justice for Ontarians Podcast Transcript: September 29, 2010. (Toronto: Ministry of the Attorney General (Ontario), 2010), online: Min. of the AG (Ontario) <http://www.attorneygeneral.jus.gov.on.ca/english/AG_podcasts/Transcripts/20100929_access_justice_transcript.asp>; Semple & Rogerson, *supra* note 7 at 417-423. However many of Ontario's investments in this area predated 2010: see Semple, "Cost-Benefit Analysis," *supra* note 5 at 39 – 44 for an overview.

²²¹ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 56: "A central component of courts administration strategy in dealing with the growth in the volume of SRL's has to be provide an increasing amount of information – forms, procedural guides and other information – on-line."

²²² ACAJCFM, *Meaningful Change*, *supra* note 9: "To the extent that they can do so safely and appropriately, families should be able to exercise self-determination and self-help in resolving family problems. The place for this help is at the front-end of the justice system."

²²³ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 17.

To policy-makers, the appeal of information provision is compounded by its non-coerciveness and its cost-effectiveness. Accessing free separation-related information has negligible costs to users with literacy and access to the information, and providing it has very modest costs to the state. Good information enhances returns from the state's investments in adjudication and mediation. It may also allow those who mediate to understand their legal rights and therefore make more informed decisions about how to claim or compromise those rights. Further information provision can also help separating people who do not make use of adjudication or mediation services. In fact, it can reduce the burden on those services by enabling fair resolution of separation-related disputes through bipartite negotiation without resort to mediation or the courts.

4.1 Varieties and Alternatives in Information-Provision

Separation-related information is typically provided in three formats: (i) recorded information, (ii) live classes, and (iii) facilitated (human-assisted) information. This section will consider these three alternatives, before identifying ways to improve Ontario's information-provision efforts.

4.1.1 Recorded Information

Recorded information includes internet resources, automated telephone services, and printed materials. Recorded information can be readily made available to people, whether or not they have embarked upon a separation. This helps people anticipate and plan for separation before they embark upon it, or consider it as option and decide to stay together.²²⁴ Websites with separation-related information have proliferated in recent years, and in Canada many of these receive state funding of some sort.²²⁵ Commendably, the Law Society of Upper Canada has made some materials from its continuing legal education seminars available free of charge to the public online.²²⁶

Some websites are targeted at specific demographic groups, such as women or children.²²⁷ The first generation of text-based websites has recently been joined by interactive and video-based initiatives. Legal Aid Ontario offers an online course in family law issues,²²⁸ and the Ministry of the Attorney-General has an interactive online court forms assistant.²²⁹ Looking outside the province, the family law website run by British Columbia's

²²⁴ Semple, "Cost-Benefit Analysis," *supra* note 5 at 32.

²²⁵ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 18: " " In early 2011, the Law Commission of Ontario counted nearly 700 pages of public information in Ontario which were available through more than ten internet sites. "" Exception: www.mysupportcalculator.com; private family law firm websites.

²²⁶ Dan Pinnington, "Older Law Society of Upper Canada CPD Materials Now Available Online Free of Charge (Slaw.ca, June 24th 2013)," online: <<http://www.slaw.ca/2013/06/24/older-law-society-of-upper-canada-cpd-materials-now-available-online-free-of-charge-2/>>.

²²⁷ E.g. Family Law Education for Women at www.flew.ca.

²²⁸ Legal Aid Ontario, "Family Law Information Program," online: <http://www.legalaid.on.ca/data/hidden/FLIP_en-MIP/player.html>.

²²⁹ Ministry of the Attorney General (Ontario), "Ontario Court Forms Assistant " online: <<https://formsassistant.ontariocourtforms.on.ca/>>

Justice Education Society complements text with extensive video, including demonstrations to prepare for self-representation in court proceedings.²³⁰

Recorded separation-related information does not have an extensive evaluation literature, but there certainly are promising signs that it is finding an appreciative audience. According to the Civil Legal Needs survey, 82% of Ontarians who accessed family law information websites were satisfied by them.²³¹ The Ministry's online forms generator has received roughly 50,000 visits per year since launching in 2010.²³² A study by Birnbaum and Bala found that, of Ontario family litigants who used the Ministry's family law site, 68% reported that it was somewhat or very helpful.²³³

Recorded telephone information about separation-related topics has on-going value, especially for those who lack access to the internet, are visually impaired or lack literacy skills. There are several apparently successful examples in Australia that have been positively evaluated, including the Family Relationship Advice Line and Men's Line.²³⁴ Telephone services, like websites, can provide customized information to users, depending on the options that they select.

Finally, printed materials continue to have an important role, despite their comparatively high expense per user.²³⁵ Paper has advantages of portability and accessibility which newer technologies sometimes lack. This is especially true for low-income people who lack internet and/or telephone access. Birnbaum and Bala's survey of Ontario family court litigants suggests a degree of satisfaction with brochures in Family Law Information Centres (FLICs): "18% reported that they were very helpful, 46% reported somewhat helpful, and 23% reported they were moderately helpful."²³⁶

4.1.2 Live Classes: Ontario's Mandatory Information Program (M.I.P.)

Live classes are the second way that the state can provide public separation-related information. It might be valuable to have classes in secondary schools on conflict-management, intimate relationship skills, and such issues as violence in intimate relationships. The Canadian Bar Association's Access to Justice Committee calls for law to be considered "a life skill, with opportunities for all to develop and improve legal capabilities at various stages in their lives, ideally well before a legal problem arises."²³⁷ However, there is no research to demonstrate that such early educational efforts reduce the incidence of separation and

²³⁰Justice Education Society of BC, "Justice through Knowledge: Justice Education Society," online: <<http://www.justiceeducation.ca/family-law>>. The Law Society of Upper Canada has done something similar, though less comprehensive, at <http://yourontariolaw.com>.

²³¹R. Roy McMurtry *et al.*, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project*. (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf> at 28.

²³²Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 22: as of February 2013, "there were over 160,000 visits to the site and some 66,000 family forms were completed or partially completed using the Forms Assistant."

²³³Birnbaum, Bala and Bertrand, *supra* note 49 at 86.

²³⁴See Parkinson, *supra* note 17 re Family Relationship Advice Line.

²³⁵Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 11 and 59: "In its response to the Interim Report, the Ministry of the Attorney General highlighted the cost of print material that we had recommended be widely distributed to locations where people regularly go and suggested that a less costly alternative to producing and updating brochures might be a colourful sticker or bookmark to promote the availability of web-based materials."

²³⁶Birnbaum, Bala and Bertrand, *supra* note 49 at 86.

²³⁷"Reaching Equal Justice," *supra* note 36 at 23.

divorce later in life, or help resolve cases more easily.²³⁸ Family separation-related education classes are typically delivered by programs connected to the family justice system, and aimed at people going through separation or facing disputes related to children born to parents who never cohabited.

Attendance at a Mandatory Information Program (MIP) is, at least in theory, now obligatory for all Ontario family litigants.²³⁹ Requiring attendance at such a program is consistent with policies in a number of North American jurisdictions and report recommendations.²⁴⁰ Ontario's MIP is a two hour program, in which a lawyer (often a volunteer) and a social worker provide information about dispute resolution inside and outside of court. Class leaders also talk about the consequences of separation for children.²⁴¹ The MIP is significantly less thorough (and correspondingly less expensive for government and time-consuming for parties) than the mandatory Family Information Sessions endorsed by the Home Court Advantage report, which would have included one 2.5 hour session for all litigants plus an additional 2.5 hours for separating parents of children under 16.²⁴²

What does the evaluation literature tell us about classes of this nature? According to unpublished statistics from the Superior Court of Justice, the satisfaction rate for those who attend the MIP programs is 75%.²⁴³ A more nuanced, and somewhat less glowing assessment is offered by Birnbaum and Bala's survey:

Of the 31% of family litigants who attended the two hour MIP session, 42% reported that it was very helpful or somewhat helpful for learning about the family justice process. Another 47% believed the sessions were very helpful or somewhat helpful about learning more about alternatives other than court, and 29% reported that the session was very helpful or somewhat helpful about learning the effects of separation on children.²⁴⁴

Regarding separation-related classes in general, evaluators have offered a basis for cautious optimism. High satisfaction rates have been found repeatedly, not surprisingly as those going through the stress and uncertainty of family breakdown welcome almost any information about what to expect.²⁴⁵

²³⁸ Semple, "Cost-Benefit Analysis," *supra* note 5 at 32-3.

