

A New Justice System for Families and Children

REPORT OF THE FAMILY JUSTICE REFORM WORKING GROUP
TO THE JUSTICE REVIEW TASK FORCE

May 2005



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Executive Summary

Family law affects us all. If we have not been directly involved in a family break-up, we have a friend or family member who has. Experience tells us that these are emotional events, and that the answers to the real issues families face often are not found in the law.

The Family Justice Reform Working Group was asked to explore opportunities for fundamental reform of British Columbia's family justice system, building on its strengths to better meet the needs of today's separating and divorcing families.

We were asked to use the many reports and studies that have been done in BC and elsewhere over the past three decades as the basis of a plan for change. When we looked at those reports we were struck by the consistency of their messages. Over and over we read that the adversarial system was not designed for family law cases and, for too many families, it does not work well. What families need is help to find better ways to communicate and to work out the arrangements that work best for them.

Past reports have consistently recommended that family cases not be treated as potential trials but be managed through processes designed to address the relationship issues and underlying emotions that actually drive family conflict. They say that it would be best for people to retain more control over the decisions that will shape their lives.

It is true that there have been innovations in family law, and there are now more alternatives to litigation. Still, mediation, collaborative law, settlement conferences and parent education programs—all worthy and welcome—have been add-ons to what remains a fundamentally adversarial framework. That framework makes a difficult situation worse by defining spouses as adversaries and disagreements as contests to be won or lost. It encourages attitudes and behaviours that do not serve families well.

We do not intend to undersell or overlook the extensive and impressive efforts made over the last several years by lawyers, judges, policy makers, court administrators and community services to reform family law in BC.

There is no question that a good deal has been accomplished already, but now is the time to take bold steps forward along the course that has been set,

towards the goal of a justice system that is fundamentally different from what we have known in the past—one that is actually designed for families.

The groundwork has been laid. Now we need to do what the experts have been recommending and move family law away from the adversarial framework.

We propose a family justice system where mediation and other consensual processes are not considered “alternative dispute resolution,” but are the norm. Just as they did before break-up, families will bear the primary responsibility for making their own arrangements, with the benefit of all the tools that the new family justice system will offer. In the family justice system we propose:

- A “Family Justice Information Hub” will be the source of information on all aspects of family law and family dispute resolution. Located on the internet and in communities throughout BC, often in the courthouse, this is where people will go to learn about their rights and obligations and about the options available to them, and be referred to the services they need.
- Before asking a court to resolve a family dispute, people will be required to participate in at least one mediation session, to try to resolve their issues, and that first session will be free.
- If mediation is not appropriate, for reasons including family violence, another consensual dispute resolution process might be appropriate.
- Mediation, collaborative law, and other consensual processes will become the expected means of resolving family disputes. Lawyers will play an important role in helping clients choose the most appropriate dispute resolution process from the available options.
- For cases that do need a judge, there will be one court, with judges who are expert in family law and committed to a new way of thinking about the resolution of family law disputes.
- Court forms will be simple “fill-in-the-blanks” forms, available online; rules will be simplified; and hearings will be informal.

The courts cannot and should not be removed from the family justice system—trial is necessary and valuable for resolving truly intractable disputes, for clarifying the legal principles upon which negotiated settlements are based, and for enforcing obligations arising out of separation. The principles of family law, as set out in statutes and developed through judicial decisions are the framework within which families can develop the solutions that fit their particular circumstances and we do not suggest that this should change.

However, we do say that the family justice system should be founded not on the values of an adversarial process, but on the values of family autonomy, cooperation and the best interests of children. This shift has already begun. Family case conferences in the Provincial Court, judicial case conferences in

the Supreme Court, mediation, and collaborative law in the private sector are all evidence of a trend. We propose to extend and accelerate these developments and to incorporate cooperative values even more deeply into the family justice system, particularly at its “front end.”

In Part One of our report we set the stage for our recommendations, describe our mandate and the composition of our Working Group, and tell how we set about accomplishing our task.

In Part Two, beginning with Chapter 3, we make and discuss our recommendations for change, in 5 chapters.

Chapter 3 describes the front end of our proposed family justice system and says that it is here that resources should be focussed. Families find the justice system complicated and confusing. Confusion can heighten and prolong conflict, especially for the increasing number of people who do not have legal representation. Information is a dispute resolution tool, and should be provided through an accessible single point of entry. The entry point we propose is the Family Justice Information Hub. This would be the front door to the family justice system; the coordination point for local services for families, for legal information and advice, for assessments, and referrals. The Hub would also be available over the internet, and by telephone.

Chapter 4 proposes a shift from a subsidized litigation system to a subsidized settlement system. This involves a change not only in programs and services, but in how people think about family dispute resolution. The reality is that the vast majority of family cases settle without a trial: we recommend that the family justice system reflect this reality and promote consensual settlements that are timely and enduring and arrived at in a way that minimizes expense and harmful conflict. Recognizing the need to allow for cases where violence or power imbalance precludes it, we recommend mandatory participation in at least one mediation session for most cases, before they go to court. To reinforce societal support for this new approach to resolution, we recommend that the first mediation session should be free for everyone.

Chapter 5 describes a simpler approach for cases that do need to go to court. Forms would be of the “check box” and “fill-in-the-blanks” variety. Forms such as the financial disclosure form would be generated automatically, online, from responses to a series of simple questions. Court procedures would be simplified and streamlined, designed to work towards resolution. Hearings would be less formal and would be actively managed by the judge.

Chapter 6 examines court structure and unified family court (UFC). In British Columbia we now have two parallel court systems hearing family cases. We recommend a single court, with authority over all areas of family law, with specialist judges and simplified procedures. Whether this proposal is accepted or not, we recommend that adjudication of family cases be available within a network of extensive services to support families, and with a focus on

cooperative resolution. In our report we explore three possible models for achieving this single court.

- One is the superior court approach to UFC, already in use in seven provinces, which moves all family matters to the superior courts. We recommend this model but only if adequate funding is assured. Experience in other provinces causes us to be concerned that funding might not be sufficient to provide the necessary level of services and the province wide implementation necessary to improve on the existing system.
- A full Provincial Court jurisdiction approach would give Provincial Court judges the same family law jurisdiction as Supreme Court judges. This solves the split jurisdiction problem almost entirely within the context of the existing judicial structure and preserves the flexibility and province wide accessibility of the current system. While attractive from a practical standpoint, this approach is precluded at this time by an array of administrative problems and by the way that s. 96 of the *Constitution Act, 1867* has been interpreted to prevent either a province or Canada from giving jurisdiction over divorce or matrimonial property to a provincially appointed judge. If the superior court approach proves unworkable, it may be worth taking a further look at this option.
- If neither of these options proves workable we propose that British Columbia consider a coordinated jurisdiction approach. Not actually a unified court model; it leaves the two existing courts in place while better integrating and coordinating their family law work. It has been considered before in BC. One approach would involve appointing Provincial Court judges as Masters of the Supreme Court and giving them as much family law jurisdiction as constitutionally possible. It is potentially complicated and inefficient but warrants further consideration if the problems of split jurisdiction cannot be resolved otherwise.

