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Comparing the Views of Alberta Judges and Lawyers with Those in the Rest of Canada on Selected Family Law Issues

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Report Commented On: Canadian Research Institute for Law and the Family, *Comparing the Views of Judges and Lawyers Practicing in Alberta and in the Rest of Canada on Selected Issues in Family Law: Parenting, Self-represented Litigants and Mediation* (2016)

The Canadian Research Institute for Law and the Family recently released a report that compares the views of Alberta judges and family law lawyers with legal professionals in the rest of Canada on parenting after separation, self-represented litigants, access to justice, and mediation. The report, written by John-Paul Boyd and myself, presents the findings of a survey conducted at the 2014 National Family Law Program in Whistler, B.C., and provides recommendations in several areas including:

- the language used in the *Divorce Act,* RSC 1985, c 3 (2nd Supp), with respect to the care of children;
- the provision of unbundled legal services to promote access to justice;
- the use of mandatory mediation where at least one party is self-represented;
- the provision of limited legal services in family law matters by paralegals; and
- the use of standardized questionnaires by lawyers screening for family violence.

The report notes some striking differences between the views and experiences of Alberta practitioners and those from elsewhere in Canada.

Shared Custody and Shared Parenting

With respect to the resolution of parenting disputes after separation, fewer of the family law cases of respondents from Alberta resulted in a form of shared custody, defined as the equal or near-equal distribution of children's time between separated parents, compared to the cases of respondents from the rest of Canada. Although almost the same proportion of Alberta respondents and respondents from the rest of Canada said that the number of their cases resulting in shared custody has *increased substantially* or *increased somewhat* in the last five years, respondents from Alberta were more likely than respondents from the rest of Canada to say that the number had *increased somewhat* or *stayed the same*, and the proportion of respondents from the rest of Canada who said that the number *increased substantially* was about a third greater than the proportion of Alberta respondents. These results may be a function of Alberta's generally more conservative political and social values but are more likely a consequence of the geographic separation of parents owing to lengthy periods of site-based work in the oil patch or the interprovincial relocation of separated parents to take work in the province, making shared custody arrangements difficult if not impossible to implement.

However, Alberta respondents also reported a substantially higher rate of cases resulting in shared parenting, defined as the equal or near-equal distribution of decision-making between separated parents, than respondents from the rest of Canada. The difference in the views of Albertans may result from the child-centred nature of the province's *Family Law Act,* SA 2003, c F-4.5, and its presumption that parents are the guardians of their children, during their relationship and after its dissolution. This presumption of guardianship and the general reluctance of the courts to remove guardianship or a right of access from a parent may explain the lower rate of cases resulting in limited contact or no contact between the child and a parent reported by Alberta respondents compared to those from the rest of Canada.

Amending the *Divorce Act*

Although a significant majority of all respondents were in favour of amending the *Divorce Act* to change the language used to describe the post-separation care of children from "custody" and "access" to alternative terminology such as "parental responsibilities" and "parenting time," a slightly larger proportion of respondents from Alberta supported the proposed amendment than respondents from the rest of Canada. The higher rate of support may stem from the existing use of such alternative terminology by Alberta's *Family Law Act* and either an established preference for such language or a preference toward eliminating the dissonance between federal and provincial terminology.

A significant majority of all respondents were opposed to amending the *Divorce Act* to create a presumption of shared custody, and the proportion of Alberta respondents opposed to such an amendment was only slightly lower than respondents from the rest of Canada. The views of Alberta respondents regarding a presumption of shared custody may reflect a positive view of the presumption of parental guardianship in Alberta's *Family Law Act* or a reaction to the conflict suggested by Albertans' comparatively higher rate of court involvement in family law matters and their higher divorce rate.

Interestingly, the comments provided by respondents from Alberta both in support of and opposed to such an amendment tended to concern conflict and power imbalances between parents or tended to be neither child- nor parent-centred, while the comments of respondents from the rest of Canada tended to concern the best interests of children.

Self-Represented Litigants and Dispute Resolution

Findings from the survey indicated that over three-quarters of all respondents thought that there are more self-represented litigants now than there were three years ago, with lawyers and judges from Alberta being even more likely to report this than legal professionals from the rest of Canada. Further, while a substantial majority of all respondents said that added challenges arise in cases involving a self-represented litigant, Albertans were more likely to say that these challenges *always* or *usually* arise than respondents from the rest of Canada. These challenges are frequently related to litigants' lack of familiarity with the applicable legislation, the rules of court and court processes and the law of evidence. Alberta judges and lawyers also said that settlement is much less likely in cases involving at least one self-represented litigant than respondents from the rest of Canada.

More than one-half of all respondents thought that self-represented litigants obtain outcomes that are worse than litigants with legal representation with respect to child support, spousal support and the division of property. When asked what might improve self-represented litigants' use of

the court system and promote settlement of their cases, the most common measures supported by respondents was a requirement that self-represented litigants attend an information session on the law and court processes and providing these litigants with plain language guides to court and trial processes. Respondents from Alberta were more than twice as likely to support mandatory mediation when at least one party is self-represented than were respondents from the rest of Canada.

Lawyers from Alberta were slightly more likely to report that they provide services on an unbundled basis than were lawyers from the rest of Canada; they were also more likely to say that they were aware of other lawyers providing these services. The most common unbundled service that lawyers reported providing was legal advice. The availability of legal services on an unbundled basis could be a more affordable alternative for self-represented litigants than full representation, and could serve to promote case settlement by ensuring that these litigants have the benefit of some legal advice.

Another mechanism that might serve to provide self-represented litigants with some measure of legal assistance is the use of licensed paralegals to provide limited legal services in certain family law disputes. A slightly higher proportion of respondents from Alberta supported the provision of legal services by paralegals than did respondents from the rest of Canada.

Lawyers from Alberta were considerably less likely to say that they always screen for family violence when referring a case to mediation than were lawyers from the rest of Canada, and a higher proportion of lawyers in Alberta who do screen for family violence reported that they do not use a standardized screening device. The proportion of cases referred to mediation that do not result in a settlement was higher in the rest of Canada than in Alberta.

Conclusion

The views of Alberta legal professionals on important current issues in family law favour change and improving access to justice to a greater degree than those of their counterparts in the rest of Canada and are surprisingly at odds with Alberta's generally conservative social values. Respondents from Alberta strongly support reforming the language of the federal *Divorce Act* on the care of children after separation, and are more likely to support the provision of limited scope legal services by lawyers, the use of paralegals to provide limited legal services, and the use of mandatory mediation when one or more parties to a family law dispute are not represented by lawyers. Finally, not only are lawyers in Alberta less likely to screen for family violence than lawyers in the rest of Canada, they are also less likely to use a standardized tool when they do screen for violence.

Based on these and other findings, we recommend that:

- the federal government consider amending the language used by the *Divorce Act* to describe the post-separation care of children;
- awareness of unbundled legal services be improved among the bar and general public;
- a pilot program be implemented to evaluate the provision of legal services in family matters by paralegals;

- the provincial government consider implementing legislation allowing a party to trigger a course of mandatory mediation when one or more parties to a family law dispute are self-represented; and,

educational efforts be made to raise the awareness among members of the Alberta bar of benefits of screening for family violence and the availability of standardized instruments for that purpose.

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