

# Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario

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*This paper examines an often overlooked problem of social justice that is of growing importance in family law: the problem of unrepresented litigants. The adversarial nature of the Anglo-Canadian justice system demands that parties be represented by counsel; when one party does not have representation, this creates difficulties not only for that party but also for opposing parties and their counsel, for court staff and for judges. Studies have been conducted in the U.S., Australia and Nova Scotia to examine why these litigants are unrepresented, what the effects of the lack of representation are, and what can be done to address the problem.*

*In this paper, the author presents the results of an empirical study of unrepresented litigants that she carried out in the Unified Family Court in Kingston, Ontario, to shed light on the characteristics of unrepresented litigants, why they were unrepresented, and the impact that the lack of representation had on them. The author examines explanations for the lack of representation that have been given in the literature, noting that the primary reason given by respondents to the Kingston Survey was that their financial resources were too high to qualify for legal aid but too low to pay for counsel. The author goes on to discuss the effects of lack of representation on judges, on opposing parties and their counsel, and on unrepresented litigants themselves. Several programs have been instituted to aid unrepresented litigants, such as the provision of duty counsel, unbundled legal services, free legal information and alternative*

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*dispute resolution, but the author argues that more is needed. The services provided for unrepresented litigants should be expanded, and legal aid funding should be increased. The author also calls for more research on the characteristics of unrepresented litigants and the impact of the lack of representation on these litigants and on the system as a whole so that we may better understand and respond to these problems.*

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## **Introduction**

Unrepresented litigants reveal a growing problem in family law. More and more unrepresented litigants are appearing in our family court system. This problem is beginning to get the attention of justice departments, judges and lawyers both in Canada and in other common law jurisdictions. Data compiled by the Ontario Ministry of the Attorney General show that in 2003, 43.2 percent of applicants in the Family Court, Ontario Court of Justice Division were not represented by counsel when they first filed with the court. The average percentage

of unrepresented litigants in Ontario family courts between 1998 and 2003 was 46 percent.<sup>1</sup> Some of these litigants may have obtained legal representation or paid for some legal advice during their proceedings, but the Ministry does not keep track of this information. The Ministry does not keep data that would allow us to distinguish what percentage of litigants are unrepresented and what percentage are “self-represented.”

Studies undertaken by the American, Australian and Nova Scotia governments showed similar trends. In the U.S., the number of unrepresented litigants varied greatly. Anywhere from 20 to 70 percent of people were unrepresented in the various states.<sup>2</sup> In Australia, approximately 35 percent of litigants were unrepresented at some point in their family law proceedings.<sup>3</sup> Similarly, in Nova Scotia’s alternative dispute resolution (A.D.R.) program, 52 percent of the participants were unrepresented.<sup>4</sup> Each of these studies used a different method of compiling its statistics, which makes it difficult to compare these numbers with any accuracy. However, there is a trend among these common law jurisdictions of a large number of litigants remaining unrepresented for some part of their family law matter.

A distinction must be drawn between self-represented litigants and unrepresented litigants. Self-represented litigants choose to represent themselves despite having the resources to pay a lawyer. Unrepresented

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1. Ontario, Ministry of the Attorney General, *Representation at Time of Filing for FLA/CLRA and Divorce Matters Filed with the Ontario Court of Justice Family Court and the Family Court Branch of the Superior Court of Justice* (20 February 2004) (on file with author).

2. See Office of the State Courts Administrator, Florida Supreme Court, *A National Conference on Pro Se Litigation: Florida Team Report* (3 January 2000), online: Florida State Courts <[http://www.flcourts.org/gen\\_public/family/bin/arizonareport.pdf](http://www.flcourts.org/gen_public/family/bin/arizonareport.pdf)> [U.S. Report].

3. Family Court of Australia, *Self-Represented Litigants—A Challenge: Project Report December 2000–December 2002* (July 2003) at 1, online: Family Court of Australia <[http://www.familycourt.gov.au/presence/resources/file/eb00030325eddec/SRL\\_A\\_C\\_challenge.pdf](http://www.familycourt.gov.au/presence/resources/file/eb00030325eddec/SRL_A_C_challenge.pdf)> [Australian Report].

4. Nova Scotia, Department of Justice, Planning and Research Division, Court Services Division, *The Nova Scotia Supreme Court (Family Division): A Summary of Evaluation Research Conducted During the Period 1999-2001* (May 2002) at iii, online: Nova Scotia Department of Justice <<http://www.gov.ns.ca/just/Publications/SCSumReport.pdf>> [Nova Scotia Report].

litigants, on the other hand, would like to be represented by a lawyer but cannot afford to pay a lawyer's fees and are not eligible for legal aid.<sup>5</sup> The distinction between unrepresented and self-represented litigants is important to keep in mind when designing assistance programs since the two groups have different needs. On one hand, it would be unfair to allow self-represented litigants to benefit from free programs that are designed to help those who cannot afford legal representation. On the other hand, providing legal information and advice free of charge could encourage people to represent themselves, which may give them the misguided impression that they can represent themselves effectively.<sup>6</sup> Some litigants fall into a grey area in between these two groups: they could afford to pay a lawyer, but only by incurring debt. Although they may be able to afford to pay for some legal services, the harsh reality is that the cost of full legal services is beyond the reach of many people. Despite this important distinction, for the purposes of this paper when reference is made to "unrepresented litigants" this can be taken to include both unrepresented and self-represented litigants.

The Anglo-Canadian justice system is adversarial in nature and assumes that both parties will be assisted by competent counsel. When one party is represented and the other is not, the balance of our system is disrupted. Unrepresented litigants are often hindered by their lack of representation. Both the literature on unrepresented litigants and the survey of unrepresented litigants in Kingston reflect that these litigants have difficulties drafting their own pleadings and filling out court forms, understanding court procedures and negotiating with opposing counsel.

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5. D.A. Rollie Thompson, "No Lawyer: Institutional Coping with the Self-Represented" (2002) 19 Can. Fam. L.Q. 455 at 456. A study done in the U.S. found that as many as 20% of people without representation could afford a lawyer but chose not to hire one; U.S. Report, *supra* note 2 at 3. In contrast, a survey done by this author at the Kingston Family Court found that only 3 of the 35 respondents (12.5%) were self-represented; see Appendix, question 8. An Australian study found that a significant number of litigants there had also chosen to represent themselves, saying they did not need or want a lawyer; Australian Report, *supra* note 3 at 1, citing John Dewar, Barry W. Smith & Cate Banks, *Litigants in Person in the Family Court of Australia: A Report to the Family Court of Australia*, Research Report No. 20 (2000) [Dewar Report].

6. Interview with Justice Harvey Brownstone (December 2003).

Furthermore, family law judges and court staff find dealing with unrepresented litigants frustrating, as do opposing parties and their lawyers. The real danger is that justice will not be done when one or both litigants in a family law matter are unrepresented.

There is also a large percentage of unrepresented litigants in the family courts in Australia and in the United States. The Australian government funded an extensive study in 2000 to ascertain how to serve the needs of their unrepresented litigants better.<sup>7</sup> In the United States, justice departments, judges and lawyers from various states attended a conference in Florida in 2000 to set a national agenda for dealing with the problem of unrepresented litigants.<sup>8</sup> In Nova Scotia, the Department of Justice has conducted studies and implemented a new program in 2002 to assist unrepresented litigants in family court.<sup>9</sup> Superior Court judges have received training from the National Judicial Institute on how to deal with unrepresented litigants in their courts.<sup>10</sup> Clearly this problem is being taken very seriously and the legal community is committed to finding ways of dealing with it.

In this paper, I will examine the nature and scope of the problem of unrepresented litigants in Ontario. I begin by describing the results of a survey conducted on unrepresented litigants in the Unified Family Court in Kingston, Ontario (“the Kingston Survey”), which asked questions about the characteristics of these litigants (such as age, gender and socio-economic status) and about their experience of being unrepresented. I then outline some of the explanations that have been offered for the growing numbers of unrepresented litigants. Next, I explore some problems that unrepresented litigants cause for judges and lawyers, and the obstacles that these litigants face when trying to represent themselves. I also discuss whether a constitutional right to representation in private family law matters should be recognised, especially where the interests of children are at issue. I then describe some of the programs that have been developed to assist unrepresented

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7. Australian Report, *supra* note 3.

