

A nightmare *in* family court

Self-represented litigants are bringing family court proceedings to the verge of breakdown. Lawyers and legal aid providers are taking steps to help out, but the real problems, and solutions, may be much more challenging.

By Bev Cline



Robyn Elliot

MacDonald Elliott Legal Services, Halifax

“There is a not insignificant group that simply doesn’t want to have a lawyer represent them and choose to make their own case.”

T rue story: a lawyer goes to family court on a minor procedural matter — five minutes, tops. But he finds himself on the docket behind a self-represented litigant, who mumbles and fumbles his way through a rambling cross-examination of his spouse, aided by a patient judge, who does her best to move matters along. Eventually, the lawyer, court order finally in hand, gets to return to his office — two hours later.

Sound familiar? If you’re in family law, or if you’ve been anywhere near a family or provincial court anytime in the last several years, it should. Litigants representing themselves are no longer an uncommon sight in family courts, with predictably negative effects on court schedules and decorum. Lawyers could soon be in the minority among advocates in family courts nationwide.

Indeed, statistics provided by counsel in the Office of the Chief Justice of the Ontario Court of Justice provide a snapshot of the self-represented situation in family law matters: “In domestic (access and custody) cases at the Ontario Court of Justice, approximately 60% of all litigants do not have a lawyer when they begin their proceedings. This percentage has remained rather consistent for the last five years.”

Family lawyers, told of these statistics, invariably have a supporting anecdote: an embittered litigant trying to reduce an ex-spouse to tears on the stand, a complainant reading out

an exhaustive account of the access parent’s failures to drop off the kids on time, a litigant flipping through a borrowed law textbook looking for what to say next, husbands and wives playing out scenes from the previous night’s rerun of *Boston Legal*.

The system is in crisis — and no one is entirely sure what to do about it. Because it isn’t just a problem of access to justice, of litigants unable to pay lawyers’ fees, although that is a major issue. It’s also because a lot of people experiencing marriage breakdown simply don’t want to hire a lawyer at all.

Do-it-yourself law

“**T**here is a not insignificant group that simply doesn’t want to have a lawyer represent them and choose to make their own case,” says Robyn Elliott, a partner with MacDonald Elliott Legal Services in Halifax and chair of the CBA’s National Family Law Section. “These people feel very comfortable getting legal information from the Internet, including websites such as that run by the Department of Justice.”

Elliott says that “individuals today generally feel more empowered and have more ability to do research. A surprising number of people arriving at my office already have researched and printed out the tables for child support.”

Jennifer Cooper, a partner with Deeley Fabbri Sellen in

MARVIN MOORE

Winnipeg, thinks that clients' preference to do their own family law research and even represent themselves in court is part of a larger societal trend. "People don't stand in awe of institutions as they used to; they don't necessarily accept that they require an expert in the field," she says.

Then there are the self-represented litigants whose reasons have nothing to do with legal or financial considerations, says Elliott. "These people have another, very personal, agenda. It could be that they can't wait to cross-examine their spouse, or drive up their spouse's legal bills, or just plain make it difficult to resolve the situation."

Sometimes, these types of self-represented litigants have been to three or four lawyers already, and didn't like what they've heard about resolving monetary issues or child custody. "They don't want to accept what the lawyers have told them. The child support tables may be very clear, but they think that if they go into court, they can convince the judge to make adjustments for them," she says.

by which the lawyer promises not to take the case to court and to refer the client to another lawyer if court turns out to be inevitable: "If [collaborative] law doesn't work out, and clients want to litigate, there's no one else to send the client to," she says.

And here's another challenge: try to hire a family lawyer in Alberta. The booming economy is creating demand for every service in every sector, including law, says Marla Miller of Miller Boileau Family Law Group in Edmonton. Potential clients sometimes can't get in to see a family lawyer for weeks.

"A lot of people are having a really difficult time finding a family law lawyer in Alberta," confirms her partner, Pierre Boileau. "They're calling around, leaving messages on the voice mails of eight, nine, perhaps even more family lawyers — and not getting callbacks. Many lawyers aren't taking new clients. So these people are being forced to represent themselves."



Elaine Keenan Bengts

*Information and Privacy
Commissioner for the Northwest
Territories and Nunavut,
Yellowknife*

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And unfortunately, although with only a small portion, says Elliott, mental health issues lie at the root of some self-represented litigants who appear before a judge without counsel, making a bad situation worse.