Finally, in Chapter 7, we conclude that changing the culture of family law involves more than just changes to services, procedures, legislation and court structure. It also involves people. Family law is distinct from other areas of law and the lawyers and judges working in this area must adopt roles, functions and values that are compatible with the needs of families. Lawyers, clients and courts are already beginning to see their relationships and responsibilities in new ways. We suggest ways that the courts can accommodate the unique demands of family law, and steps that the Law Society, Bar Association, law schools, and Continuing Legal Education Society can take to support the work of lawyers in this evolving field.

This is a report to the Justice Review Task Force. We understand that the Task Force will now offer those who work within our family justice system—judges, lawyers, mediators, and others—and the families who rely on it, an opportunity to respond to the ideas and recommendations in this report.

Part 1: ***A Mandate for Change***

1

Let's Act on What We Know

1.1 Our Current System Often Fails Families

Family law presents enormous challenges. Disputes arising out of family breakdown are as complicated and emotionally charged as they are common. If we have not experienced family breakdown personally, we certainly have friends or family who have.

When a family is together, we let its members take care of each other and we assume that the family can solve its own problems. Unless someone behaves criminally or puts children at risk, we treat the family as an autonomous unit.

But when spouses separate, new assumptions take over. Our family justice system is based on assumptions that might strike us as odd if we were not so accustomed to them: that a family's issues are best resolved by strangers; that family members should consider themselves adversaries; and that interpersonal problems should be understood in terms of competing rights.

In fact, few people really believe anymore that a court of law is the best place for separating spouses to resolve their arguments, or that a judge is in the best position to decide whether the children will spend weekends with one parent or the other. Reports, surveys, and research papers keep telling us the same things:¹

- family disputes are almost always best resolved outside of a courtroom;
- our justice system was never designed to address the emotional and other issues that arise from family break-up; and
- families in conflict need information, advice, and support so they can take responsibility for creating their own solutions.

The system we make available to them today is complicated, intimidating and costs a great deal of money just when the family's income is being stretched beyond its limits. Increasing numbers of people find themselves forced, by financial circumstances, to make their way without legal representation through a process designed for lawyers. A small number of these people go to trial on their own. Many settle, whether or not they have the information and support they need; some walk away, their conflict unresolved and possibly giving up what they need or were entitled to. Others never approach the family justice system in the first place, seeing it as inaccessible, unaffordable and unresponsive to their circumstances.

For the clients, family breakdown is an emotional – not a legal – issue. We send clients into a system not equipped to meet their needs.

„Breaking Up is Hard to Do, 1992

¹ For a summary of these reports, see Appendix A.

In the perfect system we will empower separating families to resolve their own disputes. The system will be resolution oriented. Prizes and labels will disappear and the focus will be on personal responsibility.

- Barbara Young,
family lawyer &
mediator

It is true that some people who use the court system to resolve their family law issues are satisfied with the result. It is also true that lawyers successfully negotiate agreements on behalf of their clients every day. For some of these clients, under our proposals, little may change.

What we hope will change is that families will find in the family justice system the information, support and services they need to take more responsibility for the decisions that best meet their own unique needs. We do not pretend that family break-up can be made easy. Separating families will always face enormous challenges. But we believe the family justice system can serve them better.

1.2 Conflict is Harmful to Children

Study after study tells us with certainty that exposure to conflict, and the emotional well-being of the primary parent, make a big difference to children’s ability to adjust in a healthy way to family break-up.

Knowing this, we must not offer as a first resort for separating families an adversarial system that by its very nature often heightens conflict and threatens emotional well-being. Experience and academic research² tell us, for example, that the language of affidavits—a primary tool of custody litigation—can encourage parents to depersonalize each other and cast each other in the role of the enemy. Instead of supporting a shared understanding of a parenting problem and a cooperative attempt at resolution, legal procedures can be used to lay blame and cause lasting hurt.

1.3 Still, Our Justice System Steers Families to Court

We apparently acknowledge the shortcomings of the current system and the merits of consensual processes for families in conflict, but still people are steered to the courthouse. Mediation is certainly more widely available than it was a few years ago but still is characterized as an “alternative” process.

We frame family disputes as contests and we manage cases as if they will all go to trial, even though most never will. This means that the tools available to families who need to work towards settlement are those that were designed as preparation for court.

One of the reasons why the courtroom remains, for most people, the primary resolution option for family disputes, is our legislation. The federal *Divorce Act* and provincial *Family Relations Act* are premised on a litigation model: to

² T. Ney, *The (Ab)use of Affidavits and Psychologists’ Reports in High-Conflict Family Custody Analysis: A Discursive Analysis*. (2004). University of Victoria (unpublished Master of Arts thesis).

get a divorce, people must apply to court; to preserve support and property rights, people must start a legal action. It can be said that, to a large extent, our family justice model is one of “legislated litigation.”

1.4 Defining the “Family Justice System”

We use the term “family justice system” broadly. We refer to a system that serves separating and divorcing couples, both legally married and common law, as well as families involved in child protection matters. Beyond the laws that govern family relationships, our “family justice system” includes:

- public and private services that help families with a wide range of issues arising out of separation, divorce or child protection;
- public institutions such as the courts, government ministries, and the Legal Services Society (LSS); and
- individual professionals, including lawyers, mediators, social workers and counsellors who work in these areas.

In fact, the term “system” is somewhat misleading, implying a level of coordination and cooperation that does not exist. This lack of coordination of services undermines their efficiency and utility and is addressed in the proposals that follow.

child protection cases

Child protection cases—in which decisions are made to ensure the safety of children, including whether children should continue to live with their families—are very much a part of our family justice system. In British Columbia, the *Child, Family and Community Service Act (CFCSA)* sets out much of our law about the protection of children at risk. These cases are heard by the Provincial Court under procedures designed especially for them.

The conclusions we draw in this report about the need for change in our family justice system apply as much to child protection cases as to any others. We often refer to separation and divorce, but throughout we regard child protection cases as an integral part of our family justice system.

We recognize that these cases do have certain unique characteristics and dynamics but we make our argument for the importance of good information and assessment services, and the advantages of consensual dispute resolution processes just as forcefully for these child protection matters as for cases of separation and divorce.

1.5 Why has Change been so Slow?

With so many convincing past reports pointing in the same direction, why has BC’s family justice system been so slow to change?

The last major review of the family justice system³ said "Family law is a low priority in the courts," and it remains today the poor cousin in the justice system. Criminal justice, with its public safety issues, easily attracts the interest of law makers and voters. Commercial and personal injury cases have repeat users including insurers, financial institutions and corporations that can press for reform. There is no such natural lobby group for family justice reform, no urgent claim on public attention and probably little political payoff to be earned. Still, it is the right thing to do.

Lawyers, and the network of service providers working with families, including mediators, psychologists, social workers and counsellors, need to use their communication and advocacy skills to educate the public, and legislators, about the importance of family law, and champion the cause of reform of our family justice system.

1.6 Now is the Time to Act

The fundamental thesis of this report is that the family justice system has not yet responded fully to the advice that so many have offered. Innovations such as mediation, collaborative law, settlement conferences and parent education programs—all worthy and welcome—have been add-ons to what is still, essentially, an adversarial format.