²³⁹ Ministry of the Attorney General (Ontario), "Mandatory Information Programs (MIPs)," online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/family_justice_services.asp#mip>; *Family Law Rules* O. Reg. 114/99 at Rule 8.1. These classes are the successors of the Parenting Information Sessions which used to be offered in Ontario's Unified Family Courts (Mamo *et al*, *supra* note 60 at 67.).

²⁴⁰ Joan B. Kelly, "Getting it Right for Families in Australia: Commentary on The April 2013 Special Issue on Family Relationship Centres" (2013) 51 *Family Court Review* 278 [Kelly, "Families in Australia"]; Peter Salem, Irwin Sandler and Sharlene Wolchik, "Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Approach" (2013) 51 *Family Court Review* 131; ACAJCFM, *Meaningful Change*, *supra* note 9 at 40: Recommendation 12.

²⁴¹ Birnbaum, Bala and Bertrand, *supra* note 49 at 85.

²⁴² Landau *et al.*, *supra* note 47 at 9-10.

²⁴³ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 20; citing statistics provided by the Chief Justice of the Superior Court of Justice, the Honourable Heather F. Smith.

²⁴⁴ Birnbaum, Bala and Bertrand, *supra* note 49 at 85.

²⁴⁵ Shelley Kierstead, "Parent Education Programs In Family Courts: Balancing Autonomy And State Intervention" (2011) 49 *Family Court Review* 140; Susan L. Pollet and Melissa Lombreglia, "A Nationwide Survey Of Mandatory Parent Education" (2008) 46 *Family Court Review* 375. Bala summarizes the literature as follows:

The voluntary Family Information Session classes that were previously offered in Ontario increased settlement rates and reduced demands on court resources, according to a 2003 evaluation study by Desmond Ellis and Dawn Anderson.²⁴⁶ Similar classes in American jurisdictions were found to have a variety of positive effects according to another study.²⁴⁷

It seems appropriate to have made attendance at these sessions “mandatory,” as the 2007 Mamo report found that the voluntary sessions offered at the time were poorly attended.²⁴⁸ In practice, even though “Mandatory,” it is apparent that a significant portion of family of litigants in Ontario do not attend. While there in theory there might be consequences for non-attendance, such as a prohibition on filing documents with the court until there is attendance, in practice there is an understandable judicial reluctance to impose such severe sanctions, especially because for some litigants attendance is impractical or likely of limited value, and it is apparent that many litigants do not in fact attend.

The basic challenge facing classes is that they must meet heterogeneous needs with homogenous information. A class can be simultaneously a waste of time for some audience members (who could learn what they need more quickly easily from recorded information, or if they have lawyers may have already learned it from their own counsel),²⁴⁹ and not thorough enough or interactive enough for other people.²⁵⁰ While recorded information can be targeted at specific populations,²⁵¹ classes must choose between (i) ignoring information needs for specific groups, and (ii) wasting the majority's time with information needed only by specific subgroups of attendees. Lisa Cirillo, a legal aid clinic lawyer in Toronto, comments on this problem with “single-script” classes:

Women who experienced abuse and were forced to attend these sessions would still hear the benefits of ADR extolled without regard for the safety risks such a process might expose them to; parties without children or with adult children would still hear about the impact of separation and divorce on children; and the script used did not account for the large spectrum of educational and literacy levels of the participants.²⁵²

“parents generally report satisfaction and modestly improved parenting skills.” (Bala, “Systemic Changes,” *supra* note 13 at 281-2)

²⁴⁶ Desmond Ellis and Dawn Y. Anderson, “The impact of participation in a parent education program for divorcing parents on the use of court resources: An evaluation study” (2003) 21 Conflict Resolution Quarterly 169.

²⁴⁷ Tamara A. Fackrell, Alan J. Hawkins and Nicole M. Kay, “How Effective Are Court-Affiliated Divorcing Parents Education Programs? A Meta-Analytic Study” (2011) 49 Family Court Review 107. However, a study asking litigants in an Ohio court to rate various interventions found that mediation was much more popular than classes. On a scale of 1 to 7, the classes were rated 3.51 while mediation was rated 5.68. (Leite and Clark, at 265). A study of a Nevada family court also failed to replicate the finding about the classes reducing litigiousness: Lia Marie Constance Versaevel, *Out of court: Public policy impacts concerning resolution of child custody conflicts* (M.A., Royal Roads University (Canada) 2006) [unpublished].

²⁴⁸ Mamo *et al*, *supra* note 60 at 55.

²⁴⁹ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 21: “we heard that clients with just one issue find the three hour lecture irrelevant to their particular needs.”

²⁵⁰ Bala, “Systemic Changes,” *supra* note 13, at section II(a).

²⁵¹ E.g. Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 60 calls for information specially targeted at domestic violence victims and children.

²⁵² Lisa Cirillo, “Ontario’s Family Law Process Reform: Promises And Pitfalls” AFCC Ontario Newsletter (Fall 2010).

This problem can be somewhat mitigated by having different kinds of classes for different kinds of people.²⁵³ However going down this road quickly makes the system more complex and expensive to administer.

The MIP was meant to be a universal obligation for family litigants to attend classes. However, soon after it was introduced an option was introduced whereby litigants may obtain a judge's permission to take LAO's online course instead.²⁵⁴ It is not difficult to see why harried, time-stressed people should be given an alternative to appearing in a particular classroom at a particular time. This is especially true for the many people who would have to secure time off work or extra child care in order to appear, or live a significant distance from a place where the program is offered. Nonetheless, introducing this alternative has made a complex system more so, increased demand on judicial resources, and given high-conflict separating people something new to fight about (i.e. whether someone should be excused from the obligation to attend).

There are further issues about whether attendance is meaningful for litigants who do not have significant comprehension of spoken English, whether due to language comprehension or hearing impairment. These concerns all illustrate the difficult trade-offs that mandatory programs must make between flexibility and universality.

4.1.3 Staff-Supported information

A third option is staff-supported (or "facilitated") information-provision.²⁵⁵ This means recorded information provided in a context where users can obtain live assistance from a trained person in accessing and interpreting it. In such environments, printed and online information is the centrepiece, but there is also staff available to answer questions and alert people to the existence of services.²⁵⁶ Staff, perhaps with paralegal or legal clerk training, can also assist those with literacy or other challenges in comprehending recorded information.²⁵⁷ Depending on their level of training, staff might even be able to provide a basic check of court materials prepared by self-represented litigants, and assist them with corrections of patent errors.²⁵⁸ Those who work in such positions, however, must walk a thin and often blurry line between providing "legal information" and "legal advice."²⁵⁹ There

²⁵³ E.g. Landau *et al.*, *supra* note 47 at 8+ calls for a special class for parents.

²⁵⁴ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 20.

²⁵⁵ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 61: "We believe that provided self-help tools and services are one of a range of options available, they can be useful to certain classes of unrepresented litigants, particularly if facilitated (that is, users have access to assistance in understanding or using them)."

²⁵⁶ R.A. Malatest & Associates Ltd., *supra* note 194.

²⁵⁷ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 11. Birnbaum, Bala and Bertrand, *supra* note 49 at 86: "Many family litigants do not have the education and literacy skills to benefit from these materials, and some have visual impairments or other disabilities making them inaccessible, as reflected in some comments in the survey of litigants...."

²⁵⁸ For comparisons of different kinds of non-lawyer assistance which can be provided in court, see Bala, "Systemic Changes," *supra* note 13 at 285. See also Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 61 re the Jarvis Street's First Appearance Master and the concept of the "SRL Navigator" position. Another form of expert assistance desired by SRLs is described by Macfarlane at 79: "Some SRL's expressed an interest in receiving earlier orientation that would enable them to better anticipate what lay ahead of them... These suggestions consistently emphasized orientation to the procedural and even cultural aspects of self-representation (for example, how to behave, what to wear, what to expect) rather than substantive learning "about" law."

²⁵⁹ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 69-70.

needs to be guidance for these staff about how much information and advice they provide, and clear warnings to SRLs about the limitations of the assistance provided.