8. U.S. Report, *supra* note 2.

9. Nova Scotia Report, *supra* note 4.

10. *Fall Education Seminar, Superior Court of Justice* (Toronto: National Judicial Institute, 5-7 November 2003) [unpublished] [Judicial Education 2003].

litigants in Ontario. I conclude with suggestions for future research that should be done on this topic and about what programs appear to be most effective in helping unrepresented litigants.

## I. Results from the Kingston Survey

Evidence from the Canadian Institute for Strategic Studies shows that the percentage of litigants who were unrepresented in the Kingston Unified Family Court has risen steadily from 11 percent in 1992 to 40.8 percent in 2001.<sup>11</sup> Why are more and more litigants in Kingston's family court unrepresented? The results of the Kingston Survey may help to answer that question. Thirty-five respondents voluntarily answered eleven questions relating to the profile of the litigants, the family law matters before the court, and why the litigants were unrepresented. Because of the small sample of respondents, the lack of a comparator or control group of represented litigants, and by virtue of the fact that the survey was only conducted in one location, it is not possible to use these results to draw conclusions about the characteristics of all unrepresented litigants in Ontario.<sup>12</sup> Nonetheless, some of the results of this survey were similar to those obtained by researchers in Nova Scotia, the U.S. and Australia. This supports the anecdotal evidence about the rising numbers of unrepresented litigants, who these litigants are, what family law issues they are facing, and why they are unrepresented.

The Kingston Survey was designed to collect some basic information about characteristics of family law litigants such as their age, their gender and their family status, and most importantly, the amount and source of their income. Another primary objective of the survey was to find out why people are unrepresented and what obstacles they are facing as a result of their lack of representation. Finally, the survey asked questions about the services that these litigants are using to assist them with their family law matters. The survey was designed to answer three main questions. First, are the respondents unrepresented because they cannot afford a lawyer, or because they choose not to hire a

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11. Ontario, Ministry of the Attorney General, *supra* note 1, Appendix B.

12. See Appendix, "Results of the Kingston Family Court Survey."

lawyer? Second, is lack of representation creating barriers to accessing justice for unrepresented litigants, and if so, what are these barriers? Third, are people aware of the services that are already available for unrepresented litigants, and if so, which ones are they using?<sup>13</sup> The surveys were left in the waiting area of the court, and an explanation of the purpose of the survey was posted on the wall of the waiting area. Respondents voluntarily chose to complete the surveys in the absence of the researcher and left the completed surveys in a drop box that was provided for them in the waiting area of the courthouse. The survey was conducted over a two-month period in the spring of 2004.

#### *A. Gender, Age and Socio-Economic Status*

One of the purposes of the survey was to ascertain some characteristics of unrepresented litigants, such as their age, gender and socio-economic status. The respondents to the survey varied in age from 20 to 60 with almost equal numbers in all age categories. They were, however, predominantly male (63 percent). A study done by the Australian Government also found that most unrepresented litigants were male.<sup>14</sup> One explanation for this may be that men are less likely to meet the financial eligibility standards for assistance from Legal Aid Ontario. This would correspond with results from a Nova Scotia study showing that 70 percent of those obtaining assistance from Legal Aid for family law matters are women.<sup>15</sup>

More than half of the respondents (51 percent) depended on some type of government financial assistance. A large percentage of the respondents (85 percent) had an income of \$30,000 or less per year, with 34 percent reporting an annual income of less than \$10,000. About half of the respondents had children living with them whom they were responsible for supporting.

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13. The survey questions were designed with the help of the full-time duty counsel at the Kingston Family Court, Mr. Henny Harmsen.

14. Australian Report, *supra* note 3.

15. Nova Scotia, Department of Justice Legal Aid Commission, *Review of legal aid services in Nova Scotia: a report* (Halifax: Legal Aid Review Team, 1996) at 25 (Chair: Don Murray).

## *B. Family Law Issues*

The most common family law issues that the respondents were facing were custody, access and child support. A significant percentage of respondents were asking for variations to a pre-existing order on these issues (29 percent). All of these issues concern the welfare of the couple's children in some way. This reflects Madame Justice Trussler's assertion that, "[p]eople tend to act for themselves in child welfare matters, custody, access and support prior to divorce proceedings being commenced, declarations of parentage, issues pertaining to arrears of support and enforcement of access."<sup>16</sup> A smaller percentage of the respondents were asking for a divorce order (23 percent) or for the court's assistance in dividing family property (6 percent), neither of which is covered by Legal Aid Ontario.

## *C. Reasons for and Impact of Being Unrepresented*

A very large percentage of respondents explained that they were unrepresented because they could not afford a lawyer (83 percent). In a study done for the American Bar Association (A.B.A.) that asked a similar question to a group of unrepresented litigants, only about 18 percent responded that they could not afford legal representation.<sup>17</sup> Another discrepancy between the results of the Kingston study and those of the A.B.A. study is the percentage of people who responded that they believed that they did not need a lawyer because they perceived their case as simple and felt they could manage alone. Only three respondents in the Kingston Survey replied that they felt they could manage alone (12.5 percent), whereas 45 percent of the American respondents gave the same response.<sup>18</sup> Furthermore, 72 percent of the

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16. Marguerite Trussler, "A Judicial View on Self-represented Litigants" (2002) 19 Can. Fam. L.Q. 547 at 549.

17. Bruce D. Sales, Connie J. Beck & Richard K. Haan, "Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?" (1992) 37 Saint Louis U.L.J. 553 at 590. A further 12% responded that they did not want to spend the money on a lawyer; *ibid.*

18. *Ibid.* at 567.

American respondents reported that if they had to go through the process again they would do so without a lawyer.<sup>19</sup> Unfortunately, the researchers in Australia and in Nova Scotia did not ask the respondents about their experiences in being unrepresented and there is no data other than the data from the A.B.A. study to compare with the results of the Kingston Survey. Further research is required to ascertain whether the results of the A.B.A. study are peculiar to the American population that was surveyed for the A.B.A. study, or whether similar results would be obtained elsewhere in Canada and in Australia if similar questions were asked.

When the Kingston respondents were asked about the difficulties they encountered when representing themselves, only 2 responded that they had encountered no problems. More than 50 percent of respondents found difficulties with the court forms and knowing their legal rights. A significant percentage of respondents (37 percent) found it difficult to negotiate with the opposing party's lawyer and 20 percent felt uncomfortable appearing in court by themselves. The Australian study found a perception among counsel of a lack of settlements with unrepresented litigants.<sup>20</sup> In contrast to the results obtained in the A.B.A. study, the more legal advice that unrepresented litigants obtained, the more likely they were to settle.

Some researchers suggest that self-represented litigants take up more court time and are less likely to reach a settlement with the other party. The Kingston study showed that 65 percent of the respondents believed their matter took longer to resolve because of their lack of legal representation, and 57 percent reported that they had tried to settle the matter with the other party but had not been successful. A further 29 percent had not even attempted to reach a negotiated settlement with the other party.

The Kingston respondents were asked what services they had used to assist them with their family law matter. Almost all of the respondents had consulted the duty counsel at the Family Court (86 percent). Some of the respondents had also made use of the Family Law Information Centre (37 percent) or had asked for advice from the court staff (26

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19. *Ibid.* at 588.

20. Australian Report, *supra* note 3 at 41.

percent). A few had also used mediation services (23 percent). Only one of the respondents mentioned that she had used services made available for free on the Internet.<sup>21</sup> The fact that many of the respondents had not used the Family Law Information Centre or the mediation services available for them at the Kingston Family Court might suggest that these people were not aware that these services exist. This points to the need not only to offer free legal information and services to unrepresented litigants, but also to advertise these services effectively so that these litigants are aware that they exist and know how to access them.

## II. Reasons for Lack of Representation

It is difficult to ascertain precisely why there are growing numbers of unrepresented litigants in our family courts. The academic literature does not offer many insights into potential causes, as it focuses primarily on finding solutions. Some of the causes mentioned in the studies and articles were cuts made to legal aid funding, a general negative perception of lawyers and a trend against using professional services.