Now is the time to take the next logical step. The innovations we have noted give us a firm foundation for moving ahead to do what the experts have long recommended and replace the family justice system's adversarial framework with a comprehensive dispute resolution system for families.

We propose a greater public investment in mediation and other services, and a requirement that nearly all families try these services before resorting to litigation. As a society, we say that we value family autonomy and peaceful resolution of disputes. We need to reflect those values in our family justice system and our spending priorities. Public money that now subsidizes the court system should be reallocated towards consensual dispute resolution so that more appropriate processes are affordable to all families.

There will always be some cases for which litigation and trial are appropriate. Some disputes are simply intractable, some individuals are uncompromising, and sometimes an issue of law needs to be clarified. Physical violence and other forms of abuse, or a power imbalance, mean that unless sufficient protections can be put in place, consensual dispute resolution processes may not be appropriate, and negotiation through counsel or litigation may be indicated. The general rule however should be that trials are reserved for those cases that, for good reason, need a resolution by a judge.

³ *Breaking Up is Hard to Do: Rethinking the Family Justice System in British Columbia*, Ministry of Attorney General of British Columbia, 1992.

What we propose is an approach that would probably seem obvious if we were starting from scratch to design a family justice system today. It would:

- encourage and support couples to safely determine their rights and their responsibilities to each other and to their children, based on information about the relevant principles of family law and advice about their particular situation;
- provide for judicial determination when necessary;
- be affordable, understandable, and accessible to all British Columbians;
- offer access to a wide range of information and dispute resolution services, including protection for adults and children at risk;
- centre on the needs and accommodate the best interests of children; and
- dedicate a single court to resolution of the small minority of cases that need to go to court, with judges who are expert in family law and sensitive to the emotional and economic issues that separating families face and with procedures as simple and informal as possible, always proportionate to what is at stake.

Of course we are not designing a new system from scratch. We have an array of services provided by government, private sector professionals and community agencies, which are not always delivered in a coordinated way. Not all services are available everywhere, and not all are available to everyone who needs them. We have two parallel court systems handling family cases under two quite different sets of rules and procedures.

Our recommendations take this reality into account but describe a system that reflects our ideals. We describe what needs to be done, without always being specific about who should fulfill each function. That will be a task for those who are charged with implementation and we encourage them to be creative in determining the skills and expertise required in each case, and where best to find them.

We understood our terms of reference to direct us to be realistic, but not unduly fettered by cost considerations. The cost of some of our recommended innovations can be met by shifting resources from the court system, which will need to handle fewer cases and will gain in efficiency if the family jurisdictions of our two court systems are unified. We have framed our recommendations to allow for implementation in stages, if circumstances and resources require, but there must be an implementation plan, with realistic timelines for realization of the redesigned system. The planning should start now.

2

The Working Group and Its Project

The Family Justice Reform Working Group was appointed in the summer of 2003 by the Justice Review Task Force. The Justice Review Task Force is an ongoing collaboration among government, the courts and lawyers, working together to help make the justice system more responsive, accessible and cost-effective. Established on the initiative of the Law Society of BC in March 2002, its members include the Chief Justice of the BC Supreme Court; the Chief Judge of the BC Provincial Court; and representatives of the Law Society of BC, the Canadian Bar Association, and the Ministry of Attorney General. Early in its mandate, the Task Force identified family law as a priority area for reform and appointed to this Working Group, people who have long experience in family law from many different perspectives.

2.1 Members

The Hon. Madam Justice Alison Beames
Supreme Court of BC, Kelowna

The Hon. Associate Chief Judge James Threlfall
Provincial Court of BC, Kelowna

Richard Bjarnason
Barrister and Solicitor, Prince George

Nancy Cameron
Barrister and Solicitor, Vancouver

Jill Dempster
Legal Counsel, Ministry of Attorney General, Victoria

Dinyar Marzban, QC
Barrister and Solicitor, Vancouver

Heidi Mason
Barrister and Solicitor
Manager, Field Operations Department, Legal Services Society, Vancouver

M. Jerry McHale, QC (Chair)
Assistant Deputy Minister, Ministry of Attorney General, Victoria

Carole McKnight
Mediator, Educator and Consultant, Vancouver

Mary Mouat
Barrister and Solicitor, Victoria

Irene Robertson
Senior Policy Analyst, Ministry of Attorney General, Victoria

2.2 Mandate and Principles

This Working Group was asked to propose fundamental and cost-effective change to BC's family justice system. Much good work has been done in recent years to study and improve various aspects of family justice in this Province. Our mandate was not to go over the same ground, but to build on those studies and reports and design a coherent system to deliver the services people need. We were asked to consider the concept of a unified family court and other models for organizing BC's family justice system and to recommend the best possible model for British Columbia. At the core of our mandate was the instruction to recommend the design of a family justice system that will:

- be accessible
- serve the needs of children and families first and foremost, rather than the needs of professionals
- use available resources efficiently and effectively
- integrate service planning and delivery
- promote early resolution of disputes, and
- minimize conflict by encouraging early cooperative settlement, refining and enhancing non-adversarial settlement processes, and supporting trials as an appropriate recourse only when other means are not appropriate or effective.

Our focus has been on reforms that will enhance accessibility, effectiveness and integration of services. In this report we use these words as follows:

- **Accessibility** means simplified procedures, and services that are affordable, available within a reasonable time and distance, and presented in plain language.
- **Effectiveness** means that appropriate services are matched to families' needs; that services promote timely, fair and lasting resolution of disputes, and that they foster functional family relationships after separation and divorce.
- **Integration** means minimizing overlaps and gaps in services and linking those services so users can move easily from one service to another as appropriate. It means that providers of family justice services share common objectives and cooperate in planning and delivering those services; and it means that related services share common values and priorities, and their policies and procedures are consistent and coherent.

2.3 Sources

Our Terms of Reference directed us to build on previous reports and papers that have analysed the BC family justice system. We had much material to

Since 1976, 16 reports on the family justice system in BC have been prepared by a variety of committees, commissions, working groups, practitioners and consultants.

work with, including 16 earlier reports on the BC family justice system, and a multitude of reports on family law reform from other jurisdictions, particularly Australia and Great Britain. In addition, we had the benefit of research reports published more recently in BC. Academic papers addressing dispute resolution issues generally were also a useful source of commentary and ideas. For a complete list of resources referred to in the preparation of this report, see the Bibliography at the end of this report.

Public consultations were beyond our mandate. Consultations would have added considerably to the time required to produce this report and would not have added appreciably to the information needed to write it. Between the federal and provincial governments there has been thirty years of consultation, research and academic inquiry into the questions we were asked to address.

For example, the 1992 report, *Breaking up is Hard to Do* is based on workshops held in 13 BC communities and meetings with 266 people representing all family court user and interest groups. The joint federal-provincial-territorial report, *Custody, Access and Child Support in Canada* (Fall 2001) was based on nationwide consultations through 2300 feedback booklets, 71 written submissions and 46 workshops.