Examples of staff-supported information models include Ontario's staffed Family Law Information Centres,²⁶⁰ as well as British Columbia's Supreme Court Self-Help Information Centre and Nanaimo Family Justice Service Centre.²⁶¹ Evaluations of these three initiatives report high satisfaction rates that are often in excess of 80%.²⁶² A similar service model is used at the 361 University Avenue Law Help Ontario office in Toronto (which does not seem to have undergone a formal evaluation).²⁶³ Online facilitated information provision is also possible. For example, Legal Aid Ontario might alter its website to allow users of its online Family Law Information Program to click a button to seek human assistance (at least by email) for interpreting the materials.²⁶⁴

Staff-supported information responds to the consistent finding that court users (especially self-represented litigants) need some sort of interactive, human assistance to complement the reams of online information.²⁶⁵ In the words of one of Julie Macfarlane's interviewees: "You can set up all the websites you want, but often sitting face-to-face with someone is what people really need."²⁶⁶

One objection to the facilitated information model is that the human help which people need is best provided by family lawyers. It can be argued that instead of wasting money on half-measures, the state should simply provide more family legal aid certificates. However, it seems possible that for some litigants staff-supported information can meet baseline needs more cost-effectively than legal aid certificates. As long as the assistance is limited, and those obtaining assistance are aware of its limitations, the staff involved need not be lawyers, and they can help people quickly if their main role is to direct people towards recorded or internet information instead of explaining everything orally.

There is also a need for SRLs and low-income individuals to have better access to limited consultations with lawyers. For Legal Aid eligible clients, this is being provided through services such as the Family Summary Legal Advice toll free telephone line, the Family Law Service Centres and Advice Counsel at family courts. While not properly evaluated, these appear to be cost effective programs for some legal aid clients, though many of those eligible for these legal aid services face educational, language or disability that make it impossible for them to self-represent with only this limited support.²⁶⁷

For many family litigants who may be unable to afford full representation, or who feel that they can adequately represent themselves, even with improved public legal information, there needs to be better access to legal advice in the form of limited scope retainers or "legal

²⁶⁰ Mamo *et al*, *supra* note 60 at 51 et seq.

²⁶¹ Nanaimo Family Justice Services Centre Implementation Phase Evaluation: Final Report. (Victoria, BC: Focus Consultants, 2008), online: Ministry of the Attorney General (BC) <<http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/FJSCFinalReport.pdf>>. Re BC's Justice Access Centres, see Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 82.

²⁶² Semple & Rogerson, *supra* note 7 at 420.

²⁶³ <http://www.lawhelpontario.org>

²⁶⁴ Legal Aid Ontario, *supra* note 228.

²⁶⁵ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 57: "Many other SRL's expressed the need for more than on-line resources, however good – a need for human contact and support as they navigate the justice system and prepare their case to the best of their ability. This reality was continually recognized by service providers."

²⁶⁶ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 67.

²⁶⁷ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 85-90.

coaching.” This may include having a lawyer’s assistance with drafting court documents, advice on strategy, and independent legal advice and drafting services after a mediated settlement has been reached. There appears to be significant unmet demand for limited scope retainers in family law cases, at the same time as some lawyers, especially more junior lawyers, are struggling to get sufficient work. The Law Society and Bar Association have a role in addressing this imbalance, by providing better education for the bar and public about limited scope retainers, establishing a good referral program for this type of work, linked to publicly funded legal information services and properly addressing insurance issues. There may also need to be more collaboration with legal insurers (like LawPro in Ontario) to educate lawyers about the ways to limit potential liability for the provision of this type of service.

4.2 Making Information-Provision Work Better

4.2.1 Going Beyond Doctrine and Litigation

It is important that information about substantive law is complemented with other information that separating people need to know. Self-represented litigants, according to Macfarlane,

consistently complained that on-line resources... emphasized substantive legal information but did not include information on practical tasks, for example how to serve a document, or presentation and procedure, for example how to present your case in court, how to address the judge, what to bring to court and how to prepare.²⁶⁸

The government may also have to do a better job informing people about its own non-litigation services.²⁶⁹ Awareness of family law information websites among the general population of Ontario is low.²⁷⁰ Advertising or other awareness campaigns may be necessary to ensure that people who would benefit from these resources know about them.

A 2004 Australian evaluation of the comprehensive Family Relationship Services Programs (FRSP)s in that country found that "lack of awareness about FRSP and the sub-programs is the biggest barrier preventing access to the services." Therefore, it concluded, "the single greatest way to improve the access is through increasing awareness."²⁷¹ Many users of these services reported that they wished they had known about them earlier, and "strongly suggest[ed] a need to create greater awareness about these services and other family services for parents, couples and children."²⁷²

Whether Ontario has a similar problem is not entirely clear, but recent reports have emphasized the need for building awareness about alternative dispute resolution.²⁷³ One striking finding from Macfarlane's research was that only "27% of SRLs ... (the vast majority

²⁶⁸ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 64, 98, 115.

²⁶⁹ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 11; http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf at 19.

²⁷⁰ Semple, "Cost-Benefit Analysis," *supra* note 5 at 40; citing *McMurtry et al.*, *supra* note 231.

²⁷¹ Colmar Brunton Social Research, *supra* note 18 at 35 and 41.

²⁷² Colmar Brunton Social Research, *supra* note 18 at 17.

²⁷³ Landau et al., *supra* note 47 at 8-9.

of them plaintiffs or applicants) were coded as having given consideration to alternatives before litigation, including mediation, private arbitration and counselling, and other efforts at settlement with the other side."²⁷⁴ Court service-providers interviewed in that project confirmed that very few SRLs make efforts to settle their disputes before they commence litigation, and very few of them are aware of the mediation option.²⁷⁵

One of the objectives of government information-provision campaigns should be displacing the assumption that litigation is the only way to resolve separation-related disputes. Further, information campaigns should recognize that family separation is not an exclusively legal life crisis. As Bala observes:

Separation has profound social, psychological, economic, and legal implications for adults and children. The more those who are experiencing this process understand its effects on themselves and their children, the better they can deal with its associated challenges.²⁷⁶

4.2.2 Resource allocation

Governments and politicians support information-provision for its cost-effectiveness, but resources still matter in this context. How should the available money be allocated as between recorded information, live classes, and staff-supported information? All three modes have a legitimate role in Ontario's on-going response to family separation. If resources are sufficient to allow high-quality live classes and staff-supported information, then such programs will have obvious advantages over recorded information. On the other hand, if they are of low quality then they may be misleading or a waste of time, and users might be better off accessing recorded information themselves.²⁷⁷

Of course, preparing and distributing recorded information also requires significant care and expertise. It is often said that information should be presented in plain language to be as accessible as possible to as many people as possible.²⁷⁸ However complex or technical language is not typically used with the intention of confusing the reader; it is typically used because the author thinks it necessary in order to accurately convey a complex reality.²⁷⁹ Readability and accuracy are in tension; and significant skill is necessary to compose public legal information texts that maximize both virtues.

4.2.3 More user response data

Information campaigns would benefit from better data about how users interact with them, and what they may be looking for unsuccessfully. The population of Ontario has diverse language knowledge, and disability-related needs are prevalent and should be taken

²⁷⁴ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 37.

²⁷⁵ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 38 and 73.

²⁷⁶ Bala, "Systemic Changes," *supra* note 13 at 280.

²⁷⁷ Evidence of resource insufficiency may include the fact that the MIP is in some courts staffed by volunteers (Semple & Rogerson, *supra* note 7;), and historically staffing at the FLICs has been uneven. (Mamo *et al*, *supra* note 60 at 64-5). See also Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 20.

²⁷⁸ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 66 re reading level: "in British Columbia's Guidebook for Representing Yourself in Supreme Court Civil Matters 171it is 5.1 (easily the most accessible on this measure)."

²⁷⁹ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 19.

into account by system-designers.²⁸⁰ User interaction with online and telephonic recorded information can be measured by counting clicks on various parts of websites and through response surveys such as those that Birnbaum and Bala conducted in Ontario courtrooms.²⁸¹

Comprehensive qualitative data about the overall experience of seeking information is also helpful. The work of Prof. Macfarlane points to the limitations of present web-accessible information.²⁸² As part of this research, a law student completed forms found online to file for a divorce,²⁸³ and a reading level analysis was performed of online separation-related information provided on government websites.²⁸⁴ The findings offer significant insight into the on-going practical challenges facing those who seek to manage their own separation-process relying exclusively on online materials.

4.2.4 Collaboration and Consolidation

Macfarlane reports that, when SRL interviewees asked to identify especially helpful websites, "by far the most frequently mentioned site by SRL's in all three provinces was CanLii."²⁸⁵ CanLii's information is applicable in all three of the provinces where Macfarlane conducted interviews, whereas almost all of the other sites are province-specific. Thus, one lesson from CanLii's success may be that provinces should seek opportunities to collaborate in creating information. Pooling resources can allow richer and more helpful resources – e.g. websites with video content rather than just text. While legal differences are an impediment to interprovincial collaboration, some types of information e.g. re child adjustment or general principles of family law can be provided in this format.²⁸⁶

Online separation-related information comes from a wide variety of sources, supported by many public and private entities. Some of the information may be contradictory, or appear to be contradictory to self-represented litigants.²⁸⁷ The Law Commission of Ontario's most

²⁸⁰ Karen Cohl and George Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services*. (Toronto: Law Foundation of Ontario, 2008), online: LFO <<http://www.lawfoundation.on.ca/wp-content/uploads/The-Connecting-Report.pdf>>; Lisa Cirillo, "Family Law Process Reform In Ontario: Ideological Sea Change Or Two-Tiered Justice?" (2010) Unpublished manuscript, on file with author. Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 21; Birnbaum, Bala and Bertrand, *supra* note 49 at 86.