### *A. Lack of Legal Aid Funding*

One possible explanation for the increasing numbers of unrepresented litigants in family court is the decreasing amount of funding available for legal aid services. This has been discussed in Canada and in Australia.<sup>22</sup> Under the old Canada Assistance Plan (C.A.P.) funding program, provinces were required to use a certain percentage of the funds they received from the federal government to fund certain social programs, including legal aid. However, the C.A.P. was cancelled.

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21. For example, family court forms and an explanation of the *Family Law Rules* can be found online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca>>.

22. The Australian Report also found a link between the lack of legal aid funding and the growing numbers of unrepresented litigants, and pointed out that in England, where there is more substantial funding for legal aid services, they do not have as large a number of unrepresented litigants. See Australian Report, *supra* note 3 at 1-2, citing the Dewar Report, *supra* note 5.

Under the new federal transfer payment program, the Canadian Health and Social Transfer payments, there is no such requirement for the provinces. Predictably, as soon as these changes were made, the provincial governments made deep cuts to their social programs and the Ontario government substantially diminished the funding given to Legal Aid Ontario.<sup>23</sup> As Professor Thompson describes, this created a situation in which “only the poorest of the poor are now eligible for legal aid—mostly those on social assistance or other fixed incomes.”<sup>24</sup> This leaves the working poor without any meaningful access to legal representation.

As the Kingston Survey shows, there are many people with very low incomes who do not qualify for legal aid.<sup>25</sup> In Ontario, legal aid is administered through a certificate program. Successful applicants receive a certificate, which they then bring to a lawyer. The certificate authorizes the lawyer to bill Legal Aid Ontario for a certain number of hours.<sup>26</sup> Although some statistics are kept by Statistics Canada of what percentage of applicants is granted legal aid for family law matters, these statistics do not reflect the extensive “pre-screening” that takes place. When people first contact Legal Aid Ontario to apply for a certificate, they are pre-screened for their eligibility. To be eligible for a legal aid certificate in a family law matter, the applicant must be seeking spousal support, child support, custody or access to their children. The applicant must also meet financial eligibility requirements. If they do not meet the eligibility criteria they will be told not to apply. The number of people turned away at this stage is not recorded and is potentially quite substantial.<sup>27</sup> It is also difficult to ascertain why applications are refused. Statistics show that 50 percent of applications are refused for “other reasons” and do not specify what these other

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23. Thompson, *supra* note 5.

24. *Ibid.* at 459.

25. See Appendix, question 8.

26. See “Legal Aid Ontario and You—Partners in Justice,” online: Legal Aid Ontario <[http://www.legalaid.on.ca/en/info/PDF/lao\\_and\\_you.pdf](http://www.legalaid.on.ca/en/info/PDF/lao_and_you.pdf)> at 5 [LAO and You]. See also online: Legal Aid Ontario <<http://www.legalaid.on.ca/en/info>>.

27. Statistics Canada, *Legal Aid in Canada: Resource and Caseload Statistics 2001/02* (Ottawa: Canadian Centre for Justice Statistics, 2003) at 11-12.

reasons are.<sup>28</sup> A further problem is that not all lawyers will accept Legal Aid certificates. Lawyers complain that they are not being paid enough by Legal Aid Ontario to outweigh the personal and professional costs of accepting legal aid certificates. The Canadian Bar Association's Legal Aid Liaison Committee cites problems such as government holdbacks of 20 percent on legal fees, unreasonable limits on billable hours, onerous paperwork, and taxes on legal fees and interest on trust accounts for which legal aid funding does not account.<sup>29</sup> In 2002, there was a movement among the lawyers in Ontario to strike by not accepting legal aid certificates to pressure the government into increasing the hourly rates paid to lawyers who accept the certificates. This made it very difficult for clients who had obtained certificates to retain lawyers. This undoubtedly added to the number of unrepresented litigants, although no statistics were kept to gauge the consequences of the strike to these litigants. Although the lawyers had some success (they managed to secure a 5 percent increase in the legal aid tariff<sup>30</sup>), the trend among the private bar to refuse legal aid certificates has continued.<sup>31</sup>

### *B. Negative Perception of Lawyers*

Another potential explanation is a public perception that lawyers cost too much and cannot be trusted. In the Kingston Survey, 21 percent of respondents reported that they had a previous negative experience with a lawyer. Some of the comments written on the back of the surveys also reflect this concern. For example, one respondent wrote the following: "When I had a lawyer argue the same points I put forth, the situation was totally different, and I started to gain some ground in court. However, as has happened to me on about 3 different occasions, the

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28. *Ibid.*

29. Canadian Bar Association, Minutes of the Legal Aid Liaison Committee Mid-Winter Meeting (2000), online: Canadian Bar Association <<http://www.cba.org/CBA/pdf/legalaid.pdf>>.

30. See online: Ontario Bar Association <[http://www.oba.org/en/agr/current\\_issues\\_en/legal\\_aid.aspx](http://www.oba.org/en/agr/current_issues_en/legal_aid.aspx)>.

31. See Cristin Schmitz, "Report confirms Bar's flight from handling legal aid cases" *The Lawyer's Weekly* 23:45 (2 April 2004) (QL).

lawyers then find new things to fight about or a different way to fight about the same things, all for the purpose of increasing your fees.” Another respondent alluded to this, writing, “The requirement of a court order to simply alter incorrect information at the FRO [Family Responsibility Office] is a waste of time and money. That the legal profession supports this situation as it stands is truly shameful and indicates dishonesty.” In at least one recent case, claims of excessive billing have been substantiated. In *McRae v. Simpson*,<sup>32</sup> Justice Campbell ordered a law firm to cut its bill by 80 percent, finding that “[t]he times expended on the file was outrageous, given the issues involved and the means of the parties.”<sup>33</sup> It is unlikely that this firm is alone in over-billing clients.

However, it is important to recognise that family law litigation is inherently costly due to the amount of paperwork that needs to be prepared and filed with the courts, and the complexity of the *Family Law Rules*<sup>34</sup> and procedures. The family law forms and procedures are designed to be understandable, to improve communication between parties and to provide information to the judges. The *Family Law Rules* should expedite proceedings and encourage settlement. Although unintended, the overall effect of the forms and the Rules can be cumbersome even for lawyers, and can be difficult to understand for unrepresented litigants, especially those who lack education.

Some lawyers also find it challenging to keep up to date with court procedures and to draft forms and pleadings. An article written by a family lawyer in Toronto lists some of the many documents that must be drafted, reviewed with clients, signed, sworn, served and filed with the court: applications; financial statements (including updated financial statements sworn within thirty days of each court appearance); net family property statements; case information sheets; support deduction orders and information sheets; case conference memoranda summarizing the information set out in the application; settlement conference memoranda (summarizing information in court records yet again); and

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32. *MacRae v. Simpson*, [2003] O.J. No. 407 (Sup. Ct. J.) (QL).

33. Cristin Schmitz, “Judge blasts ‘outrageous’ overcharging in family law cases” *The Lawyers Weekly* 22:40 (28 February 2003) (QL).

34. O. Reg. 114/99.

confirmation sheets, confirming that counsel intend to appear at court as scheduled.<sup>35</sup> It is not surprising, therefore, that family law litigants who are represented often face large legal bills on top of their support and other financial obligations, or that many people cannot afford to pay these large legal bills and as a result find themselves unrepresented.

### *C. Trend against Using Professional Services*

In a Florida conference on unrepresented litigants in 2000, one of the theories that emerged was that there is a general trend among the American people of moving away from their dependence on professional services. This is resulting in a decrease in the use of legal services in the United States.<sup>36</sup> It was also suggested at this conference that instead of viewing unrepresented litigants as “problem clients,” the courts should begin viewing them and treating them as “customers” and gearing their services to the needs of this large group of people.<sup>37</sup>

The results of the Kingston Survey suggest that the increasing numbers of unrepresented litigants in Ontario appear to be more as a result of inability to pay than as a result of a trend away from the use of legal services. Most of the people who responded to the Kingston Survey would gladly have made use of a lawyer’s services if they could have afforded to, but had to resort to duty counsel or advice counsel instead.