Our thinking has been informed by the richness of the contributions to these and many other earlier reports, both by professionals in the system and by the people who have used it. We did commission research on a number of specific issues where it was needed. Those studies and the material on hand proved a more than adequate information base.

Our conclusion was that the concerns people have with the system and the directions family law needs to take are already well articulated; actually accomplishing change is the larger issue.

Not surprisingly, common themes emerge from past reports:

- Courts are generally the wrong forum for addressing the emotionally charged issues facing separating families: litigation can be prolonged, expensive and focused on parents' rights rather than children's best interests;
- Cooperative approaches including mediation, and better information for separating parents are recommended, with special consideration if family violence is a factor;
- Better enforcement of support orders and supervised access services are needed; and
- Aboriginal people, rural communities, and non-English speakers all have particular needs for better access to family justice services.

The concerns people have with the system and the directions family law needs to take are already well articulated; actually accomplishing change is the larger issue.

2.4 Recent Innovations

We take these ideas, so consistently asserted in the last 30 years, to be self-evident. In fact, since 1995 an impressive number of recommendations and innovations have been implemented:

- Family Justice Counsellors offer some mediation services in 28 communities through Family⁴ Justice Centres and travel regularly to 10 additional communities. These mediators are all trained and certified to national standards.
- Parent education programs are offered in 21 communities: in 10 of them, attendance is mandatory before an appearance in Provincial Court.
- The use of mediation in family law has expanded significantly across the province.
- Collaborative law practices are gaining ground: lawyers agree with their clients that they will work towards settlement, not litigation. If either party begins contested litigation, the lawyers must resign from the case.
- Child protection legislation introduced in 1996 makes mediation available for parents and social workers when there is disagreement about the care of a child; qualified mediators chosen from a roster provide this service throughout the province; family group conferences and judicial case conferences are also widely used to resolve child protection issues.
- Lawyers (“Family Duty Counsel”) are available at more than 40 Provincial Court locations in BC and will be available in most Supreme Court locations by summer 2005, to give advice to people with family law problems or child protection issues; they can also speak in court on behalf of people who cannot afford lawyers.
- Information on family law and dispute resolution services is available through LSS and Ministry of Attorney General toll free telephone lines and websites.
- Both the Supreme Court and Provincial Court have rules in place to promote the early settlement of cases, and in most cases it is mandatory to meet with a judge before a contested hearing can be held.
- At Provincial Court in Kelowna, Surrey and Vancouver, parties must attend an assessment interview with a Family Justice Counsellor before a first family court appearance. A Family Justice Counsellor assesses the case and refers parties to appropriate dispute resolutions services. In addition to assessment by a Family Justice Counsellor, the services of a child support officer, a Family Maintenance Enforcement Program (FMEP) outreach worker, an advice lawyer and family duty counsel are available.

⁴ For an inventory of justice services to families in BC, compiled in 2003, see Appendix C.

- Support enforcement mechanisms have been strengthened to enhance administrative, rather than court enforcement of child support.

The record is encouraging, and it reflects a deliberate and commendable strategy to reform family law and make it more responsive to families. With these innovations in place, we now have the foundation for a cohesive approach to reform that will fully realize the vision flowing from the earlier reports and from the understanding that has been reached in the last two decades about how to best resolve family law disputes.

2.5 The Family Justice System Matters

What also has become clear is that there are compelling reasons why we need a strong and viable network of family justice services. We are all affected: more than 40% of married couples in BC can expect to divorce before their 30th wedding anniversary and divorce applications are only a portion of the 26,000 family law applications filed in BC courts every year.⁵ Break-ups of common law relationships and child protection cases also bring British Columbians into the family justice system.

We all need to care about how well our justice system addresses the needs of so many of us. For most of us, when we come to the family justice system, it is a time of emotional turmoil. There is potential for power imbalance, abuse and exploitation. There are many demands on energy, attention and finances at the time of family break-up, so families need a justice system that is as accessible, and as simple and as affordable as possible. It should promote the health and safety of children and adults and focus on helping to find solutions that work for families.

⁵ Profiling Canada's Families III, Vanier Institute of the Family, 2004

Part 2: Delivering Family Justice

We propose an approach to family justice that gives family members the information they need; helps them to assess their situation and choose among options; and provides dispute resolution processes so that they can arrive at agreements that meet their family's needs. When necessary, a judge will be available to adjudicate, but usually not until there has been an attempt at consensual resolution.

We base our proposal on two assumptions:

1. Most families, with information, legal advice, and support, can and should take responsibility for resolving disputes over money and property and over parenting issues, whether these be between parents, or between parents and public authorities.
2. An effective family justice system will help families make healthy transitions, from one household to two, or from one legal relationship to another.

The cornerstone of our proposal is a central source of information, assessment and referrals—a Family Justice Information Hub. This Hub will be available to all British Columbians, whether in their communities, over the telephone, or on the internet. From there, people will be directed to the services they need.

This means a fundamental shift of resources and services to the “front end” of the family justice system, to provide coordination and support for the broad range of services now being provided in the public and private sectors, as well as for enhanced access to consensual dispute resolution processes. Public subsidy needs to be refocussed so that less is spent on litigation and more on those dispute resolution processes that encourage families to take responsibility for their own arrangements, while offering safeguards for adults and children who may be at risk. This is a realistic expectation if a large number of cases can be kept out of court and if the courts can operate more efficiently in handling the family cases that need it.

We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities.

- Mnookin and Kornhauser, 1979

We propose moving from a court-focussed system to one where the court plays an important role but is just one option among several and almost never the first.

For cases that do need adjudication by a judge, we propose a single court, with judges and staff who understand not only the law but the dynamics of family relationships, and who are committed to the goals of family justice.

But whether or not a single court for family cases is adopted in British Columbia, our other recommendations apply. Whether or not there is a single court for family cases, court procedures need to be specially designed, with simplified rules and forms to make legal representation more affordable and to accommodate those who do not have the benefit of a lawyer.

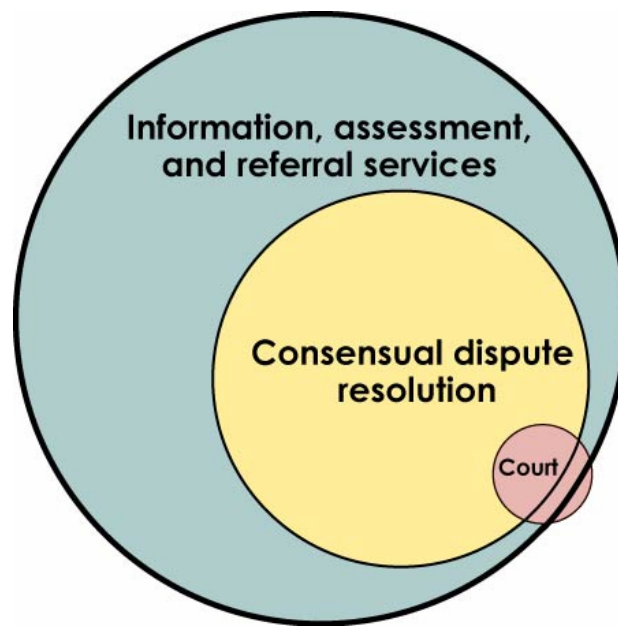
In this report we will deal with each of these areas in turn:

1. information, assessment and referral (the services to be delivered by the Family Justice Information Hub)
2. consensual dispute resolution (CDR), and
3. the courts and family law.