Not enough lawyers

In addition to these problems on the demand side of the ledger, there's a growing problem on the supply side as well: sometimes, even when a litigant wants to hire a lawyer, there are none to be found.

"Legal Aid is very generous up here and has a full contingent of lawyers," confirms Yellowknife lawyer Elaine Keenan Bengts, past chair of the CBA's Family Law Section. But she estimates that one-third of all family law cases involve self-represented litigants at some stage for one very simple reason: there aren't enough private-practice family lawyers to service the Yellowknife market.

Keenan Bengts, who is also Information and Privacy Commissioner for the Northwest Territories and Nunavut, devotes approximately 60% of her time to family law. Her associate spends all her time on family law matters — but they are still run off their feet. Potential clients, she says, are often self-represented because they have no choice. Who are they going to call?

Nor can she offer collaborative law services to her clients,

The situation in Alberta is exacerbated because many family lawyers, like Miller and Keenan Bengts, opt to practise mediation or collaborative law, further reducing the pool of available family litigators. Anecdotes fly about the lengths Alberta clients will go simply to find a lawyer, driving from oil-fuelled communities such as Fort McMurray or Grand Prairie to Saskatchewan seeking family law assistance.

Negative impacts

Just ask any family lawyer what it's like to go into court with a client whose spouse is self-represented, and you can hear an audible sigh over the telephone, followed by almost universal agreement: when one party is self-represented, it generally drives up costs for the client who has the lawyer.

"There's a real financial and tactical imbalance when one party has no legal bills," says Gerry Sadvari, a family law partner with McCarthy Tétrault in Toronto. A small percentage of individuals, he says, want to "make their spouse's legal bills skyrocket" by lengthening the process. "They really don't have a financial incentive to resolve the issues."

Nor is it easy just to move the whole thing from the courtroom to the negotiating table. Most family lawyers are extremely uncomfortable negotiating with self-represented parties, primarily because of ethical considerations: the "infrastructure of trust" among lawyers that's present when



a lawyer,” says Grant Gold, a partner at McCague Peacock Borlack McInnis & Lloyd in Toronto and treasurer of the CBA’s Family Law Section.

And what about the impact of self-represented participants on the judge? There is pretty widespread agreement that “judges [are] bending over backwards” — giving a lot of latitude to unrepresented litigants, but still keeping a steady hand on decorum and processes.

According to the Office of the Chief Justice of the Ontario Court of Justice, “unrepresented litigants tend to have difficulties preparing their forms, meeting requirements under the Family Law Rules, and articulating their cases clearly to the judge.” As a result, “judges may take the time in court to explain the court process, provide information about the law and requirements of evidences, and direct them to available resources. Cases move more slowly.”

Marla Miller

Miller Boileau Family Law Group, Edmonton

Alberta’s booming economy means potential clients sometimes can’t get in to see a family lawyer for weeks.

both sides are represented is missing.

“If I’m doing a separation agreement, where one party is unrepresented, I’m not comfortable doing an informal interim child support agreement, as I might do if the other party had

Lawyers helping out

Ideally, most if not all family law litigants would have the benefits and insights of legal counsel in court. But with that ideal situation appearing increasingly distant, lawyers are pitching in to help self-represented litigants navigate the system better and generally make the best of the situation.

For example, each spring the Young Bar Association of Montreal (YBAM) operates a marathon telephone call-in clinic. Staffed by 50 to 60 volunteers, the well-publicized event attracts more than 1,500 calls — a whopping 60% to 75% of which relate to family law issues, says Mathieu Piché Messier, president of the YBAM and a partner with Borden Ladner Gervais LLP in Montreal.

The volunteer lawyers have no way of knowing how many of the calls are from people either in the throes of representing themselves in court or contemplating doing so, says Piché Messier. But these callers often pose detailed questions about divorce or custody issues. The calls can last between 15 and 30 minutes before the lawyer, after suggesting the caller contact a family lawyer, has to gently move on to other calls, he says.

And of course, there’s legal aid. While most lawyers agree that legal aid needs better funding and revised eligibility criteria, legal aid providers are nonetheless doing what they can to assist. Legal Aid Ontario, for example, provides family duty counsel and advice lawyers to family law clients in approximately 130 locations across the province, including all 35 provincial court-based Family Law Information Centres.