## **III. Problems Created by Lack of Representation**

Howard Rubin summarized the problems caused by lack of representation very well in the following passage:

Any person has a right to represent himself or herself in a civil action. This basic right has created an ordeal in the courts arising from the statement, “I wish to represent myself.” From this point on, the adversary system, upon which civil procedure rules are

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35. H. Christina MacNaughton, “High Cost of Family Law,” online: Lancaster, Brooks & Welch <<http://www.lbwlawyers.com/publications/highcostoffamilylaw.asp>>.

36. U.S. Report, *supra* note 2 at 3.

37. *Ibid.* at 4.

based is out of synchronization. The judge is faced with the task of balancing fundamental fairness and order in the proceedings. The *pro se* litigant must struggle with how to present his or her case. The opposing attorney must protect and advocate his or her client's interest, while meeting the legal obligation to bring the truth to the court's attention. Further, the party represented by counsel, having a right to demand vigorous representation, must cope with escalating legal costs because of numerous delays.<sup>38</sup>

Although the subject of Rubin's discussion is self-represented litigants in Illinois, the problems that he describes in this passage arise equally in the case of all litigants who lack representation. Because our adversarial system assumes that parties are represented by counsel, lack of representation causes a problem for everyone involved, including judges, opposing parties and their lawyers, and unrepresented litigants themselves.

#### *A. Problems for the Judge*

When unrepresented litigants appear in their courts, judges have to decide whether to apply the same standards to them as they do to lawyers. This is especially difficult for the judge to decide if one litigant is represented and the other is not. In this situation, if the judge chooses to relax the rules of the court for the unrepresented litigant, this might create the appearance of bias for the other party. Whether or not a judge will be lenient in applying the rules of civil procedure may depend on the reason why the person is not represented. If the person has simply chosen not to hire a lawyer, the judge is less likely to be lenient than if the person is unrepresented because of lack of resources.<sup>39</sup> Judges are most likely to take this into account when deciding questions such as whether to grant the unrepresented party an adjournment.<sup>40</sup> Another dilemma for judges is how much they should educate unrepresented litigants. For example, these litigants tend not to understand how to draft pleadings properly, or what the rules of evidence are. Taking the time to explain all of these things to the unrepresented litigant can

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38. Howard M. Rubin, "The Civil *Pro Se* Litigant v. The Legal System" (1989) 20 Loy. U. Chicago L.J. 999 at 1000 [footnotes omitted].

39. Thompson, *supra* note 5 at 474.

40. *Ibid.* at 475.

lengthen the proceedings significantly.<sup>41</sup> The judge is then faced with the challenge of balancing the unrepresented person's right to a fair trial with the other party's right not to have exorbitant legal fees.<sup>42</sup>

Lack of representation can also undermine the integrity of the justice system. Judges rely on lawyers to act as liaisons between themselves and the litigants to ensure that the integrity of the process is maintained. Lawyers explain court procedures to clients, decide whether or not a motion is worth bringing to court, and encourage their clients to be honest and disclose everything that they are required to disclose.<sup>43</sup> Judges cannot rely on unrepresented litigants in the same way as they do lawyers who are, by virtue of their position, "officers of the court."<sup>44</sup>

Finally, not only are more unrepresented litigants appearing in family court, but the problems they bring to court expand beyond legal issues. One family law judge has said, "So little of our work involves genuine legal issues to be truly adjudicated. At our level in family court we are a dumping ground for massive social and economic issues and for the acts of very dysfunctional families. I feel that I am more a social worker than a judge."<sup>45</sup> As a result, many family law judges are overwhelmed.<sup>46</sup>

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41. *Ibid.* at 482-84.

42. Rubin, *supra* note 38 at 1004.

43. Thompson, *supra* note 5; see also Law Society of Upper Canada, *Rules of Professional Conduct*, r. 2.04(14).

44. See e.g. *Findlater v. Crivea*, [1997] O.J. No. 1807 (Ct. J. (Gen. Div. Fam. Ct.)) (QL), where a self represented litigant submitted a fraudulent document allegedly showing that his wife had consented to give him custody. The wife had, in fact, only agreed to give him custody temporarily so that she could work, with the understanding that the children would be returned to her once she had paid off a debt. The father submitted a fake court order that showed him as having full custody of the children. When the judge realized what the truth, he commented at para. 11,

It may now be necessary for the court to refuse to accept consent motions from unrepresented parties without a formal appearance and hearing. . . . We have been fortunate in being able to rely without any hesitation on the honesty and professional obligations of counsel. Obviously, we cannot afford that luxury in the absence of a member of the Bar.

See also Cristin Schmitz, "Family Court Fraud," *The Lawyers Weekly* 17:03 (23 May 1997) (QL).

45. Cristin Schmitz, "Canadian Judges in Distress, Psychologist Finds in Survey" *The Lawyers Weekly* 22:15 (23 August 2002) (QL).

Part of the Ontario Superior Court of Justice educational seminar in 2002 was dedicated to the problem of unrepresented litigants.<sup>47</sup> The judges were given advice about what kind of information to give unrepresented litigants and how to handle procedural issues such as adjournments. Most of the information given at the seminar was aimed at criminal court judges but some of it is also applicable to family court situations. More judicial education on this topic is necessary to ensure that unrepresented litigants are treated fairly and that the same standard is applied to all of them; to ensure that the concerns of opposing, represented parties are adequately addressed by judges; and to ensure that judges have the training to enable them to cope with the social problems that unrepresented litigants present.

### *B. Problems for Opposing Parties and their Lawyers*

A significant problem for opposing parties and their lawyers is the cost created by unrepresented litigants through their lack of familiarity with the process and rules of the court. Most unrepresented litigants are confused and do not know how to follow the proper procedures or how to fill out the appropriate forms.<sup>48</sup> Other litigants, particularly self-represented litigants, believe that they can do as well as any lawyer, if not better. Christina MacNaughton provides a typical example:

Having grown up on a steady diet of American television lawyer shows, the litigant feels himself to be a better lawyer than the lawyers, and because the trial time is not costing him anything beyond time missed from work, calls as witness every person who has ever been part of the couple's life in an effort to discredit the other party. . . . Such trials go for weeks.<sup>49</sup>

Both of these types of litigants increase the amount of time it takes to resolve the issues between the parties.

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46. *Ibid.* The survey discussed in this article on the phenomenon of judicial burnout among family court judges mentions that one of the factors leading to burnout is dealing with so many unrepresented litigants.

47. Judicial Education 2003, *supra* note 10.

48. MacNaughton, *supra* note 35 at 6.

49. *Ibid.*

In their article, “A Practising Lawyer’s Field Guide to the Unrepresented,” Professor Thompson and Lynn Reiersen describe some of the many problems encountered by lawyers dealing with unrepresented litigants.<sup>50</sup> One major problem is that of conflicts of interest. Unrepresented litigants often ask opposing lawyers to provide them with free legal advice. It is as simple as asking, “what should I do?” In such situations, lawyers must be very mindful of Rule 2.04 of the *Rules of Professional Conduct*, which prohibits lawyers from representing both sides in a dispute.<sup>51</sup> There is also a professional responsibility to treat unrepresented litigants with respect, in the same way you would treat another lawyer.<sup>52</sup> The balance between these two responsibilities can be difficult to maintain. A lawyer must also be very careful not to coerce or unduly influence unrepresented litigants into signing an agreement because this may affect the validity of the agreement.<sup>53</sup> This can be difficult for lawyers considering their clients’ desire for expediency.

Professors Thompson and Reiersen make the following suggestions to lawyers who are dealing with an unrepresented litigant. First, lawyers must make it very clear that they are representing the opposing party and not the unrepresented litigant. Second, they must advise the unrepresented party to get a lawyer. Third, they must make all terms of settlement clear and be flexible with these terms. Finally, they must not overreach, mislead, pressure, or threaten the unrepresented litigant in the course of negotiation.<sup>54</sup> Thomson and Reiersen also emphasise that communication between the lawyer and the unrepresented litigant should be done in writing if possible.<sup>55</sup>

Judges may place a greater burden on lawyers if the other party is unrepresented. They may ask the lawyers to assist the unrepresented litigants in various ways, such as explaining court procedures and

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50. Rollie Thompson & Lynn Reiersen, “A Practising Lawyer’s Field Guide to the Self-Represented” (2002) 19 Can. Fam. L.Q. 529.

51. *Rules of Professional Conduct*, *supra* note 43, r. 2.04(14).