As illustrated by the graphic below, the first of these components is the one that underlies and supports the others. Information, assessment and referral logically come first—no one can act effectively without appropriate information—but they must continue to be available at any time, as people progress towards resolution.

Most disputes will be resolved through consensual processes. A judge will be called on in relatively few cases, and normally after other options have been exhausted. In only a few cases should a court be the first and perhaps only resort.

Figure 1: The Components of a Family Justice System



3

Information, Assessment and Referral

This is the “front end” of the family justice system, where our energies and resources have the most potential for producing positive results. The recommendations we make here will cost money, some of which will come from reallocation of resources now required by our two court systems, and some of which will be new money. We cannot guarantee that money spent here, at the front end, will reap cost savings for the justice system, but we are confident that minimizing family conflict will benefit our health, education and social systems and reduce the emotional and financial toll on families.

3.1 A Family Justice Information Hub

The key to our proposal is a Family Justice Information Hub. This is where families across the province would know they could turn for access to an array of information and services. Just as everyone knows to dial 411 for directory assistance, British Columbians would come to know this Hub as the place to go when they need help or information about a family law issue.

The Family Justice Information Hub would provide general information about the family justice system, as well as case specific information, advice and referrals.

The Family Justice Information Hub should have a physical presence in as many communities as possible. The courthouse is often a convenient location, with good access by public transit and recognized by most people as a safe place.

The Hub is where people will phone or visit to:

- ask questions of a lawyer or staff member;
- get basic legal information and referrals to legal advice;
- obtain printed materials;
- view informative videotapes;
- look up information or fill out forms on dedicated computer terminals;
- talk to a case assessor about services and options to meet their needs;
- attend courses, and
- participate in mediation, which may be available at the same location.

For people who cannot easily get to a Hub, or who prefer to obtain services online, a virtual door to the Hub will be available over the internet and at dedicated family justice computer kiosks located in convenient locations in the community. The kiosks we envision would use touch-screen technology to convey information in a variety of formats including text, audio and video. They could be stand-alone units, placed in libraries and anywhere else where

The Hub is the front door to the family justice system, where families would know to turn for access to an array of information, services and referrals.

people can have free access to them. They could also be used in courthouses or in Hub locations, to supplement other information services. They could incorporate pamphlet racks, providing take-away materials as well.

The principal functions of the Family Justice Information Hub are:

1. **Information:** People who are facing a family break-up or whose children are at risk need information to help them plan for the future. Information can lessen fear, conflict and distrust, and minimize the expense of working out solutions. Appropriate and timely information gives people options and some measure of control over the process.
2. **Assessment and referral:** Once family members have an information base, they will often need help from other professionals. A qualified person working with them to assess their needs can make sure they are pointed in the right direction. For example, the assessor could meet with one or more family members to discuss whether the situation is suitable for CDR and if so, which of the various dispute resolution options available in the community would be most appropriate and useful. Or, they might be referred to a lawyer for legal advice and assistance in pursuing either CDR or litigation.

Want of information leads to ill-informed choices, unexpected outcomes and lost time. Relevant information can reduce fear, frustration and conflict, and minimize the expense of working out solutions.

The Hub will be the place in each community through which local agencies and organizations can coordinate their services, many of which are already being provided. A local steering committee, including representatives of the major service providers, should have responsibility for minimizing gaps and overlaps and ensuring that the services offered reflect the needs of their communities. For example, steering committees should pay particular attention to the experiences and needs of the Aboriginal communities in their area.

Information, assessment and referral services are the most important components of a family justice system and they merit the dedication of significant attention and resources. In fact, many of these elements are already in place. Particularly in the area of public legal information, BC is known for innovation and for a depth of talent. The problem is that with so many different sources of information British Columbians often do not know where to turn for answers to their questions.

Families, of course, can get the information and services they need directly from lawyers and service providers in the community. The Hub will serve as a resource for those “contact points” so that they can be sure they are giving up to date and consistent information about procedures and services.

BC now has 28 Family Justice Centres. These centres were created in response to the *Breaking Up is Hard To Do* report, which called for establishment of community family relations centres as a front door to the family justice system. These centres provide many, but not all of the services we envision for the Hub. They are staffed by Family Justice Counsellors who provide information, mediation, and other services to families with custody,

access, and support issues. The centres also offer the Parenting After Separation (PAS) program, and prepare custody and access reports for court. However, at present, Family Justice Counsellors do not mediate property issues, nor do they generally serve clients with Supreme Court matters. Their clientele are generally people of modest means.

Our model of a Family Justice Information Hub incorporates features and services presently offered through Family Justice Centres, but the Hub:

- will be in more locations;
- will have a presence in the courthouse;
- will be better equipped to offer a wider range of information and access to advice; and
- will be better resourced and offer a broader range of services for all family disputes, including those now heard in both Provincial and Supreme Courts.

We propose building on the experience gained in Family Justice Centres.

Based on experience with existing family programs, we predict that outside the Lower Mainland and large urban communities staffing of specialized positions for assessment, referral, mediation and general advice for families, will be challenging.

Supreme Court Self Help Information Centre (SHIC).

Some of the elements of the Family Justice Information Hub will be tested in an innovative project now underway at Vancouver Law Courts. Working in partnership, a number of non-government agencies⁶ and the Ministry of Attorney General have established BC's first Supreme Court Self Help Information Centre (SHIC).

The goal of the pilot project is to provide legal information, education and referral services to unrepresented litigants who are involved in family and general civil actions. The SHIC will give people basic help in understanding the dispute and litigation processes and their role and responsibilities. The project will include a resource centre from which clients will be able to access government and non-government services including:

- legal information in print, on video and on the internet;⁷
- public access terminals with internet access to self help information;

⁶ These agencies include the Law Courts Education Society, the Legal Services Society, the BC Courthouse Library Society, Pro Bono Law of BC, Community Legal Assistance Society of BC, the People's Law School and the Canadian Forum on Civil Justice. The Federal Department of Justice and the BC Supreme Court and Court of Appeal have also participated. The Law Foundation of BC and the Vancouver Foundation have contributed funding. The Ministry of Attorney General is represented by Justice Services Branch and Court Services Branch.

⁷ www.supremecourtselfhelp.bc.ca

- limited help with Supreme Court forms;
- referrals to LSS legal advice or duty counsel services and pro bono legal advice;
- referrals to classes and orientation sessions on substantive issues or court process; and
- information about dispute resolution options including court.

A formal evaluation will assess the effectiveness of supported information and education, including: in-person help, public access kiosks, the internet, brochures and booklets. The evaluation will also look at possibilities for expanding the project.