²⁸¹ Birnbaum, Bala and Bertrand, *supra* note 49.

²⁸² Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 15: "the focus of most new initiatives being developed across North America is to offer SRL's more on-line resources – forms that can be completed on-line, on-line websites and information. While these initiatives are an important part of responding to the phenomenal growth in the number of SRL's, it seemed questionable that such a heavy and singular emphasis should be placed on these types of resources, particularly in the absence of SRL input on what services and resources they actually needed and wanted."

²⁸³ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 56-9.

²⁸⁴ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 66.

²⁸⁵ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 63. This is surprising on one level because CanLii presents raw legal data (statutes, rules, and case law) without efforts to interpret it for those without legal training. It may reflect a tendency in Macfarlane's sample toward better-educated litigants who have spend a great deal of time and energy representing themselves.

²⁸⁶ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 : "The next most frequently mentioned sites were all from British Columbia: they were the Justice Education Society of British Columbia's video collection¹⁵⁵; the British Columbia Legal Services Society family law website¹⁵⁶; and JP Boyd's family law website (a privately maintained website)¹⁵⁷."

²⁸⁷ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 64.

recent report calls for the information to be organized into a single "hub," in which the quantity of information would be restructured and reduced.²⁸⁸

The appeal of having information collated and organized in this way is obvious. However, the institutions currently operating family law information websites may be unwilling to simply close them and abandon their investments, especially given that these sites attract high traffic and meet the needs of specific populations. Moreover, it may also be true that most people searching for separation-related information on the internet do not begin the process by typing in a URL, but rather by performing a search query. Perhaps search engines will always be the "hubs" and starting places for the information-seeking process. If so, online information providers should not waste resources trying to become hubs, and instead focus on creating pages which are useful to those who search for separation-related information, at the same time working to improve links and avoid unnecessary duplication.

4.3 Improving Access to Information & Advice: Conclusion

While there have been significant improvements, there is a clear need for further improvements in access to legal information and advice about family law issues in Ontario. To the extent that public funds are being used, the government needs to improve and better coordinate existing web-based and other resources, including access to trained staff at court houses and elsewhere who can provide basic assistance with such matters as completion of court documents. To the extent that provision of such services can prevent SRLs from making futile or incorrect submissions to the court, they can pay for themselves by saving judicial resources.²⁸⁹ There are also needs to better access to personalized legal advice and limited scope retainers that individuals should be expected to pay for; the Law Society and Bar Association have a role for helping to improve access to this type of service.

5. Four Unresolved Issues

Thus far, this Report has argued that three things reliably *work* when the state responds to family disputes. These are enforced adjudication, mediation and the provision of information. According to the evaluation literature, it is these three types of services that most reliably advance children's interests and protect adult rights, in a cost-effective manner.

However, there remain significant unanswered questions in policy and program delivery for family disputes. Part 5 of this Report identifies three broad questions relevant to state choices in this area. The evaluation literature does not allow these questions to be answered in a clear way, but identifying the questions and the relevant arguments is helpful for those concerned with policy decisions and research.

²⁸⁸ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 37 and 60.

²⁸⁹ Macfarlane, "National Self-Represented Litigants Project," *supra* note 7 at 61: "Some SRL's tell stories of working on their papers, and then submitting what they had thought were the right documents, correctly completed, to the court – but when they took a day off work to appear at a hearing, being told that they could not be heard because their paperwork was incorrectly completed. Service providers note that this causes a great deal of aggravation and frustration, and suggests that a procedure for checking forms and alerting SRL's to evident errors or omissions beforehand would save considerable judicial as well as SRL time."

In recognizing the need for governments to make choices about what services to provide in a context of imperfect research information and limited resources, this Report may again be taking a more realistic approach than some recent reports which have essentially offered lengthy lists of measures that governments should undertake, some of which may be quite expensive and without proven effectiveness, and without offering clear priorities.

Policy-makers are confronted with decisions about:

- (i) whether to offer triaged service-delivery or tiered service-delivery;
- (ii) whether to preserve and increase the variety of family dispute resolution programs, or simplify and consolidate them;
- (iii) whether and how users of services should be required to pay for them; and
- (iv) whether to support hybridity of adjudicatory functions with settlement-seeking and relationship-building functions, as opposed to separating these functions from each other.

5.1. Tiers or Triage?

The traditional approach to family dispute resolution services is to provide them in *tiers*. Low-cost, low-coercion options are generally available and tried first, followed by escalating interventions as necessary, with adjudication and enforcement being the final resort.²⁹⁰ For example, family courts have traditionally sought to achieve resolution of cases through mediation (in some places mandatory mediation), and then applied court-based solutions when and if that proves impossible. Involvement of the Office of the Children's Lawyer only comes after mediation is tried and as a case moves towards a possible trial. Ontario's new Mandatory Information Program is another example of a tiered service delivery model, insofar as the presumption is that all court users must attend the classes before starting on the litigation process.²⁹¹ The tiered service model requires all (or most) system users to attend certain services before they can access other ones.

However, *triage* has become increasingly popular among courts and scholars in recent years.²⁹² Also known as differentiated case management, triage is the effort to determine at an early stage which interventions are most appropriate for each case, based on its specific characteristics.²⁹³ The goal is to direct each case to the most appropriate intervention, without wasting resources and users' time on interventions that can be predicted to be likely to be ineffective.²⁹⁴ Triage is typically conducted through a questionnaire and/or interview

²⁹⁰ Salem, *supra* note 190.

²⁹¹ See section 4.1.2, *supra*.

²⁹² E.g., recommending the adoption of triage in Canadian family courts, see Landau et al., *supra* note 47 at 11-12; Trevor C. W. Farrow *et al.*, Addressing the Needs of Self Represented Litigants in the Canadian Justice System. Association of Canadian Court Administrators, 2012), online: ACCA <<http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>> at 11; ACAJCFM, *Meaningful Change*, *supra* note 9 at Recommendation 13; Bala, "Systemic Changes," *supra* note 13 at 279; Aviel, *supra* note 131 at 2121; "Reaching Equal Justice," *supra* note 36 at 25.

²⁹³ Andrew Schepard, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* (New York: Cambridge University Press, 2004) ; Kourlis et al., *supra* note 31.

²⁹⁴ Salem, *supra* note 190 at 381.

with a court staff person. Such systems have been implemented in Australia's Family Relationship Centres,²⁹⁵ and in quite a few American courts.²⁹⁶

Should separation-related services be delivered through tiers or through triage? The argument for triaged services typically begins by pointing out the heterogeneity of cases and their needs.²⁹⁷ For example, some people have a level of basic knowledge and functioning such that requiring them to sit through a mandatory parenting class is a waste of their time and educational resources. Intervention resources are scarce, and ideally they should not be used on cases where they have little chance of doing any good. If successful, triage reduces the number of interventions a user must experience before (s)he gets to the one that's actually appropriate. The concept of triage is borrowed from the medical context. If one walks into an emergency ward, a professional will conduct a triage examination to determine what service you need and how urgently you need it. Typically a person in Ontario can only see a medical specialist if a family doctor determines that this is an appropriate case for a referral.

Evaluations have been conducted of new legal programs described as "triage," usually with good indications of success.²⁹⁸ However, these evaluations typically do not compare the programs with a similar suite of services offered in a tiered delivery model.²⁹⁹ Therefore they do not offer a clear research basis for preferring this service delivery model.

Tiered services (especially mandatory mediation) also have convincing arguments in their favour. Arguably staff should spend their scarce time on actually helping people with proven techniques like mediation, rather than devoting that time to trying to determine which service is most likely to be effective for a particular case. Resource scarcity can offer an argument for tiers: triage makes sense only if there is a diverse menu of services from which the triageur may select and this is not true in jurisdictions like Ontario.³⁰⁰ It has been argued that, for those with lawyers, mandatory state-provided triage is an inappropriate intrusion on the solicitor-client relationship.³⁰¹ Perhaps most importantly, it has not yet been demonstrated that it is possible to decide *ex ante* which among various services is likely to work best for an individual or case.³⁰² If doing so is indeed possible, it might require a level of training and expertise which is not typically provided staff in family courts or in programs of alternative entry into the family justice process like such as Australia's Family Relationship Centres.