52. *Ibid.*, r. 4.01(2)

53. Thompson & Reiersen, *supra* note 50 at 536.

54. *Ibid.* at 535.

55. *Ibid.*

providing other legal information. Since there is no clear line between providing legal information and providing legal advice, Thompson and Reiersen suggest that lawyers should resist this kind of pressure from judges unless assisting the unrepresented litigant will also assist their client in some way.<sup>56</sup>

### *C. Problems for the Unrepresented Litigant*

In the Kingston Survey, the most common difficulties experienced by unrepresented litigants were difficulty understanding and filling out court forms, knowing and understanding court procedures, talking to and negotiating with judges and lawyers, and knowing their legal rights. All but two of the respondents indicated that they had had some difficulty due the fact that they were unrepresented. The majority of the respondents felt that their family law matters had taken longer to resolve and were frustrated by their inability to reach a settlement with the other party.

In contrast, the A.B.A. study on unrepresented litigants showed that “*Pro se* cases are completed in less time than attorney represented cases and are more likely to end by default judgment.”<sup>57</sup> This study also found that the unrepresented were more likely to reach a settlement prior to going to court than were those who were represented. Given that one of the roles of a family law lawyer is to encourage and facilitate settlement, people who are represented should be more likely to settle expeditiously than people who are unrepresented. Even more disturbing was their finding that unrepresented litigants were more satisfied with the legal process and the judges, and were happier about the terms of their agreements than were those who had been assisted by lawyers. They were so pleased, in fact, that 72 percent of them were ready to represent themselves a second time if necessary.<sup>58</sup> The Kingston study does not show whether unrepresented litigants in Kingston really do take longer to resolve their cases than do represented parties, nor does it compare the experiences of unrepresented versus represented litigants in terms of

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56. *Ibid.* at 543.

57. Robert Yegge, “Divorce Litigants Without Lawyers” (1994) 28 *Fam. L.Q.* 407 at 409.

58. *Ibid.* at 410.

how they perceive the legal system and judges. It would be interesting to replicate the A.B.A. study in an Ontario court to see how Ontario litigants who are unrepresented compare with their American counterparts. Do unrepresented litigants in Ontario settle their family law matters more quickly than do represented litigants, as was the case in the U.S. study, or is the opposite the case, as the Kingston Survey respondents suggest?

Unrepresented litigants may not know that they are missing essential information about their case. The A.B.A. study found that “research indicates that *pro se* litigants frequently fail to proceed with the benefit of important information about such critical matters as pre-trial relief, allocation of insurance and pension benefits, and tax consequences.”<sup>59</sup> Because they do not know the law, unrepresented litigants may overemphasize irrelevant facts and underemphasize very important ones.<sup>60</sup> Furthermore, family law litigants are usually emotionally wrought and the negative feelings that they have about the other party can make it very difficult, if not impossible, for them to consider their situations objectively. Family law lawyers not only know what information is essential and what to emphasise, but they can also sort through emotions to concentrate on legal issues.<sup>61</sup>

#### *D. Constitutional Right to Representation*

The fundamental importance of legal representation in family law disputes has prompted some discussion of whether a constitutional right to representation should be recognised. Canadian courts did not recognize the constitutional right to state-funded representation until 1988 in *R. v. Rowbotham*.<sup>62</sup> In *Rowbotham*, the Ontario Court of Appeal found that the seriousness and complexity of a case may mean that an accused cannot receive a fair trial without counsel, and in such cases the right to state-funded counsel exists. This principle was extended to family law cases in *N.B. (Minister of Health and Community Services) v.*

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59. *Ibid.* at 411.

60. MacNaughton, *supra* note 35.

61. *Ibid.*

62. (1998), 41 C.C.C. (3d) 1 (Ont. C.A.) [*Rowbotham*].

*G.(J.)*,<sup>63</sup> a child protection case that involved an indigent mother who was fighting the state for custody of her child. The Supreme Court recognized that child protection proceedings could constitute a threat to a child's and a parent's right to security of the person under section 7 of the *Charter*, particularly when the state is threatening to remove custody of their children.

The Supreme Court determined that when deciding whether or not state-funded counsel is required, courts must consider "the interests at stake, the complexity of the proceedings and the capacity of the parent."<sup>64</sup> In *W.(K.L.)*,<sup>65</sup> the Supreme Court affirmed that the section 7 right to security of the person is infringed when the state interferes in the parent-child relationship. Justice L'Heureux-Dubé noted that state intervention in family matters can cause "distress arising from the breaking of the bond between parent and child, the 'gross intrusion into a private and intimate sphere' caused by direct state interference with the parent-child relationship through inspection and review and the potential stigmatization of the parent as 'unfit' when relieved of custody."<sup>66</sup> Courts have recognized not only a duty for the state to fund counsel in some circumstances, but also a duty for the court to assure itself that representation being provided is adequate. Courts have recognized that for representation to be effective legal aid programs must pay lawyers for enough hours to prepare adequately.<sup>67</sup> Courts have also found that if a legal aid program refuses to fund a client who a judge finds has a constitutional right to representation, the judge can order the province to pay for counsel.<sup>68</sup>

If it is the case that state interference in family matters causes distress and stigmatization, should state-funded counsel be provided for all

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63. [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 [*G.(J.)* cited to S.C.R.].

64. *Ibid.* at para. 2.

65. *Winnipeg Child and Family Services (Central Area) v. W.(K.L.)*, [2000] 2 S.C.R. 519, 10 R.F.L. (5th) 122 [*W.(K.L.)* cited to S.C.R.].

66. *Ibid.* at para. 86.

67. See Nicholas Bala, "The *Charter of Rights* and Child Welfare Law" (Paper presented to the Law Society of Upper Canada Program on *Conduct of a Child Protection File*, 9 March 2004), online: Canada Court Watch <[http://www.canadacourtwatch.com/legal\\_documents/charter&childwelfare2004.pdf](http://www.canadacourtwatch.com/legal_documents/charter&childwelfare2004.pdf)>.

68. See *ibid.* at 24.

indigent parents fighting the state? What is the limit to the principles set out in *G.(J.)*? The Ontario Superior Court has ruled that the principle in *G.(J.)* does not apply when a mother is already separated from her children due to a supervision order granted to the grandparents by her consent.<sup>69</sup> However, in Professor Thompson's opinion, "This is way too narrow a reading of *G.(J.)*. . . . In my view, once a child protection proceeding begins, the parents' section 7 'interest' is engaged and that does not end until the case is dismissed or a permanent wardship order is made."<sup>70</sup> Subsequently, a Saskatchewan court found that there may be a right to representation for an indigent parent who is appealing a final court order as long as the case has sufficient merit and has some chance of succeeding.<sup>71</sup>

Although courts have held that section 7 applies to family law cases in which the state is involved, the same has not been found to apply in private family law cases. In the case of *Ryan v. Ryan*,<sup>72</sup> for example, the Nova Scotia Court of Appeal ruled that a father who was seeking to vary a custody order was not entitled to state funded counsel primarily because the state was not interfering with his rights directly and there was no stigmatization involved. One reason why private family law cases might fall outside the scope of *G.(J.)* is that when the state is not a party to a proceeding the *Charter* does not apply. In *Young v. Young*,<sup>73</sup> the Supreme Court confirmed that the *Charter* has no application to private family law custody and access disputes. Another possible concern of the courts, raised in *Miltenberger v. Braaten*, is that the courts are reluctant "to require the government to spend limited resources in providing legal counsel for private individuals."<sup>74</sup>

However, there is a rationale to support the application of section 7 in private family law cases. There have been several cases in the U.S. where courts have recognized that there may be a constitutional right to state-

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69. *Children's Aid Society of London and Middlesex v. C.(T.)*, [1999] O.J. No. 5506 (Sup. Ct. J.) (QL).

70. Thompson, *supra* note 5 at 462.

71. *R.A.F. v. Saskatchewan (Department of Justice)*, [2003] S.J. 783 (Q.B.) (QL).

72. [2000] N.S.J. No. 13 (C.A.) (QL).

73. [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117.