1. The Family Justice Information Hub as a front door

We recommend

- that highly accessible Family Justice Information Hubs be established throughout British Columbia as the front door to the family justice system, and that the Hubs:
 - ♦ offer extensive information, needs assessment services, and referrals to other services, including to lawyers;
 - ♦ be promoted as the place where people can go for help with family problems at any time, from the very early stages and as long as there are issues to be resolved;
 - ♦ be established in as many communities as possible, and wherever possible be physically located in or have a presence in a courthouse;
 - ♦ be accessible province wide over the telephone and the internet;
 - ♦ be part of a province wide network, but supported by local community service providers and other stakeholders; and
 - ♦ serve as a focus for coordinating family justice system services, including local community services for separating families, so as to minimize service gaps and overlaps.

3.2 The Information People Need

People need many different kinds of information, and they need it at different stages. The Family Justice Information Hub must always be available to families as they move through the process, with information that is relevant to their needs at the time. Here, we outline generally some of the types of information that a Hub could provide.

General orientation: People often do not know where to start. They need help to identify the issues needing resolution, to understand what the justice system can and cannot do for them, to know what their rights and obligations are, to know what services are available to assist them and to know what options exist for resolving issues.

Information about impacts on children: Parents need information about how children are affected by separation and divorce so they can help their children through these difficult times. Research and our experience in BC⁸ suggest that educational programs are very useful to separating parents.

Parenting information: Our child protection laws recognize that it is best for children to live with their families in their communities, but sometimes parents need help to make this possible.

Information for children about separation and divorce: Children need a safe place to go with questions that cannot be answered by their parents, and they need to know they can rely on the information they receive.⁹

Information about dispute resolution options: Many people are not familiar with mediation and collaborative law as ways to resolve disputes.

Information about the court system: Those who need the involvement of a court to resolve a dispute need information about how the court system works, especially if they are not represented by a lawyer.

Information about services: People need to know what services are offered by government agencies, community associations, professionals in private practice, and others and how to gain access to them.

Legal advice and information: People need to understand what the law says about the rights and obligations that arise on family breakdown. Only then can they move forward towards a practical and enduring resolution of their dispute. In addition to providing general information about laws and procedures, the Hub would provide limited advice to clients about the law and how it applies to their particular circumstances, as well as referral to a list of family law lawyers.

3.3 How Information can be Delivered

Information of all kinds can be delivered in many different ways. We list a few of them here.

In print: Printed materials remain an important information source for many people. In BC we have many agencies that produce excellent written materials, including LSS, People’s Law School, Law Courts Education Society, Canadian Bar Association BC Branch, and The Law Centre. These agencies, through the BC Public Legal Education and Information (PLEI) Working Group, share expertise and coordinate publications. The work of this group deserves continued and enhanced support.

⁸ *Mandatory Parenting After Separation Pilot: Final Evaluation Report*. Ministry of Attorney General, Policy, Planning and Legislation Branch (2000).

⁹ Ministry of Attorney General has recently launched two websites for young children and teens: <http://www.familieschange.ca/kids> and <http://www.familieschange.ca/teen>.

On the telephone: The telephone offers privacy and gives equal access to those with limited literacy skills. The Dial-A-Law service¹⁰ offered by the Canadian Bar Association BC Branch provides pre-recorded taped messages on many family law topics; the Ministry of Attorney General Family Justice Information Line¹¹ handles about 350 calls a month; and the LSS LawLine¹² connects callers to a lawyer who gives information and referrals and gives legal advice to those who qualify financially.

On the internet: An internet based information service has many advantages: it can be maintained centrally yet provide services at an unlimited number of locations; it is available around the clock from public places and from people's homes and workplaces; it can present information at the level of detail that the user chooses; and it can present material in many formats including text, photographs, animation, video, and voice.

Some American courts provide an internet program that automatically generates court forms from answers to a series of simple questions, and also provides virtual court tours by means of streaming video, and a voice-over guide that reads aloud the text that appears on the screen.¹³

BC is already well served by online information about the family justice system.¹⁴ But as the amount of information available over the internet proliferates, it can become overwhelming. An internet portal could serve as the virtual access point for the Family Justice Information Hub. This is where people would turn if it is not easy for them to visit a Hub location, or if they simply prefer to use an online service. Besides providing access to content from a variety of sources, a full-function portal would offer a menu of online forms and access to information about a range of services.¹⁵

An important component of this internet portal would be an online database of community and government services available throughout the province.

¹⁰ In the Lower Mainland: 604-687-4680; elsewhere in BC: 1-800-565-5297; on the internet: at www.cba.org/bc click on Public & Media and then on Dial-A-Law

¹¹ In the Lower Mainland: 604-660-2192; elsewhere in BC: 1-888-216-2211

¹² In the Lower Mainland: 604-408-2172; elsewhere in BC: 1-866-577-2525; on the internet at www.lss.bc.ca/legal_info/law_line.asp

¹³ www.icandocs.org

¹⁴ LSS has extensive self-help family law materials available on its website, including kits that lead a litigant step-by-step through various procedures. The site is well-used, with 2,300 visits per month (50% of those by justice system personnel.)

<http://www.familylaw.lss.bc.ca/selfhelpmaterials.asp>.

The Ministry of Attorney General provides useful information and forms on its family justice website: <http://www.ag.gov.bc.ca/family-justice/index.htm>.

The Ministry of Children and Family Development website has information about child protection law and services: www.mcf.gov.bc.ca/child_protection.

The Canadian Bar Association's BC branch provides information on family law and child protection topics on its website www.bccba.org/Guest_Lounge/dial-a-law.asp.

¹⁵ For examples of useful internet portals see the Legal Service Society's LawLink: <http://lawlink.bc.ca> and California's <http://www.cc-courthelp.org>.

Because it can be maintained centrally, but made available everywhere, this would be a valuable resource to clients of the family justice system but also to Hub staff who make referrals to services. It would be especially useful when staff in one location is asked to make referrals in a different community or region. Judges, lawyers, mediators, counsellors and others working in the family justice system would also find this database a useful tool that would help them give better service to families.

Through a coordinated public information campaign and targeted efforts aimed at transition house workers, clergy, police, and others to whom people often turn for information, this portal could become well recognized as the family justice system's digital doorway. It would offer up-to-date, comprehensive information. LSS's LawLINK program offers a constructive model and useful information has been provided by a recent evaluation report.¹⁶

At kiosks: An "information kiosk" can function as a self-help centre. What it would look like could depend on its location. At some sites it might be as simple as a computer terminal; at others it might include pamphlets and a printer for downloading forms and for use in conjunction with in-person services.

Touch screen technology can present information in a way that does not require keyboard skills. For example, the DNA-People's Legal Services of Arizona has a touch screen program that presents visual information and text, with voice tutorials in English, Navajo or Hopi.¹⁷

By lawyers: Legal advice can reduce or head off conflict. Many people will continue to retain lawyers privately. Others will get help as needed from a range of pro bono clinics and legal services. The Lawyer Referral Service provides advice from a lawyer in private practice for a nominal fee.¹⁸ Limited legal advice offered strategically through the Family Justice Information Hub could help to resolve conflict before it escalates unnecessarily.

We will discuss in greater detail some ways to provide legal advice to more people at chapter 7.2.

By court registry staff: Court registry staff are often the first contact for people seeking information about the justice system. We do not see it as the role of registry staff to perform the functions of a Family Justice Information Hub, but they have the potential to make a real contribution to its success.