²⁹⁵ Kelly, "Families in Australia," *supra* note 240 at 282.

²⁹⁶ Shepard, "Evolving Judicial Role," *supra* note 36 at 398; Peter Salem, Debra Kulak and Robin Deutsch, "Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen" (2007) 27 Pace Law Review 741.

²⁹⁷ See section 1.3, *supra*.

²⁹⁸ R.A. Malatest & Associates Ltd., *supra* note 194 ; Marsha Kline Pruett and Megan Durell, Family Civil Intake Screen and Services Evaluation: Final Outcomes Report. Connecticut Judicial Branch Court Support Services Division, 2009), online: AFCC <<http://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ConnecticutFinalReport.pdf>>.

²⁹⁹ See e.g. Pruett and Durell, *ibid* at 27: " introduction of these two new facets of the system--the [triage] screen and new types of service--occurred simultaneously and positive results generally cannot be attributed more to one facet than the other."

³⁰⁰ Bala, "Systemic Changes," *supra* note 13 at 285: "absent a broad range of government-provided or -subsidized services, the 'triage' function would have little utility for litigants who lack resources to purchase services."

³⁰¹ Bala, "Systemic Changes," *supra* note 13 .

³⁰² Salem, *supra* note 190 at 381: " a major flaw exists in the case for replacing tiered services models with a triage system: it is predicated on accurate, easy to administer, replicable methods of predicting the most appropriate service for each family."

A compromise between tiered and triaged services is presumptively mandatory, but screened services. Lisa Cirillo distinguishes screening from triage on the basis that the former process is quicker and less ambitious. She writes that, "whereas screening is focused on identifying the presence of red flags" which would make a certain service inappropriate for a particular case, a "triage process is broader, and includes both identifying and prioritizing the family's needs."³⁰³ Family mediation programs now almost invariably screen users for domestic violence and power imbalance issues that would make participation inappropriate.³⁰⁴ The Action Committee on Access to Justice endorses presumptively mandatory mediation, with exemptions for family violence or "where it is otherwise urgent for one or both parties to appear before the court."³⁰⁵ One advantage of screening over triage is that screening can be done by the mediator him- or herself, thus saving the parties from having to go through a separate process just to determine which process would be best for them. Arguably, presumptively mandatory, screened services reflect the suitability of non-coercive interventions for most people, while allowing an escape hatch for the inappropriate cases.

5.2. Variety or Consolidation?

A second thorny question pertains to the respective virtues of variety and consolidation in family court resource models. To what extent should the state fund a wide variety of different programs to respond to family relationship breakdown? To what extent should the available resources be concentrated on a smaller number of programs?

In Ontario today, it is common to find multiple family dispute resolution programs undertaking to similar, or at least overlapping, services, either fully funded or subsidized by government. Government-funded mediation is provided by (i) formal mediation programs within and outside of courts; (ii) judges in pre-trial conferences,³⁰⁶ and (iii) informally, by lawyers and clinical investigators from the Office of the Children's Lawyer.³⁰⁷ There is also private mediation, especially for economic issues and those with greater economic resources.

Some form of triage is conducted at (i) family courts by Information and Referral Coordinators, (ii) by Legal Aid Ontario in determining eligibility for legal services, and (iii) by the Office of the Children's Lawyer in determining eligibility for its own services.

As noted above, separation-related information is provided by websites from a wide variety of public and quasi-public sector agencies.³⁰⁸ Staffing is sometimes provided by the civil service, though more often through contract to private providers (e.g. family mediation) or non-profit agencies, and sometimes through voluntarism (e.g. some of the Mandatory Information Programs). Variety is also found in courthouse practices and in the Family Law Rules, which provide (for example) for a Family Case Manager only in Ottawa.³⁰⁹

³⁰³ Cirillo, "Ontario's Family Law Process Reform: Promises And Pitfalls," *supra* note 252.

³⁰⁴ Linton, *supra* note 217; Semple, "Feminist Critique," *supra* note 48 at 224 to 232.

³⁰⁵ ACAJCFM, *Meaningful Change*, *supra* note 9.

³⁰⁶ Noel Semple, "Judicial Settlement-Seeking in Parenting Disputes: Consensus and Controversy" (2012) 29 *Conflict Resolution Quarterly* 309 [Semple, "Consensus and Controversy"].

³⁰⁷ Birnbaum, "Examining Court Outcomes," *supra* note 114 at 6; Barbara J. Fidler and Rachel Birnbaum, "Child Custody Disputes: Private and Public Assessments" (2006) 25 *Canadian Family Law Quarterly* 137 at 155; Semple, "Getting it Right," *supra* note 11 at Part II.

³⁰⁸ Section 4.2.4, *supra*.

³⁰⁹ *Family Law Rules* O. Reg. 114/99 at R. 42.

It is certainly possible to imagine a more streamlined, comprehensive and coherent system. Mediation services could be consolidated in a single program and triage services consolidated to another program. Ottawa's Family Case Manager program could be evaluated, and either spread across the province if cost-effective, or else abolished in Ottawa if not. Closing duplicative programs would reduce administration and overhead and allow more money to be spent on the "front lines" delivering services. In sparsely populated areas, it is easier to make the entire suite of separation-related services available to all people if there are fewer, but better-resourced items in the suite.³¹⁰

There is evidence that system users (especially SRLs) are confused by the status quo system and the "alphabet soup" of public bodies and publicly funded or subsidized agencies working in this sphere.³¹¹ It might be easier to create awareness and understanding of separation-related services if the services were organized in a more straightforward way.³¹² Former Chief Justice Warren Winkler recently put the case for simplification as follows:

I do not believe these changes can be achieved by tinkering at the edges of the existing family law system or by grafting new procedures and services onto the existing system. The reforms I am advocating can best be achieved by undergoing a fundamental overhaul of the current system. Only in this way can we properly ensure that all elements of the family justice system work together in harmony to achieve a coherent and balanced system that is affordable, timely, easy to understand and easy [to] manoeuvre through.³¹³

However, there are also reasons to value variety in family dispute resolution programs, especially in larger urban centres with diverse populations. If mediation (for example) works, then it might be necessary to give people multiple opportunities to benefit from it, including a publicly subsidized mediation service, the pre-trial judicial conference room and the OCL clinical investigator's disclosure meeting. Some cases require multiple opportunities to attempt settlement at different stages and in different ways to achieve a non-litigated outcome.

Similar services are rarely exact duplicates of each other, but rather alternatives with subtle but important differences.³¹⁴ A variety of services could mean a "thousand flowers

³¹⁰ Colmar Brunton Social Research, *supra* note 18 at 37: "Logistical factors, such as location of the service, the distance to travel and access to transport also prevent usage, with the lack of local services a key factor stopping some non-users from accessing the services. "

³¹¹ For a first-hand account of the complex set of institutions and processes which confronts users, see A. Arshad, "A Self-Represented Family Litigant" Canadian Forum on Civil Justice News and Views (Fall 2007) and the accompanying analysis in Semple & Rogerson, *supra* note 7 at 438-9. The LCO calls for entry points to the family law system which "minimize duplication of persons and institutions with whom the individual must deal" (Law Commission of Ontario, at 11).

³¹² Section 4.2.1, *supra*.

³¹³ Chief Justice Warren K. Winkler, "Family Law and Access to Justice: A time for Change (Remarks delivered to 5th Annual Family Law Summit of The Law Society of Upper Canada. Toronto, Ontario, June 17, 2011)," online: <<http://www.ontariocourts.ca/coa/en/ps/speeches/2011-Family-Law-Access-Justice.htm>>. See also Semple & Rogerson, *supra* note 7 at 448.

³¹⁴ The cornucopia of available programs has been credited for the success of Australia's Family Relationship Centres. See Kelly, "Families in Australia," *supra* note 240: "Central to the concept and success of a single-entry

blooming," with best practices being identified and then spread across the province and beyond. Arguably separation-related services should be as diverse as users' needs. Perhaps the Family Case Manager system works well in Ottawa – but can *only* work well in Ottawa—because of unique characteristics of the family justice community in that area. As the Law Commission put the point:

For the family justice system to be effective and responsive to the needs of families, it must appreciate how families are not only similar, but also how they are different... the design of the system needs to be inclusive and that it needs to be flexible in recognizing that not all individuals who appear to be characterized in a particular way share the same views and experiences.³¹⁵

The LCO has called for multiple "entry points" to the family justice system, in recognition of the diverse needs that people bring to it.³¹⁶ Aboriginality, gender, rural residence, and ethnic diversity are all among the relevant personal characteristics that might require the system to reach out to someone in a different way.³¹⁷ Distinctive populations have specific characteristics and benefit from information and services that take account of their particular concerns, capacities and needs; while there may be added costs to tailoring information and services to specific populations, doing so does improve access to justice even if there is some apparent duplication.