74. [2000] S.J. 599 (Q.B.) (QL).

funded counsel in certain private family law cases. For example, in the case of *M.L.B. v. S.L.J.*<sup>75</sup> the U.S. Supreme Court ruled that an indigent parent who was fighting a step-parent's application to adopt her child should be able to appeal the trial judge's decision to terminate her parental rights without having to pay the application fee that was normally required. The U.S. Supreme Court based its decision on the fourth amendment's due process and equal protection clauses and, similar to the Supreme Court of Canada in *G.(J.)* found that, "parental status termination was irretrievably destructive of the most fundamental family relationship."<sup>76</sup>

Professor Bala points out that there are some situations in which a parent may have a stronger claim to state-funded legal representation for a private family law matter, such as cases involving allegations of child abuse or when one indigent parent has the benefit of legal aid and the other has no representation.<sup>77</sup> The Canadian Bar Association (C.B.A.) recently announced that its "Past President J.J. Camp, Q.C., is heading up a four-person, blue-ribbon legal team that is launching a test case to challenge British Columbia's legal aid plan."<sup>78</sup> One of the members of the team pointed out that, "Without legal aid, access to justice is a hollow phrase, as many people simply cannot take advantage of their legal rights."<sup>79</sup> In case this legal challenge fails, the C.B.A. is also attempting to get provincial government to work together to apply pressure on the federal government to increase their transfer payments and to earmark these specifically for legal aid funding.

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75. 519 U.S. 102 (1996).

76. *Ibid.* at 555.

77. Nicholas Bala, "The Constitutional Right to Legal Representation in Family Law Proceedings" in Canadian Bar Association, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2002), online: Canadian Bar Association <[http://www.cba.org/CBA/pdf/2002-02-15\\_case.pdf](http://www.cba.org/CBA/pdf/2002-02-15_case.pdf)>.

78. Canadian Bar Association, News Release, "CBA Announces Legal Team to Lead Court Challenge on Constitutional Right to Legal Aid" (19 February 2005) online: Canadian Bar Association <[http://www.cba.org/CBA/News/2005\\_Releases/2005-02-19\\_lacounsel.asp](http://www.cba.org/CBA/News/2005_Releases/2005-02-19_lacounsel.asp)>.

79. *Ibid.*

## IV. Assisting Unrepresented Litigants: Present and Future

The problems of unrepresented litigants have been recognized and there are resources available to assist these litigants. There is some (albeit limited) access to lawyers and paralegals, as well as legal information clinics and alternative dispute resolution. Although these resources provide some relief, unrepresented litigants—and other participants in the justice system—need more.

### *A. Duty Counsel*

The Kingston Survey showed that 86 percent of the unrepresented litigants who responded had made use of the services of the duty counsel at the Kingston Family Court. These results echo a general consensus in the literature that the duty counsel funded by legal aid programs provide a valuable and necessary service for unrepresented litigants. However, duty counsel are limited in the services they are allowed to provide. They can only provide services to unrepresented litigants if they meet the income guidelines, which are the same as those used to determine eligibility for legal aid certificates. Many people are excluded because of the restrictive income requirements. For example, you are not eligible for duty counsel assistance if you have liquid assets of \$1,500 or more. Duty counsel are also not allowed to assist litigants with property disputes or uncontested divorces. They cannot provide independent legal advice on separation agreements.<sup>80</sup> They can, however, provide advice about the role of counsel, referrals, and court procedures, and they can review pleadings, draft documents, discuss agreements, provide general legal advice, assist in reaching settlement and attend court with an unrepresented litigant.<sup>81</sup> The amount of assistance duty counsel can provide is also limited by the number of people whom they must assist in a day. Some family courts also offer “advice counsel” who can

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80. Gord Macdonald & Helena Birt, “Duty Counsel and the Self-represented Litigant” (2002) 19 Can. Fam. L.Q. 497 at 507.

81. *Ibid.* at 506.

provide up to twenty minutes of free legal information and advice to any litigant, irrespective of their financial status.

Legal Aid Ontario has also started three new family law legal clinics in Ontario called Family Law Offices (F.L.O.s)—one in Toronto, one in Ottawa and one in Thunder Bay. Lawyers work full time in these clinics to assist people who have obtained a legal aid certificate but who cannot find a lawyer to accept their certificate. A report done on this project shows that the clients are very satisfied with the services provided by these lawyers.<sup>82</sup> At present, however, these staff lawyers cost the same amount as the private lawyers hired under the certificate program. This may be due in part to the fact the private lawyers have been referring the more complicated cases to F.L.O.s. Whereas the private family lawyers are restricted as to the number of hours they can bill for any one client, the F.L.O. lawyers do not face the same restrictions.<sup>83</sup>

### *B. Agents*

Rule 4(1)(c) of the *Family Law Rules*<sup>84</sup> theoretically permits a party to be represented by a non-lawyer. However, in a series of decisions, courts have limited this right to one that should be used only in special circumstances.<sup>85</sup> In *Carroll v. Carroll*,<sup>86</sup> the Ontario Court of Justice ruled that to approve the use of an agent a judge must consider the proposed involvement of the agent, the education and expertise of the agent, and the particular circumstances of the matter before the court. The court can also limit the involvement of the agent. The agent must obtain special permission to represent the litigant in court.<sup>87</sup> In *Clarke v. Clarke*,<sup>88</sup> the Ontario Superior Court ruled that prior authorization was required before an agent could help unrepresented petitioners prepare

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82. Colin Meridith & Peggy Malpass, *Evaluation of the Legal Aid Ontario Pilot Staff Family Law Offices: Final Report* (2002), online: Legal Aid Ontario <<http://www.legalaid.on.ca/en/info/PDF/FLO-Evaluation-Report.pdf>>.

83. *Ibid.* at 68.

84. *Supra* note 34.

85. Trussler, *supra* note 16.

86. [2000] O.J. No. 3969 (Ct. Jus.) (QL) at para. 8.

87. *Ibid.*

88. [2001] O.J. No. 3797 (Sup. Ct. J.) (QL) [*Clarke*].

court documents.<sup>89</sup> Because there is no current certification for agents, courts have to decide whether or not an agent is qualified to assist a litigant for each individual case. This principle was affirmed in *Karrach v. Karrach*:

When a firm of entrepreneurs offers divorce services to members of the public, neither Parliament nor the court on its behalf can control the quality of the reconciliation and mediation advice that is provided. The absence of this safeguard alone is a sufficient reason to require court approval when a spouse wants someone other than a lawyer to represent [him or her] in divorce proceedings.<sup>90</sup>

In *Clarke*, the Court explained that there are dangers involved in allowing agents to prepare documents without any acknowledgement of their assistance. Judicial reception of unauthorized representation may be perceived as condoning a breach of the rules, ignoring the weight of jurisprudence and perhaps as being complicit in or indifferent to the commission of a regulatory offence. The result may be to undermine the rule of law and bring disrepute to the administration of justice.<sup>91</sup> The *Clarke* decision has curtailed the use of agents in family courts in Ontario.

A report by the Ontario Ministry of the Attorney General recommends that new guidelines be developed to encourage the use of agents in situations where a couple has no children or significant assets and where spousal support is not at issue. It also recommends that agents be allowed to assist with uncontested divorces if proceedings are commenced within one year of separation and the couple has entered into a separation agreement that resolves all the relevant issues.<sup>92</sup> Most unrepresented litigants are dealing with issues involving their children and are unable to resolve their disputes on their own. If the use of agents is limited in this way, then agents will be of little use to the majority of unrepresented litigants.

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89. Thompson, *supra* note 5 at 476.

90. [1995] A.J. No.1037 (Q.B.) (QL) at para. 2.

91. *Clarke*, *supra* note 88 at para. 37.

92. Ontario, Ministry of the Attorney General, *A Framework for Regulating Paralegal Practice in Ontario, Executive Summary and Recommendations* (9 June 2000).

