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The Vicious Spiral of Self-Representation in Family Law Proceedings

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A lot of good research on litigants without counsel has been published in the last three years, most notably, in my view, [Julie Macfarlane's *Identifying and Meeting the Needs of Self-represented Litigants*](#), a [trio of papers](#) published by the [Canadian Research Institute on Law and the Family](#) on the views of Alberta judges and family law lawyers, and a report by the Canadian Research Institute on Law and the Family with professors [Nicholas Bala](#) and [Rachel Birnbaum](#) (in press) on the results of a national survey of judges and lawyers. Although this research doesn't necessarily label it as such, I've noticed that there's a bit of a slippery slope effect to litigating without counsel, in which the decision to self-represent, whether a choice was involved or not, seems to trigger a cascade of adverse effects that ultimately result in litigants without counsel achieving worse results in every major area of family law than would have been achieved with counsel.

The judges and lawyers surveyed firstly said that by and large litigants without counsel have unrealistically high expectations of the outcomes they are likely to achieve. (In the Alberta research, three-quarters of judges and almost 90% of lawyers said that litigants without counsel "always" or "usually" have unrealistic expectations of outcome; almost half of judges and lawyers outside Alberta said the same thing in the national survey, and 30% said that litigants without counsel "sometimes" have unrealistic expectations of outcome.)

Perhaps as a result of their overly optimistic expectations, litigants without counsel are more likely to go to trial than settle. (In Alberta, 87% of judges and 89% of lawyers said that settlement without trial or before the end of trial is "less likely" or "much less likely" if one party is self-represented. In the national study, almost 60% of judges and lawyers said that settlement is "less likely" or "much less likely". The national survey also showed that 70% of respondents from Alberta and 55% of respondents from the rest of Canada believe that litigants without counsel are more likely to take unreasonable positions based on principle.)

When litigants without counsel get to trial, problems arise as a result of their unfamiliarity with the law and court processes. (In the Alberta study, a range of 85 to 100% of judges said that additional challenges "always" or "usually" arise in cases involving a litigant without counsel because of their unfamiliarity with the applicable legislation, the rules of evidence, the rules of court and hearing and trial processes. A range of 70 to 77% of judges and lawyers outside of Alberta said the same thing in the national survey.)

At the end of the day, litigants without counsel achieve worse results than litigants with counsel. (In the national research, a range of 51 to 55% of judges and lawyers in Alberta thought that litigants without counsel achieved worse results on child support and spousal support, parenting arrangements and the division of property; 32 to 44% of judges and lawyers in the rest of Canada felt the same way. About 18% of judges and lawyers said that there is no difference in the results achieved by self-represented litigants on support issues, about 20% said that there is no difference in the results on support issues and about 13% said that there is no difference in the results for property division.)

(However, despite their difficulties with court and court processes, litigants without counsel are generally treated well by judges. In [The Rise of Self-representation in Canada's Family Courts](#) (summary), a study which included a survey of Ontario litigants, Nicholas Bala, Rachel Birnbaum and [Lorne Bertrand](#) found that 14% of litigants without counsel believed that they were treated "very well" by the bench, 39% thought the way they were treated was "good" and 13% thought they were "not treated well at all." According to the national survey, 97% of the lawyers from Alberta and 74% of the lawyers from the rest of Canada believe litigants without counsel receive "very fair" or "fair" treatment from the bench.)

It appears from the research that litigants without counsel find themselves caught in a vicious spiral. Self-represented litigants generally have unrealistically high expectations for the outcome of their cases, which reduces the likelihood that their cases will be resolved without trial. When they do proceed to trial, their lack of knowledge of the governing legislation, the rules of evidence, the rules of court and court processes frequently causes additional problems and doubtless increases the length of trials and the number of adjournments, and, when their trials do complete, self-represented parties usually achieve worse results than they would have with counsel.

I'll provide some thoughts on ways of interrupting the slippery slope in a future post; in the meantime, the results of the research on the attitudes and outcomes of litigants without counsel should be factored into the family justice reform work being undertaken across the country. Mandatory mediation and other diversionary steps strike me as an obvious contribution to a solution.

This comment was originally posted on [Access to Justice in Canada](#).

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