With increasing numbers of people going to court without lawyers, registry staff are very much the face of the family justice system to many people. By reflecting the Hub's ethic of helpful service to the people who arrive at the

¹⁶ *Evaluation of the LawLINK Project: Interim Report #1*, prepared by Focus Consultants (2004).

¹⁷ <http://www.dnalegalservices.org/kiosk/loader.html>

¹⁸ 604-687-3221, and toll-free throughout BC: 1 800-663-1919

registry needing information or assistance, they will contribute to building a positive public image for the family justice system.

Registry staff also need a clear understanding of what constitutes legal information, which they may give, and legal advice, which they may not. Some jurisdictions have done considerable work in this area: Michigan has developed a model that considerably broadens the scope of what many would think of as legal information and encourages court staff to help unrepresented litigants to the extent possible.¹⁹ The Association of Canadian Court Administrators addressed the responsibility of court staff for helping litigants as a focal point of its 2004 annual conference. We support this initiative and encourage further similar work.

Through courses and workshops: The common themes that affect many people experiencing family break-up offer opportunities to provide information to people in groups. BC has considerable experience and expertise in this mode of information delivery, going back to the beginnings of the People's Law School in the early 1970's.

A more recent innovation, the Parenting After Separation (PAS) program, gives parents information about the impact of separation on children and adults, and how parents can best help their children through this difficult time; about the range of dispute resolution options available, including mediation and court; and about the child support guidelines. The three-hour sessions are mandatory at BC's largest Provincial Court locations for all contested cases involving children. They are also offered on a voluntary basis in other communities and in several languages in the Lower Mainland.

In terms of subject matter, the range of information and education that could be provided in a workshop format could be expanded considerably. For example, one California jurisdiction²⁰ has had considerable success in offering evening workshops aimed at the small number of high conflict families who consume large amounts of court resources.

¹⁹ The Michigan courts' booklet on legal information and access to the courts can be found at <http://www.courts.michigan.gov/mji/resources/legal-advice/LegalAdviceBook.pdf>.

²⁰ *High Conflict Parent Education Program*. Superior Court of California (undated). [CD ROM]. Contra Costa: Contra Costa County Superior Court.

2. A wide range of information and advice services

We recommend

- that a primary role of the Family Justice Information Hub be the provision of information and referrals to lawyers and other services for parents, children and anyone else involved in family break-up.
- that the Family Justice Information Hub provide information through printed materials, over the telephone, the internet, and at kiosks.
- that the Family Justice Information Hub offer limited legal advice as well as information.
- that an internet portal be developed as the digital doorway to the Family Justice Information Hub.
- that the role of court registry staff be reviewed to ensure that they are equipped to play a supportive role in the new family justice system.
- that Parenting After Separation be available province wide, and that it be mandatory for all parents involved in contested applications concerning children.

3.4 Information must be Coherent and Accessible

plain language

Whether information is provided over the internet, in printed pamphlets, on the telephone, by means of videotapes, in courthouse signs, or any other medium, it must be done in a way that takes account of the user's needs, abilities, and understanding.

This means more than using simple words. It means breaking complex procedures down into simple steps, using familiar vocabulary in a consistent way, and organizing material logically. For printed or internet materials it also means good design and use of tables, photographs, diagrams and any other visual device that can support and clarify the text.

Web and printed information should be available in languages other than English and should also be available in formats designed specifically for people with low literacy and for those who are sight and hearing impaired. The LawLine model, which links to interpreters by telephone, could be used by the Family Justice Information Hub.

reaching remote communities

Our province's geography and population patterns pose challenges for the efficient and effective delivery of services to all British Columbians. In rural and remote communities, where populations are scattered and public transit is unavailable or inconvenient, alternatives to in-person

The Working Group sees the potential for webcams as a tool for delivering high quality and responsive service to remote locations.

services sometimes must be found. For example, attending PAS sessions is mandatory in the largest Provincial Court registries in the province, but elsewhere, people can borrow videos of PAS sessions from their public library. We support efforts to improve the quality and depth of the video package.

Video conferencing or webcams should be considered as possible mechanisms for providing assessment services and legal advice, where in-person service is impractical. In fact, the Working Group sees the potential for webcams as a tool for delivering high quality and responsive service to remote locations.

In-person services that are currently available in rural or remote communities should be used as efficiently as possible. LSS's local agents, for example, are available in some communities that lack other in-person service: their role could possibly be expanded to include provision of information services. Provincial Government Agents around the province may be able to play a role in this respect as well.

Basic information and assessment services for several communities in a region could be made available in person on a semi-regular basis, linked to circuit court schedules and other key events in the justice system, such as mandatory judicial case conferences under the *CFCSA*. Lawyers and social service professionals who travel to remote communities on government contracts could have their retainer extended by a day or part-day to allow them to deliver a workshop or a one-hour class on a topic that meets local needs. Or, a workshop curriculum could be delivered locally by members of community groups working through the Family Justice Information Hub.

Technology can be used to fill the gaps in availability of in-person services. Online learning is a growing field and could be used to deliver programs province wide via the internet. For example, in a California regional self-help centre a lawyer conducts workshops and clinics via real-time video conferencing, linking to groups of unrepresented litigants in three locations.²¹

3.5 Meeting the Needs of Aboriginal Communities

In 1992, *Breaking up Is Hard to Do* reported on issues raised in Aboriginal community workshops, including:

- the need to have family law issues dealt with outside the current court system, in a culturally appropriate way;

²¹ See www.buttecourt.ca.gov/self_help/default.htm. The British Columbia Continuing Legal Education Society is a leader in the field of online learning and should be a resource for the delivery of internet educational programs.

- the need for the family justice system to respond with greater cultural sensitivity to the concerns of Aboriginal people; and
- the need for culturally appropriate information and education about justice issues.

It was clear from the report that many of the concerns raised by Aboriginal British Columbians were strikingly similar to those raised in all the other workshops.

There is a need for culturally appropriate information and education about family justice issues

At the same time, however, Aboriginal participants identified some unique issues that did not arise in other workshops, including communication within and across cultures, different heritages and languages and Aboriginal women's issues. They suggested that courts need to be familiar with the community perspective on the family when making custody orders. This includes the role of the extended family and the nature of Aboriginal communities. They also felt that service providers need to know more about the role of the band and the complexity of living on or off reserve.

We are confident that the recommendations we make in this report, although addressed to the needs of all families in BC, do respond especially to concerns raised by Aboriginal British Columbians. As we move towards resolving family disputes outside of court, in ways that reflect the values and interests of the particular family, we can develop new dispute resolution techniques that also encourage the expression of cultural values and community traditions.

We do recognize, however, that there are unique issues among BC's Aboriginal communities that must be addressed.

- We know for example, that for the resolution of child protection cases efforts are underway to adapt the mediation process to the cultures of Aboriginal people, and we commend such initiatives.
- The particular information needs of Aboriginal families and children must be identified and met. Some of these needs are defined by the remoteness of their location, and in those cases the observations and recommendations immediately above will apply. For example, family justice websites can be developed in collaboration with Aboriginal people, with access facilitated by locating computers on reserves.²²

Local partnerships must involve Aboriginal communities in the development and operation of Family Justice Information Hubs so that each hub can respond effectively to the needs of the Aboriginal families it serves.