5.3 Who pays?

Who should pay for family dispute-related adjudication, mediation, and information services? Traditionally, the obvious answer was "the taxpayers." There are no filing fees in the Ontario Court of Justice, and family law information is provided without charge. Having the state provide universal free services has obvious attractions, in this as in other contexts. Often, the people who most in need of these services have the least ability to pay for them. As in the medical system, justice system user fees may deter even those who *can* pay from accessing the system when they need it and thereby lead to larger and more expensive problems later.³¹⁸ This is most obviously the case in domestic violence situations. Court fees might also deter child support applications, thereby impoverishing custodial parents, harming

point for separating parents was the identification and development of a large array of accessible services made available to parents at entry to the FRCs. ... "

³¹⁵ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 40-41.

³¹⁶ Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 18.

³¹⁷ Law Commission of Ontario, *Towards a More Efficient and Responsive Family Law System (Interim Report)*. (Toronto: LCO, 2012), online: LCO <<http://www.lco-cdo.org/family-law-reform-interim-report.pdf>> at 9; Cohl and Thomson, *supra* note 280. See also Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 53: "The suggestion has been made that programs designed and delivered by non-Aboriginals simply cannot bridge the cultural divide between the mainstream justice system and the unique world-view and needs of Aboriginal communities."

³¹⁸ Pascaline Dupas, *Global Health Systems: Pricing and User Fees* (Prepared for the Elsevier Encyclopedia of Health Economics) (Stanford, CA: 2011), online: Stanford <http://www.stanford.edu/~pdupas/Dupas_Pricing&UserFees.pdf> (last accessed: 15 November 2012); Jeffrey Simpson, "Patient user fees in Canada? Hot potato (Published in the The Globe and Mail, Wednesday, Mar. 06 2013)," online: <http://www.theglobeandmail.com/commentary/patient-user-fees-in-canada-hot-potato/article9317535/>.

their children's interests, and leading to social assistance claims which cost the state much more money than the court fees generate.

However, there is also compelling logic to support user fees, at least for some services. Some people consume large amounts of public resources with excessive and vexatious family litigation;³¹⁹ it is difficult to see why they should not bear part of the cost. More generally, those who must pay even a nominal amount for a scarce resource tend to use it more economically than they would if it were entirely free. Some people can easily afford to pay court or other user fees, which are modest in Ontario. The Superior Court of Justice charges filing fees of \$125 to \$157 for an application, and \$280 to place a matter on the trial list to be heard.³²⁰ The mediation program in the Toronto Superior Court of Justice costs users between \$5 and \$195 per hour, depending on income and number of dependents.

As noted above, there is no reasonable prospect that the government will completely absorb the cost of every useful family dispute-related program. The challenge is therefore to decide how to allocate the public funds that are available. If user fees are ruled out, then the set of programs available will be smaller and/or more poorly resourced. Services like those of the OCL are currently rationed using criteria that might be questioned;³²¹ if a sliding scale user fee were imposed on parents then more children could benefit from the OCL's work. Although it is important to consider whether OCL services should be delivered in other ways and based on other criteria than at present, it is also necessary to recognize that there is great value to children, parents and the courts in high conflict cases in having an independent professional, whether a social worker, a lawyer or both, involved in a case, and the provision of some such services without charge to the litigants is available in some form in many jurisdictions.

Assuming that user fees will continue to be part of the system, the structure and application of those fees should be carefully considered. Certain services – e.g. application to court in domestic violence cases – should be completely free to use. One challenge in setting fees is the difficulty of determining *ex ante* which cases are urgent or involve serious risks. It is probably uncontroversial that non-urgent, non-violent cases should be subject to moderate user charges; this is consonant with the fact that fees are also charged for government services like drivers' licenses and health insurance cards. Sliding fee scales such as those used for off-site family mediation seem progressive and fair, although there are administrative costs and inconveniences involved in scrutinizing parties' incomes.

User fees might also be used more creatively, to discourage counterproductive behaviour or compensate the state for unnecessary resource use. In British Columbia, for example, significant fees must be paid for hearings or trials that last longer than 3 days. The 4th through 10th days each cost \$500, and each day after the 10th costs \$800.³²² To the extent that longer hearings reflect excessive adversarialism or obstructionism on the part of litigants, this levy may be considered legitimate and fair. The British Columbia Court of Appeal recently held that these court fees do not violate section 7 of the *Charter*, so long as they are waived for those who are "impoverished or in need."³²³

³¹⁹ Semple, "Whose Best Interests?," *supra* note 103 at 310 *et seq*; Susan Pigg, "I divorce, 54 hearings, 5 judges, \$200,000" *Toronto Star* (8 May 2009) LI.

³²⁰ "Superior Court Of Justice — Family Court — Fees." *Administration of Justice Act*, O.Reg. 417/95, at s.1.

³²¹ See section 2.2.2, *supra*.

³²² "Appendix C — Fees." *Court Rules Act*, Supreme Court Family Rules. B.C. Reg. 169/2009.

³²³ *Vilardell v Dunham*, 2013 BCCA 65 (CanLII), online: <<http://canlii.ca/t/fw3ws>>. Leave to appeal to the Supreme Court granted.

5.4. Adjudication and Settlement-Seeking: Hybridity or Separation of Spheres

Adjudication and settlement-seeking are conceptually distinct approaches to family conflict, but they are often intermingled in practice by both policy-makers and judges. To what extent should we welcome hybridity of settlement-promotion and adjudication in the family justice system? The alternative is to maintain or increase separation between these functions within the system.

5.4.1 Hybridity and Separation at the Level of Interventions

Hybrid approaches to family justice are those that combine efforts to bring about consensual settlement with efforts to identify and impose a just resolution.³²⁴ Mediation-arbitration is an explicit hybrid that has become increasingly common in private family dispute resolution in Ontario.³²⁵ Here, parties agree to have their dispute mediated by an individual who will subsequently impose an outcome if agreement cannot be reached.

Judicial dispute resolution (JDR) in pre-trial conferences is also characterized by hybridity. The parties may choose whether or not to settle, but adjudication is a prominent threat in the background.³²⁶ In some versions of JDR the judge is able to impose consequences on parties considered insufficiently willing to compromise.³²⁷ Similarly mediation is hybridized with adjudication if the mediator is given the power to influence subsequent litigation outcomes in the event of non-settlement; this non-confidential or "reporting" mediation is practiced in Australia and in some American courts.³²⁸

Compare this to classic facilitative mediation, which consciously seeks to insulate its settlement-seeking and relationship-building work from the realm of adjudication. The traditional facilitative mediator has no authority over the parties, and no power to influence litigation outcomes in the event of non-settlement. Providing mediation in a facility geographically removed from the courthouse is another way to increase its conceptual separation from the adjudicative process.

Collaborative family law (CFL) is also based on the idea that settlement-seeking should be separated as much as possible from adjudication. In CFL, the parties and their lawyers sign an agreement committing themselves to reaching a negotiated settlement. If they fail to do so,

³²⁴ William H. Ross, Cheryl Brantmeier and Tina Ciriacks, "The Impact of Hybrid Dispute-Resolution Procedures on Constituent Fairness Judgments" (2002) 32 *Journal of Applied Social Psychology* 1151; Allan E. Barsky, "Mediative evaluations: The pros and perils of blending roles" (2007) 45 *Family Court Review* 560 at 571.

³²⁵ William A. Donohue, Nancy Burrell and Mike Allen, "Models of Divorce Mediation" (1989) 27 *Family Court Review* 37 at 37.

³²⁶ Semple, "Consensus and Controversy," *supra* note 306 at 322; Semple, "Mock Trial," *supra* note 12 at s. IV(2)(iv).

³²⁷ Melissa L. Breger, "Making Waves or Keeping the Calm: Analyzing the Institutional Culture of Family Courts through the Lens of Social Psychology Groupthink Theory" (2010) 34 *Law and Psychology Review* 55.