Legal Aid Alberta (LAA) responded to that busy province’s challenges by starting to provide duty counsel in Family Chambers in Edmonton last December, says Wendy Bouwman Oake, director of client services. Two months later, LAA added duty counsel in Edmonton’s Provincial Court, and a month after that, added Family Docket Court in Calgary to the list.

For its part, Legal Aid Manitoba (LAM) is now investigating whether to set up duty counsel services in Family Motions Courts in Winnipeg. “To date, we have undertaken some

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L'impasse du droit de la famille

Les problèmes qu'occasionnent les personnes qui se représentent seules dans des causes familiales en cachent d'autres, qui s'annoncent difficiles à régler.

Le scénario vous est sans doute familier : avocat en droit de la famille, vous vous présentez à la cour pour une question procédurale mineure, qui ne devrait prendre que cinq minutes. Or voilà qu'une partie qui se représente seule vous précède au rôle. Après avoir écouté un interrogatoire malhabile et informe, vous retournez finalement au bureau — avec deux heures de retard.

Les justiciables qui ne sont pas représentés par un avocat sont devenus majoritaires en droit de la famille au Canada. Selon les statistiques du bureau du juge en chef de la Cour de justice de l'Ontario, 60 % des justiciables dans les causes de droits d'accès et de garde d'enfants ne sont pas représentés lorsqu'ils entament les procédures. « Ce pourcentage a été plutôt constant au cours des cinq dernières années », écrit le bureau.

Les avocats en droit de la famille ont généralement plusieurs anecdotes à ce sujet : un justiciable aigri qui tente de faire fondre son ancienne épouse en larmes à la barre de témoins; un demandeur qui lit le compte-rendu détaillé des menus retards de son conjoint qui devait chercher l'enfant à l'école.

Il y a bel et bien une crise. Mais le problème, c'est que personne ne sait vraiment comment la gérer. Parce qu'il ne s'agit pas seulement d'une simple question d'accès à la justice, ou de justiciables

incapables de se payer un spécialiste. En fait, de plus en plus, les gens ne sont plus intéressés à embaucher un avocat.

Droit amateur

L'internet y est certainement pour quelque chose, selon Me Robyn Elliott, associée chez MacDonald Elliott Services à Halifax, et présidente de la section du droit de la famille de l'ABC. « Il est surprenant de voir la quantité de gens qui entrent dans mon bureau qui ont déjà fait leurs recherches », dit-elle.

Me Jennifer Cooper, associée chez Deely Fabbri Sellen à Winnipeg, parle d'une tendance. « Les gens n'ont plus le même respect pour les institutions et ils n'acceptent pas nécessairement le fait qu'un expert est nécessaire pour aller à la cour », note-t-elle.

Parfois, un époux querelleur poursuit son propre ordre du jour, ajoute Me Elliott. « Ils peuvent être impatients d'interroger leur conjoint, ou de faire monter ses frais d'avocats. »

Et quand ce n'est pas la demande, c'est l'offre. En Alberta, par exemple, le boom économique a créé une demande dans tous les secteurs, incluant les services juridiques. Des clients potentiels attendent parfois plusieurs semaines avant de consulter un avocat, racontent les associés de la firme Miller Boileau Family Law Group à Edmonton, Mes Marla Miller et Pierre Boileau.

Les avocats à la rescousse

La situation met plusieurs avocats mal à l'aise, en plus de forcer les juges à multiplier les acrobaties pour permettre à la partie non représentée par avocat d'être entendue.

Comment réagir? Des avocats s'organisent. À chaque printemps, par exemple, l'Association du Jeune Barreau de Montréal organise une clinique juridique par téléphone, à laquelle 50 à 60 jeunes avocats participent. Sur quelque 1500 appels traités, entre 60 à 75 % portent sur des questions familiales, soutient Me Mathieu Piché Messier, le président de l'Association et associé chez Borden Ladner Gervais à Montréal.

Il y a aussi l'aide juridique. Celle de l'Alberta a placé un conseiller juridique permanent à la Chambre de la famille d'Edmonton en décembre dernier. Quelques mois plus tard, elle a répété l'expérience à la Cour provinciale d'Edmonton et à Calgary.