### C. *Unbundled Legal Services*

Although most lawyers are full-service lawyers, some are willing to offer unbundled legal services. These lawyers offer specific services such as general legal advice about their case, advice for A.D.R., evaluation of a client's case, procedural information, reviewing or preparing correspondence or documents, factual investigations, legal research, examinations for discovery, planning negotiations, planning for a court appearance, providing support during a trial or assisting with an appeal.<sup>93</sup> Although unbundled legal services cannot provide complete relief for unrepresented litigants, lawyers have been encouraged to offer these services on the theory that "some services are better than no services. Clients who are appearing in court with some help will mean less clogging up of the system."<sup>94</sup> Providing unbundled legal services may create a "potential niche market for lawyers," opening up "a different kind of specialization."<sup>95</sup> In the U.S. there are even some private legal clinics that provide unbundled legal services. These clinics specify the cost of each service in advance depending on how much time it takes.<sup>96</sup>

These services have raised some concerns in Canada. The most controversial issue is the ghost writing of pleadings, as this could lead to allegations of fraud, contempt or negligence.<sup>97</sup> If lawyers assist litigants in drafting pleadings, they are expected to inform the court of this so that the court is not misled. Lawyers are often reluctant to put their names on such pleadings, as they do not want to be seen by the court as the solicitor of record. Another reason that this concept has not grown to the same extent in Canada may be related to liability. If a lawyer has not been involved in a case from the beginning and is just providing a specific service to the client, there is a danger that the lawyer might miss

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93. Thompson, *supra* note 5 at 470.

94. Dean Jobb, "N.S. Lawyers Launch Pilot Project to 'unbundled' legal services" *The Lawyers Weekly* 22:33 (10 January 2003) (QL).

95. *Ibid.*

96. Forrest Mosten, "Unbundling of Legal Services and the Family Lawyer" (1994) 28 *Fam. L.Q.* 421 at 425.

97. Jobb, *supra* note 94.

an important fact in the case or overlook a conflict of interest. However, lawyers can avoid these pitfalls if they remember to obtain a retainer that clearly sets out what they will be doing for their clients, take the time to ensure that there is no conflict of interest and identify their role in preparing any documents.<sup>98</sup>

#### *D. Pro Bono Legal Services*

The Canadian Bar Association recently suggested that their members should dedicate 3 percent of their billings to *pro bono* work. Pro Bono Law Ontario (P.B.L.O.) attempts to encourage a *pro bono* ethic in the legal community. As the director of P.B.L.O. explains,

*Pro bono* is meant to complement, not replace, legal aid. *Pro bono* should never be viewed as a substitute for a properly funded legal aid plan. It is the obligation of the government to provide adequate levels of legal aid funding, especially in core areas such as family law and criminal law. Pro Bono Law Ontario is focusing on pragmatic methods for enhancing access to the justice system for individuals who are not poor enough for legal aid, yet lack the means to hire a lawyer.<sup>99</sup>

One of the services offered by P.B.L.O. is a family law clinic staffed by family lawyers who are offering their services for free. Students have also been offering *pro bono* legal services at the family courts in Toronto and Kingston through “The Family Law Project,” sponsored by Pro Bono Students Canada. The purpose of this program is to assist unrepresented litigants in filling out paperwork and getting oriented to court procedures. The students are limited in that they cannot provide any legal advice. However, they have more time to sit and listen to people and to deal with the emotional side of the issues that unrepresented litigants present than a duty counsel does.

#### *E. Free Legal Information*

Free legal information about family law issues is provided in various forms. An organization called CLEO (Community Legal Education

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98. *Ibid.*

99. Lynn Burns, “*Pro Bono* Law Ontario” [unpublished, on file with author].

Ontario) provides free pamphlets on a number of family law issues including child support guidelines, custody and access, getting divorced, pension benefits and common-law and gay and lesbian relationships. These materials can also be obtained online.<sup>100</sup>

There are Family Law Information Centres at most Ontario courthouses. These centres are often staffed by “advice counsel” paid for by Legal Aid Ontario. These lawyers can provide up to twenty minutes of legal advice to anyone regardless of financial status but can only assist a client further than this if they meet the financial requirements of Legal Aid Ontario.

The Internet provides limited assistance to unrepresented litigants. The *Family Law Rules* and forms are made available for free online at the Ministry of the Attorney General’s website.<sup>101</sup> There is also a great deal of information about family law available online. There is even a site called “CompleteCase.com” that offers an “online divorce” for people in some Canadian provinces, but not yet in Ontario.<sup>102</sup> Many sites, however, are simply promotional and do not offer much substantive legal advice. It would be difficult for an unrepresented litigant who has not had much education or any legal training to ascertain whether the information that is being provided for free on the Internet is legally correct or applies in their situation.

The studies done in Nova Scotia, the U.S. and Australia all concluded that offering information and forms online in a user-friendly way is a cost-effective method of reaching out to and helping unrepresented litigants. Many of the courts in these jurisdictions have since developed websites that include information about court procedures, substantive legal matters and where to get further assistance with family law matters. However, as was reflected in the Kingston Survey, it is important to advertise these services properly so that unrepresented litigants are made aware of them.

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100. See online: CLEO <<http://www.cleo.on.ca/english/pub/onpub/subject/family.htm>>.

101. See online: Ministry of the Attorney General  
<<http://www.attorneygeneral.jus.gov.on.ca/>>.

102. See online: Complete Case <<http://www.completecase.com/?ri=51>>.

## *F. Alternative Dispute Resolution*

One solution that has often been suggested to the increasing numbers of unrepresented litigants in the courts is to direct people towards A.D.R. programs such as mediation. Most family courts offer mediation services that are geared to participants' income. Many of the people who use these services are unrepresented. The Ontario Association for Family Mediators, which provides training and certification for professionals wanting to provide family mediation services, offers general information about family mediation for prospective clients.<sup>103</sup> The mediators hired by the Ontario government to staff the family court mediation services are all certified by this organization.

In Nova Scotia, courts are offering a new service called conciliation. The conciliator is basically an intake person who attempts to settle issues between the parties, especially child support, access, and custody issues. The conciliator also drafts consent orders, directs matters to the court and can make interim orders for child support.<sup>104</sup> A review of these conciliation services found that the clients were generally happy with the quality of service and the results obtained. Fifty-one percent of the parties reached an agreement in three or fewer sessions, which represents a huge cost saving due to a decrease in the use of court time.<sup>105</sup> This program has reduced court appearances of unrepresented litigants by 25 percent.<sup>106</sup>

Despite the apparent benefits of A.D.R., the Ministry of the Attorney General offers an important warning about family mediation:

A party considering mediation should speak to a lawyer before seeing a mediator. It is helpful to know the law and one's rights and obligations first, before mediation starts. Lawyers will usually not go to mediation with the parties. But, it is important for parties to show any agreement reached during mediation to their lawyers. Mediation is not appropriate for everyone, particularly in cases where there has been violence or abuse.

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103. See online: Ontario Association for Family Mediation <<http://www.oafm.on.ca/index.html>>.

104. Nova Scotia Report, *supra* note 4 at 5.

105. *Ibid.* at ii, 14.

106. *Ibid.*

Where one party is afraid of, or intimidated by, their spouse/partner, mediation may not be a good idea.<sup>107</sup>

Not all mediators are created equal, and not all couples are ready for mediation or are able to communicate effectively or safely enough to benefit from mediation. An advice counsel could help litigants decide if mediation would be effective in their case and could provide some preliminary substantive legal information, which makes the mediation more worthwhile and efficient.

### *G. Simplifying the Law and Court Procedures*

To a certain degree, family law has already been simplified. The *Family Law Rules* are intended to be simpler than the regular rules of civil procedure, and the *Federal Child Support Guidelines* are intended to make it easier for litigants, lawyers and the courts to determine eligibility for child support. Despite this, most unrepresented litigants still have difficulty understanding their legal rights and court procedures. Is it possible to simplify things even more?

Professor Thompson has expressed a concern about this: "If the courts move too far to accommodate the unrepresented, litigants will be encouraged to proceed on their own in even greater numbers. But, if too little is done to recognize or assist, inefficiencies and costs will plague the system and costs will be imposed upon represented parties."<sup>108</sup> Although there is not much information about the effect of simplifying court procedures on the number of unrepresented litigants, the report of the national conference held in Florida states that the programs being offered for unrepresented litigants in the U.S. are not encouraging litigants to be unrepresented.<sup>109</sup>

There is a further concern that if we oversimplify court procedures courts may become overburdened by irrelevant and confusing evidence, and that the fairness of the court procedures will suffer as a result. As

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107. See online: Ministry of the Attorney General  
<<http://www.attorneygeneral.jus.gov.on.ca/english/family/mediation.asp>>.