³²⁸ Hugh McIsaac, "Confidentiality Revisited: California Style" (2001) 39 *Family Court Review* 405; Hilary Astor, "Making a Genuine Effort in Family Dispute Resolution: What Does It Mean?" (2008) 22 *Australian Journal of Family Law* 102.

the lawyers will not represent those parties in the event of litigation.³²⁹ This is meant to increase the mutual commitment to reaching a consensual settlement.³³⁰

5.4.2 Hybridity and Separation at the Level of Systems

The contrast between hybridity and sphere-separation can also be seen at the systemic level. Ontario's family justice system and services exhibit significant hybridity of adjudication and settlement-seeking. Unified family courts (UFCs) are committed to integrating mediation and other settlement-promoting functions. UFCs are inspired by the "multi-door court house" concept, with some of the "doors" leading to settlement-seeking and others leading to adjudication, but all of the doors are in the same hallway.³³¹ It is often said that settlement values or culture should be infused or integrated into family courts.³³² Most recently, the Action Committee on Access to Justice called for "the family justice system to integrate and utilize non-adversarial, problem-solving values even more fundamentally than it already has," with the "goal of entrenching consensual dispute resolution values and processes more firmly at the centre of the family justice system."³³³ In a similar vein, the CBA Access to Justice Committee has called for a "re-centring of courts as the main pathway to dispute resolution processes and referral to other services for non-legal aspects of people's problems."³³⁴

By contrast, other jurisdictions have consciously chosen to establish space between adjudicative responses to family separation and settlement-seeking/relationship-building ones. Perhaps the best known example is Australia's system of Family Resource Centres (FRCs).³³⁵ The FRCs, which provide mediation and information along with a range of other family dispute-related services, are geographically, administratively, professionally and financially distinct from the family courts. FRCs offer services to intact families, for example where there are difficult relations between the spouses or involving adolescents, as well as those going through separation. This augments their conceptual separation from family court.³³⁶

Along similar lines, a Resource Center for Separating and Divorcing Families is being planned for Denver University, separate from any court.³³⁷ Settlement and information services will be provided by graduate students from law, social work, and psychology

³²⁹ Pauline H. Tesler, "Collaborative Law: What It Is and Why Lawyers Need to Know About It" (1999) 2008 American Journal of Family Law 215.

³³⁰ Wanda Wieggers and Michaela Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 Osgoode Hall Law Journal 738.

³³¹ Bozzomo & Schepard, *supra* note 10 at 345-6; ACAJCFM, *Meaningful Change*, *supra* note 9 at 33.

³³² Erin Shaw, *supra* note 16 at 8 and 14.

³³³ ACAJCFM, *Meaningful Change*, *supra* note 9 at 3-4.

³³⁴ "Reaching Equal Justice," *supra* note 36 at 27.

³³⁵ Parkinson, *supra* note 17; Kelly, "Families in Australia," *supra* note 240.

³³⁶ Moloney et al, *supra* note 43 at 244.

³³⁷ Resource Center for Separating and Divorcing Families at the University of Denver. (Denver: Institute for the Advancement of the American Legal System, 2013), online: IAALS <http://iaals.du.edu/images/wygwam/documents/publications/Resource_Center_Overview.pdf> Resource Center for Separating and Divorcing Families at the University of Denver. (Denver: Institute for the Advancement of the American Legal System, 2013), online: IAALS <http://iaals.du.edu/images/wygwam/documents/publications/Resource_Center_Overview.pdf> Resource Center for Separating and Divorcing Families at the University of Denver. (Denver: Institute for the Advancement of the American Legal System, 2013), online: IAALS <http://iaals.du.edu/images/wygwam/documents/publications/Resource_Center_Overview.pdf>.

departments of the University, under the supervision of professionals. These models reflect what one recent report describes as:

...spli[t] responsibility between courts and community agencies. Courts would be responsible for delivery of services that fulfil its core functions of fact-finding, decision making and enforcement such as forensic evaluations in child custody disputes. Community agencies would be responsible for delivery of helping services.³³⁸

5.4.3. Arguments for and against hybridity

Without much discussion or debate, the arguments for combining adjudication with settlement-seeking and relationship-building services have largely been accepted as the foundation of family justice in Canada. It is generally assumed that it is more efficient and effective for users to access all of the solutions for their separation-related problems through one process. Keeping the services and approaches closely interrelated makes it easier for a case to be shifted from one service to another. It is helpful for information from settlement-seeking process to be available for reuse in adjudication processes; otherwise the adjudication process and parties must absorb the expense of gathering the information all over again. Hybrid interventions like JDR might settle cases which pure facilitative mediation cannot, thereby saving them from trial.³³⁹

The arguments for separating these spheres are less familiar in Canada, but they have significant support in the international literature. Infusing too much settlement-seeking ethos into adjudication may undermine its ability to protect people from exploitation and violence.³⁴⁰ At the same time, requiring people to go to court or commence litigation in order to access non-coercive services means that some will delay or avoid accessing those services altogether.³⁴¹ Going into a court or before a judge may prime people to make arguments rather than consider compromises, due to popular connotations and expectations of these institutions.³⁴² The intermingling of adjudicative and settlement and relationship-building functions may well be contributing to the sense of disorientation and confusion which self-represented litigants experience when they enter the system.³⁴³ The stand-alone FRC model may allow for more creative programming and new funding opportunities unavailable to

³³⁸ Kourlis et al., *supra* note 31 at 28.

³³⁹ Menkel-Meadow, *supra* note 198 at 500; Ilan G. Gewurz, "(Re)Designing Mediation to Address the Nuances of Power Imbalance" (2001) 19 Conflict Resolution Quarterly 135 at 22-23; Louise Otis and Eric H. Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 Pepperdine Dispute Resolution Law Journal 351 at 364; Robin N. Amadei & Lehrburger, *supra* note 200 at 64-5.

³⁴⁰ Bozzomo & Schepard, *supra* note 10 at 336; Jane Spinak, "Romancing the Court" (2008) 46 Family Court Review 258.

³⁴¹ See, for example, the submission of the Ontario Collaborative Law Federation to the LCO: "resources for families (entry points) should not be tied to the court system and in particular parties should not have to start litigation to avail themselves of these resources." (Law Commission of Ontario, *Access to Family Justice*, *supra* note 3 at 74) Regarding the importance of early intervention, see Colmar Brunton Social Research, *supra* note 18 at 43-4; Parkinson, *supra* note 17 at 204-5.

³⁴² Semple, "Mock Trial," *supra* note 12 at IV(2)(iv).

³⁴³ For example, an SRL who prepares for a judicial pre-trial conference or appointment with an OCL social worker by reading the applicable statutes and rules would be totally unprepared for the settlement-seeking which is likely to occur therein. (Semple, "Mock Trial," *supra* note 12 at IV(2)(iii).)

court-adjunct services, such as private foundation support or social finance.³⁴⁴ There is strong evidence that Australia's FRCs are effective,³⁴⁵ although hybridized programs might accomplish similar success if they had the resources which the FRCs have.

Conclusions

Among the various interventions with which the state can respond to family separation, *what works?* According to the evaluation literature, which programs most cost-effectively protect children's interests and adults' rights? In seeking to respond to these queries, this Report has acknowledged two overarching challenges.

First, the realistically achievable degree of success in a case varies widely depending on the circumstances and attitudes of the parties. Separating parents and their children deserve the opportunity to form harmonious co-parenting partnerships. However, the state's efforts to help them do so cannot come at the expense of the core mandate of the justice system of protecting baseline children's interests and adult rights.

Second, the rise of self-represented litigation has undermined the central role of legal representation, which was formerly the bedrock of the family justice system. Family lawyers will continue to have a central role in the resolution of many cases, often outside of the court system, whether through negotiation, arbitration or mediation, or through litigation in the family courts. Further, as discussed in this paper, there are steps that need to be taken to increase access to lawyers for limited advice purposes as well as through enhancements to Legal Aid for the lowest income Ontarians. However, if the family justice system is to function effectively and efficiently, it can no longer be assumed that most separating people will have lawyers. The family justice system must recognize and respond to the fact that a large and perhaps growing proportion of family cases will involve one or both parties as SRLs, for at least some portion of the separation and dispute resolution process.

There are things we do know about what is effective in the family system, and what can be done to improve its ability to meet the needs of those with family dispute problems. There are also decisions that need to be made about the family justice system that must be made in the face of some uncertainty about the most effective or efficient approach. What we know is that three things reliably work in responding to family separation: enforced adjudication, mediation, and information-provision. For each of these three major categories, this Report has reviewed research evidence of efficacy, the varieties and alternatives available to policy-makers, and room for better responses at modest or no cost to government.

