

Family

Judicial perspectives on self-represented litigants in family courts

By **Rachel Birnbaum and Nicholas Bala**

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(October 13, 2020, 2:57 PM EDT) -- The growing numbers of self-represented family litigants is a major concern, not only in Canada but internationally. Self-represented litigants may not achieve just outcomes, and the lack of legal representation often slows down the court process, thus imposing costs on the court system and those who have lawyers. There are also concerns that the lack of legal representation may heighten tensions between parents and result in outcomes that may jeopardize the well-being of children.

The Canadian Judicial Council issued a Statement of Principles to provide guidance for judges facing the challenges of dealing with self-represented litigants, and there is now a significant body of jurisprudence that establishes the duties of judges in cases where one or both parties are self-represented. There is, however, little research about how judges feel about the growing number of self-represented litigants.



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As part of an ongoing study about the use of limited scope retainers, we surveyed 57 Ontario judges to learn about their views and experiences with the self-represented family litigants.

Increasing numbers of SRLs

Consistent with other research, the judges report a significant increase in the number of unrepresented family litigants in their courts over the past decade. Over two thirds indicate that there is "much more" self-representation, and almost all of the others see "more" self-represented litigants.

All the judges agree that a significant factor in self-representation is that litigants cannot afford a lawyer and are not eligible for legal aid. A significant number of the judges (67 per cent) also agreed that many litigants decide not to have a lawyer because they believe that they know enough about family law to represent themselves.

Gender differences

A significant portion of the judges (44 per cent) believe that there are gender differences in the reasons that parties are self-represented. Men may be more likely to decide to represent themselves so that they can directly confront their former partners. These judges believe that women are more likely to be self-represented for economic reasons, they tend to be in more financially precarious situations and unable to afford the services of lawyers.

As one judge observed: "I think more men than women are prone to thinking they can do a better job themselves and also will not pay for a lawyer even if they can afford it."

Consequences of self-representation

Almost all the judges (95 per cent) indicated that self-representation significantly increases the

amount of court time required to resolve a case, especially if both parties are self-represented. About two thirds of the judges indicated that settlement is less likely if one or both parties are self-represented.

As one judge observed: "Self-reps are reluctant to settle because they do not know what a reasonable settlement is." Interestingly, however, almost a fifth (18 per cent) think that settlement is more likely if both parties are unrepresented.

Challenges with self-represented

Almost all the judges offered comments about the challenges that they face in cases where one or both parties are self-represented. Clearly one of the challenges is that self-represented parties lack an understanding of the substantive and procedural law and, in particular, don't have a sense of what type of evidence they need to introduce.

As one judge observed: "The self-represented party may not know what evidence is required for the judge to make the necessary findings. They might call witnesses who don't have relevant testimony or ask irrelevant questions of witnesses." The judges indicate that the lack of knowledge at least results in more court time being devoted to cases where parties are self-represented.

Many judges expressed sympathy with the self-represented, as well as concerns about cuts to legal aid, while recognizing that these litigants often have unrealistic expectations of the court process.

As one judge observed: "Many are overwhelmed; they don't understand the rules, the law or the forms.... Many think the judge will rule at the first court appearance and it will be over. They are discouraged when they realize how often they need to miss work [and] how many court appearances are necessary before they can have a final order."

Judges recognize that they have a challenging role in family cases where parties are self-represented; for example, commenting on the difficult balance they must achieve: "Explaining the law; managing the emotions of the self-represented, including the self-represented feeling at a disadvantage because they cannot afford a lawyer; trying to reassure the self-represented that the process is fair while not alienating the party who has a counsel."

Conclusions

Innovative developments such as promotion of unbundled legal services and increased use of technology can help increase the extent to which parties in family cases have access to legal services. This research also suggests that investments in legal aid may actually reduce total expenditures on the justice system.

However, it is apparent that we have passed a tipping point in the family justice system. We need to recognize that there will continue to be large numbers of self-represented litigants in the family courts. Indeed, those with resources are increasingly looking outside the court system to arbitration to resolve family cases.

This research reveals some of the costs associated with the increase in the numbers of self-represented litigants, but also suggests that the judiciary is adapting to the challenges in a system in which many involved in family cases do not have lawyers.

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