Mais tous s'entendent : l'augmentation du *pro bono* n'est pas la solution, car la pratique est déjà très courante. L'avocate de Winnipeg Me Jennifer Cooper estime plutôt que la solution se trouve dans l'assurance juridique.

« Aux États-Unis, les gens achètent des assurances pour toutes sortes de frais juridiques, dit-elle. Assurances vies, assurances pour les animaux, assurance domiciliaire.... Pourquoi l'assurance légale ne deviendrait-elle pas une forme acceptée de protection? »

Le problème du public qui tourne le dos aux avocats, toutefois, pourrait bien nécessiter des solutions beaucoup plus drastiques, comme de changer les règles de procédure, de revoir le rôle des juges et des avocats ou de réévaluer les coûts d'une dispute familiale.

Car les clients envoient un message clair : ils ne peuvent plus, ou ne veulent plus, utiliser le système tel qu'il est actuellement. Alors le nœud de la question demeure : comment le système, lui, va-t-il réagir? ■

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preliminary research to establish the number of unrepresented litigants that appear in family motions court to represent themselves in their legal matter," says Executive Director Gerry McNeilly. That research noted that "73% of unrepresented individuals in family motions courts would not qualify for legal aid," he adds.

Jennifer Cooper also points to LAM's Expanded Eligibility Coverage programs, which issues a legal certificate under one of three categories: full eligibility, agreement to pay (partially eligible clients must repay all or part of the cost of legal services), and expanded eligibility (clients will pay the full cost for providing legal services).

LAA, says Bouwman Oake, has "expanded our staff Family Law Offices and are actively pursuing changes to our processes to make it easier for lawyers to do business with us, including simplifying and improving the remuneration available under our tariff, developing an on-line billing program, and arranging for many types of legal disbursements to be directly billed to us."

Seeking solutions

So what can be done to ease the problems created by self-represented litigants in family law? To begin with, family law practitioners want to make it extremely clear that the answer is not, repeat, not, to ask them to do more *pro bono* work.



In family law, many say, there's already a *de facto pro bono* system at work anyway. "Many family lawyers actually do part of their work for free," says Cooper. "Lawyers are human; you begin to care about your clients in what are often very difficult emotional situations."

And it can be a struggle for family lawyers to collect from clients in any event. "We're talking about individuals, as opposed to corporations who have budgets for legal matters," says Cooper. "In family law, every client is, and feels, poorer than before their divorce." Legal services that are billed but not paid end up as effectively *pro bono*.

Part of the answer might lie in bolstering the family bar

Mathieu Piché-Messier

Borden Ladner Gervais LLP, Montreal

Between 60% and 75% of calls to the Young Bar Association of Montreal call-in clinic are on family law.

itself. Family law hasn't always enjoyed the same aura or cachet as other practice areas, says Keenan Bengts. "Most of us do family law because we're passionate about it. Family law is not a glory area — it can be depressing and emotionally draining. We've got to find some ways to bring young lawyers into this field."

In Ontario, adds Sadvari, the family law bar is aging. At the same time, "there's a shortage of opportunities for young litigation lawyers to get on their feet in court. Is there a way that we can bring these lawyers and self-represented litigants together?"

Cooper has thought a lot about access to justice issues for the middle class in general, and sees the insurance model as one possible solution. "In the U.S., people buy insurance for legal costs [of all kinds]," says Cooper. Life insurance, pet insurance, home insurance — why couldn't legal insurance become an accepted form of protection?

But none of these potential solutions, useful as they might be, focuses on the fundamental issue, which is clients: a growing number of them simply choose to do without a lawyer. One potential inference that can be drawn from that fact is that the standard family law system — two lawyers, a judge, and a lot of time and money — isn't working very well for them.

It isn't as if family law cases with full legal representation tend to proceed quickly and quietly, providing rapid resolution for parties at minimal cost and trauma. That suggests that any real solutions to self-representation are going to have to be more structural, affecting court rules, the role of judges and lawyers, and the costs in time and money of addressing marital breakdowns.

Clients are making clear that they can't or won't use the family law system we've created. Perhaps the real question is: how will the system respond? ■

Bev Cline, a business and history writer in Toronto, is also Managing Editor of *CCCA Magazine*.

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