However there is also a great deal that we don't know. Should the state deliver separation-services in tiers, or through triage? Should we consolidate programs, or welcome variety? To what extent and in what ways can user fees and co-payments be used to fund services? Should we welcome hybridization of adjudication with settlement-seeking and

³⁴⁴ The University of Denver centre described above (*supra* note 337 and accompanying text) is supported by the Gates Frontiers Fund. Social finance is an initiative whereby private investors fund social programs and the state pays them if and when measurable success is achieved. A group of public sector bodies recently launched a Social Impact Bond program which works on this basis: SocialFinance.ca, "Social Impact Bonds," online: <<http://socialfinance.ca/social-impact-bonds>>. Impartiality and constitutional considerations would probably make it impossible for court-adjunct programs to accept money from private foundations or social finance, but stand-alone FRC-type centres would not face this impediment.

³⁴⁵ Parkinson, *supra* note 17; Moloney et al., *supra* note 43.

relationship-building, or should we separate the spheres? This Report has not purported to solve all of these challenging questions. However, the Report identifies questions about which there is an urgent need for further research. Further, it has summarized the relevant considerations and arguments, and made some suggestions for addressing issues in the face of lack of clear research answers about the effective response to these policy choices. While future research will provide better direction for policy-makers, the reality is that some policy decisions must be made, at least implicitly, even without clear research direction.

The analysis in this document is in some ways consistent with several recent reports, though this Report is cautious regarding the likelihood of any significant net increases in public expenditures on family justice, and emphasizes the need for greater efficiency. We are not advocating dramatic restructuring of Ontario's family justice system. That is neither necessary nor realistic in the present fiscal and political environment. However, as identified in this Report, there is scope for significant change and improvement in the effectiveness and efficiency of the family justice system in ways that will not require enormous increases in government expenditure.

The prevalence of family breakdown, and the serious risks that it poses to children's interests and adults' rights must not be underestimated. There are great social and economic costs if family disputes are not properly resolved. It is clear that many in Ontario are not at present receiving the kind of help and support that they need to effectively and efficiently resolve family disputes. However, the analysis and research discussed in this Report can help policy-makers and professionals to undertake more effective and efficient responses. There is, therefore, reason to be cautiously optimistic about the prospects for progress in the responses to family relationship breakdown in Ontario and elsewhere in Canada.

Summary of Key Observations & Recommendations

The state can only maximize the likelihood and degree of success in as many different cases as possible by deploying multiple interventions in its response to family disputes. (Section 1.3)

Although there is a need for careful evaluation, Ontario's pilot project integrated domestic violence court in Toronto may add real value by dealing concurrently with the family law and criminal law cases arising from violent family breakdown. (Section 2.1)

Unified Family Courts should be created in all centres in Ontario where the population is sufficiently large. Judges presiding in these courts should have significant family law experience and training, but also the administrative flexibility to hear other cases. (2.1)

Judges dealing with family cases should have interest and knowledge necessary for these cases and one-family-one-judge case management should be implemented. (2.1)

Government enforcement of support obligations is an efficient use of resources that helps assist those who are economically vulnerable (most often mothers). (2.1)

In appropriate cases, judges should be prepared to impose cost consequences on parties disregarding disclosure obligations, rejecting reasonable settlement offers or causing unreasonable delay. (2.1)

Scarce judicial labour for adjudication should be conserved by allocating administrative and clerical tasks to other justice system staff whenever possible. (2.2).

Legislation should be enacted to allow judicial appointment of parenting coordinators to help implement custody and access orders in high conflict cases has the potential to reduce costs to the state and parents, and reduce the effects of conflict on children (2.2.))

There should be serious consideration to re-focusing judicial efforts on adjudication, and assigning most or all settlement-seeking functions to non-judicial mediators. (2.2 and 3.1)

There should be an increase to the poverty line in eligibility for family services from Legal Aid Ontario, though increasing entitlement for family legal aid should be accompanied by some rethinking of how services are provided. Even if this occurs, high levels of self-representation in family cases should be considered the “new normal” for many lower and middle income Ontarians, and the family justice system reformed accordingly. (2.2.1)

Allowing filing of documents by email or secure web form would remove the challenges which many SRLs face in printing, collating, and physically filing forms and documents, as well as reducing costs for those with representation. (2.2.1)

Local courthouse procedural variance makes it more difficult for SRLs to learn about the system by reading legal information (which is not typically region-specific). There should be procedural consistency across the province's courthouses. (2.2.1)

Rules which prioritize lawyers' interests over others' interests should also be scrutinized and potentially reformed. (2.2.1)

SRLs have the same entitlement to procedural and substantive justice as represented parties do; working with SRLs in is an essential part of the judicial role in family court. (2.2.1)

In the long run, making adjudication work better in the era of growing, or at least continuing, self-representation requires appointing and training family judges in a different way. (2.2.1)

The family justice process may be more efficient and effective if judges dealing with SRLs take a more activist or inquisitorial stance. (2.2.1)

Program delivery at the Office of the Children's Lawyer should be attuned to the basic current realities of family court, including pervasive self-representation and systemic delay. (2.2.2)

Although more research is required into the most effective ways to bring the child's views before the courts and parents, allowing for use of "views of the child" reports in Ontario would add a flexible, affordable option for courts and parents. (2.2.2)

Ontario should establish an administrative process to recalculate child support obligations when parental income changes. (2.2.3)

Government statistics and research should seek to distinguish between resolution through settlement and resolution through abandonment of a case. (2.3)

The government should explore ways to promote bipartite negotiated resolution of family disputes, e.g. by providing information about the law and about how to negotiate, precedents for resolution agreements or parenting plans, or safe space and opportunity for parties to talk. (2.3)

The government should do more to ensure that parties are aware of mediation and have the opportunity to use it. Information about the value of mediation and access to these services should be made available to all of those with family disputes, even before litigation is commenced. (3.2 and 3.4)

In a separation case without child custody or access issues, evaluative mediation may be the most efficient way to bring about a just resolution. In cases involving minor children, there are significant reasons to believe that facilitative mediation is more appropriate than evaluative mediation. (3.2)

There should be regulation of mediation unless government-subsidized, supported and controlled mediation is extended to cover all litigants who wish to utilize it. (3.4)

Making legal and child-related information available to individuals involved in a family dispute or concerned about the possibility of being in one is a proven strategy that is and should continue to be part of the state's response to family relationship breakdown. (4)

While the internet has a central role in providing information, telephone and paper-based information also have significant value. (4.1.1)

Separation-related education such as Ontario's Mandatory Information Program has a helpful role to play according to the evaluation literature, but there are questions about it should be mandatory for all litigants. (4.1.2)

Staff-supported information models have promise, but there needs to be guidance for these staff about how much information and advice they provide, and clear warnings to SRLs about the limitations of the assistance provided. (4.1.3)

For many family litigants who may be unable to afford full representation, or who feel that they can adequately represent themselves, even with improved public legal information there needs to be better access to legal advice through limited scope retainers or “legal coaching.” (4.1.3)

There is significant unmet demand for limited scope retainers in family law cases, at the same time as some lawyers, especially more junior lawyers, are struggling to get sufficient work. The Law Society and Bar Association have a role in addressing this imbalance by providing better education for the bar and public about limited scope retainers, establishing a good referral program for this type of work, linked to publicly funded legal information services and properly addressing insurance issues. (4.1.3)

It is important that information about substantive law is complemented with other information that separating people need to know. The government may also have to do a better job informing people about its own non-litigation services. (4.2.1)

One of the objectives of government information-provision campaigns should be displacing the assumption that litigation is the only way to resolve separation-related disputes. (4.2.1)

If resources are sufficient to allow high-quality live classes and staff-supported information, then such programs will have obvious advantages over recorded information. On the other hand, if they are of low quality then they may be misleading or a waste of time, and users might be better off accessing recorded information themselves. (4.2.2)

Websites funded by government agencies and non-government organizations that provide separation-related information should work to improve links and avoid unnecessary duplication. To the extent that public funds are being used, the government needs to improve and encourage better co-ordination of existing web-based and other resources, including access to trained staff at court houses and elsewhere who can provide basic assistance with such matters as completion of court documents. (4.2.2)

An appealing compromise between tiered and triaged services is presumptively mandatory, but screened services. (5.1)

The structure and application of various user-fees should be carefully considered to encourage efficient use of resources. Further research is necessary regarding the potential of using user fees and cost awards to discourage counterproductive behaviour or compensate the state for unnecessary resource use. (5.3)