108. Thompson, *supra* note 5 at 488.

109. U.S. Report, *supra* note 2 at 2.

Professor Delisle points out, “[t]he trial judge uses the rules of evidence to ensure efficiency, fairness and the closest possible approximation to the truth.”<sup>110</sup> If we relax these rules too much, judges will have a difficult time sifting through evidence. Furthermore, due to the highly emotional and antagonistic nature of many family law cases, judges will have great difficulty determining what is fair and what is in the best interests of all the parties involved, including children.

However, there are certain areas of family law that are more confusing than they need to be. One of these areas is spousal support. The courts have not been able to develop firm guidelines on who should be eligible for spousal support, how much should be awarded, and for what period of time spousal support should be paid. Thankfully, there are now proposed advisory spousal support guidelines that will likely assist in clarifying this contentious area of family law.<sup>111</sup> More guidance is also required in the area of pension division. The federal government has provided some assistance by passing legislation that makes it possible to divide Canada Pension Plan payments at the source. However, private pensions are still difficult to value and the division of these frequently causes confusion for family lawyers and litigants.<sup>112</sup> Codifying and clarifying support and pension entitlements may be of assistance to unrepresented litigants because they create certainty, thereby making it easier for litigants to know and understand their legal rights and obligations and to reach settlement.

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110. Ronald Delisle, *Canadian Evidence Law In a Nutshell* (Scarborough, Ont.: Thomson Carswell, 2002) at 3.

111. See Carol Rogerson & Rollie Thompson, “Spousal Support Advisory Guidelines: A Draft Proposal” (Report presented to the Department of Justice Canada, Family, Children and Youth Section, January 2005), online: Department of Justice <<http://www.justice.gc.ca/en/dept/pub/spousal/project/index.html>>. These guidelines are advisory only, and are not being legislated by the federal government. See Ontario Bar Association, News Release, “Just Released—Draft Spousal Support Guidelines” (31 January 2005), online: Ontario Bar Association <[http://www.oba.org/en/main/home\\_en/Newsdetails.aspx?no=NEWS01312005-5143-1E](http://www.oba.org/en/main/home_en/Newsdetails.aspx?no=NEWS01312005-5143-1E)>.

112. Thompson, *supra* note 5.

## Conclusion

It is clear that there are too many unrepresented litigants in the family courts in Ontario and that this is causing problems both for the justice system and for the litigants themselves. Other common law jurisdictions have made a concerted effort to put together a plan to address these problems. Ontario must do the same. In order for justice to be done we need programs that will assist people to represent themselves when they can and other programs, such as legal aid, that will provide financial assistance so that they can obtain legal representation for their family law matter if they need it. This is especially true where the issue is custody, access or another issue that involves the best interests of children.

The unrepresented litigants who replied to the survey at the Kingston Family Court were not represented because they did not have the resources to hire a lawyer. Almost all of them would have hired a lawyer if they could afford it. This illustrates the need for professional legal services that people can afford. The most obvious way to increase the availability of legal services is to increase the funding for legal aid. It is also evident that the financial eligibility for legal aid services is much too low. There is a large and growing group of people who cannot afford to pay lawyers' fees and who are not financially eligible for legal aid.

It is difficult to generalize the results of the Kingston Survey because the sample of unrepresented litigants was small and the study was only conducted in one court. However, some of the results of that study are similar to the results of similar studies done in the U.S. and Australia. Most notably, all three studies found that most unrepresented litigants were unrepresented due to an inability to afford legal services and that many unrepresented litigants had difficulties filling out forms, following court procedures and talking to other lawyers. These litigants cause numerous problems for judges, lawyers and court staff and may be taking up a disproportionate amount of court time. Some of the programs that have been implemented to assist unrepresented litigants elsewhere, most notably the conciliator program in Nova Scotia, could

be implemented in Ontario and would go some way to solving the problem.

Other ways of improving access to legal services are to encourage lawyers to unbundle their services, to offer *pro bono* services and to accept Legal Aid certificates. The use of agents is also a possibility especially if paralegals become a regulated profession and there is some quality assurance. Another program that shows the great potential for Ontario courts is Nova Scotia's conciliator program. Having such a program in Ontario may decrease the number of unrepresented litigants who go to court and would assist these litigants in reaching a settlement in a much less adversarial way.

Much more research should be done on unrepresented litigants. We need more information about who these litigants are, why they are unrepresented and which of their needs are going unmet. A study similar to the American Bar Association study, in which the experience of unrepresented litigants was compared to those of represented litigants, would help in determining whether the unrepresented litigants really do take up more court time and settle less often than do represented litigants. Such a study should be done on a wide scale at several different family courts and should include a comparator or control group. To design effective programs for unrepresented litigants, we need to know more about them and to have statistics that will serve to convince government and other sources to provide funding for these programs.

We also need to ascertain which programs work best to assist unrepresented litigants and how we can tailor programs so that they meet the needs of those who cannot afford legal services, as well as those who choose not to hire a lawyer despite having significant financial resources. A study should be done on "best practices" that looks at effective programs for unrepresented litigants around the world. A national or even provincial conference, similar to the conference held in Florida in 2001, would help set an agenda and strategy for aiding unrepresented litigants.

What is important is to ensure that some steps are taken to relieve both the unrepresented litigants and the justice system as a whole. Our *Charter of Rights and Freedoms* guarantees equality before the law. Being self-represented because of a distrust of lawyers is one thing, but it is

difficult to see how someone who is unrepresented because they cannot afford a lawyer is “equal before the law” to someone who does have the means to pay for legal representation. If we do not address this problem soon, these litigants will continue to threaten the balance of the scales of justice.

## APPENDIX

### Results of the Kingston Family Court Survey

(Total number of respondents = 35)

ANSWER	NUMBER OF RESPONDENTS	PERCENTAGE OF RESPONDENTS
<b>1. What family law matters are you dealing with?</b>		
Divorce	8	23%
Access	11	31%
Spousal Support	5	14%
Variation of an order	10	29%
Children's Aid matter	4	11%
Custody	12	34%
Child Support	15	43%
Property	2	6%
<b>2. Are you :</b>		
Male	22	63%
Female	13	37%
<b>3. How old are you?</b>		
Under 20	3	9%
21-30	6	17%
31-40	10	29%
41-50	7	20%
51-60	4	11%
60+	1	3%
<b>4. Do you have any children living with you that you are supporting? How many?</b>		
Yes	17	49%
1	8	23%
2	4	11%
3	2	6%
4 or more	3	9%
<b>5. What is your main source of income?</b>		
O.W., O.D.S.P., EI., OAS, WCB	18	51%
Employment	16	46%
Other	1	3%

<b>6. How much income does your family unit earn per year?</b>		
Under \$10,000	12	34%
\$10,000-\$20,000	7	20%
\$20,000-\$30,000	11	31%
\$30,000-\$40,000	0	0%
\$40,000-\$50,000	1	3%
\$50,000+	4	11%
<b>7. What services have you made use of to assist you with your family law matter?</b>		
Family Law Information Center	13	37%
Duty Counsel	30	86%
Mediation	8	23%
Court staff	9	26%
Lawyer	3	9%
Other	1	3%
<b>8. Why don't you have a lawyer?</b>		
Can't afford one	29	83%
Not eligible for legal aid	12	34%
Did not apply for legal aid	5	14%
Had lawyer but can no longer afford to pay them	6	17%
Can do as good a job as a lawyer by representing myself	3	9%
Don't trust lawyers	3	9%
Have had a previous negative experience with lawyers	4	11%
Don't know how to find one	2	6%
<b>9. Which of the following have you found difficult to do without a lawyer?</b>		
Filling out forms	21	60%
Appearing in court by myself	7	20%
Knowing my legal rights	20	57%
Negotiating with/talking to lawyers	13	37%
Nothing	2	6%
All of the above	5	14%

<b>10. Do you feel that not having a lawyer has:</b>		
Increased the amount of time it is taking to resolve your family law matter	23	65%
Decreased the amount of time it has taken to resolve your family law matter	1	3%
Not made any difference in terms of time	10	29%
<b>11. Have you tried to negotiate a settlement with the other party? If so, what was the outcome?</b>		
Yes-unsuccessful	20	57%
Yes-successful	5	14%
No	10	29%