²² For an example of a website serving an Aboriginal community see <http://www.dnalegalservices.org/kiosk/loader.html>. This website is in English, Navajo and Hopi in both text and voice over, and is accessed through kiosks on Navajo and Hopi reservations.

3. Accessible information for everyone

We recommend

- that information on the family justice system be delivered in a way that respects the principles of plain language and the diversity of languages and cultures in our province.
- that information be delivered in a wide range of formats, to reach all British Columbians, including those in remote communities, those with low literacy, with visual or hearing impairment.
- that in-person services be provided wherever possible, using visiting services as necessary. Otherwise, communications technology should be used to make personal contact with people in remote parts of the province.
- that the unique needs of Aboriginal communities in each area of the province be a particular focus of attention for local steering committees.

3.6 A Family Justice Assessment Service

needs assessment is critical

Once people have an information base, they need to know how the information applies to their particular situation. They need to know what to do next.

Once people have information, they need to know how the information applies to their situation. They need to know what to do next.

This is why needs assessment and referral are an integral component of the Family Justice Information Hub.

From the justice system's perspective, resources are limited and need to be applied where they can do the most good. Separation and divorce are often linked to other issues such as financial problems, mental health problems, or substance abuse. Qualified staff at the Family Justice Information Hub could assess clients' circumstances and determine what process or services they need.

Safety issues can be identified at this stage. Skilled assessors can recognize adults and children who are at risk. Research and experience both show that spouses are often at greatest risk of violence from a spouse or partner in the period immediately following separation. An assessment worker can refer such a person to legal and other support services.

If a restraining order is needed, a case can be put quickly before a judge. Similarly, child protection cases that must get into court immediately to meet legislated time frames can bypass assessment. On the other hand, cases that seem suitable for consensual dispute resolution processes can be sent in that direction.

An assessment system for some family law matters now operates in three Provincial Court locations in BC through the Family Justice Registry

Program: parties applying for custody, access, guardianship and child support must meet with a Family Justice Counsellor to learn about available services, before they can appear in court. An evaluation of this project shows that families find these interviews helpful and fewer cases go on to trial. Cases that do go to court after this assessment resolve in less time than other cases.²³ Our recommendations for assessment are informed by what we have learned from this project, but they go beyond it.

Needs assessment should be available at the Family Justice Information Hub to anyone at the early stages of a dispute, and throughout, so that people can return for more help when they need to make new decisions.

Safety issues must be identified early, by skilled staff.

providing assessment services throughout BC

In-person assessment services should be available through the Family Justice Information Hub in as many communities as possible. This will be a challenge in BC, where geography complicates service delivery. When similar services were being tested in 1999, a pilot project at three small court registries in the Kootenays demonstrated that they could not be provided economically to these rural communities.

More creative service delivery models will have to be found for rural and remote communities: telephone assessment services, a “circuit court” approach, webcam conferencing and video conferencing are potential tools.

Webcam conferencing offers potential for extending assessment services to people who cannot easily visit a Family Justice Information Hub; it can occur between desktop computers and does not result in long distance charges. BC’s Access to Justice pro bono network, for example, has been linking clients in Williams Lake with pro bono lawyers in Vancouver via webcam since August 2004. The project is expanding to provide service to clients in Smithers, Prince Rupert, Terrace and Grand Forks.

assessment services and immigrant women

Women who have recently arrived in Canada can experience special problems during separation and divorce, especially if they are leaving an abusive relationship. They may feel extraordinary pressures from their own cultural community to remain in the home; if they leave they may face social isolation. Their own cultural values may emphasize the collective good over individual interests, making it harder to justify leaving. Many have a deep-seated fear of police and other authorities. They may also fear racism, threats to their immigration status and deportation. They often lack knowledge of the family justice system and available resources and if their English language skills are

²³ *Final Report: Evaluation of the Family Justice Registry (Rule 5) Pilot Project*. Prepared by R.A. Malatest & Associates, Ltd., for the Ministry of Attorney General, November, 2002.

not good, they may have trouble taking advantage of those resources, even if they do know about them.²⁴

The Family Justice Information Hub could gain a high profile in all sectors of the community, including among immigrant populations. Knowledgeable staff would make referrals to services that are culturally appropriate and could make interpreters' services available as well.

assessment as a gateway

Our proposals aim to create a shift in public expectations so that people will expect to resolve their family disputes without going to court.

In our proposal (see Chapter 4) an attempt at consensual dispute resolution will be required, with certain exceptions, before a family case can be taken to court.

The assessment service will be available to meet with people to determine whether they can be exempted from this requirement. The assessment service will also help give people options for choosing a mediator or collaborative lawyer and explain how these processes work and their place in the justice system.

A file will be opened for every person attending the assessment service, recording basic information including the issues in dispute, names, and addresses, and the services to which people have been referred. If clients return to assessment at a later stage, they will not need to repeat their story and staff can consider what steps have already been taken to try to resolve the matter, before making another referral.

Implementation of an assessment service of this nature will need to ensure that confidentiality of personal information is respected and that potential conflicts of interest are addressed when assessors provide services to both spouses.

Our proposals aim to create a shift in public expectations so that people will expect to resolve their family disputes without going to court.

²⁴ MacLeod, Linda and Maria Shin, *Isolated, Afraid, and Forgotten: The Service Delivery Needs and Realities of Immigrant and Refugee Women Who Are Battered*. National Clearinghouse on Family Violence, Family Violence Prevention Division, Health and Welfare Canada. Ottawa(1990). <http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/html/femisole.html>

4. A needs assessment and screening service

We recommend

- that a needs assessment service, with appropriately trained and qualified staff, be available to anyone at the early stages of a dispute as a component of the Family Justice Information Hub.
- that where possible, assessment be available in person, and where that is not possible, by telephone or other communications technology.
- that guidelines for identifying and responding to family violence be developed for use by those who work in the family justice system.
- that the assessment service of the Family Justice Information Hub support dispute resolution by screening participants, providing information and referrals, and granting exemptions (from the consensual dispute resolution requirement).

3.7 Referral Networks are Key to Integrated Service

“Integrated service delivery” means related services working together to minimize gaps and overlaps in what they provide to their clients, and it means that clients can easily find the services they need, and can move easily from one service to another.

“Integrated service delivery” means that related legal and non-legal services work together to minimize gaps and overlaps to provide coordinated services for families in crisis.

For families in crisis, legal solutions alone are often not enough. Assessment staff at the Hub must be well informed about the full range of services available in the community, eligibility requirements, and waiting lists so that they can refer clients appropriately.

BC has a wide range of government and non-government services for families but a recent study²⁵ found that court registry staff and other “front line” workers have trouble keeping current with all of them. In some communities, agencies that serve the same clientele are unaware of each other. The result is service gaps and occasional overlaps in family programs. The online database of services that we recommend as a component of the Family Justice Information Hub will allow anyone to find current, reliable information about services to meet a particular family’s needs.

It is important that the Family Justice Information Hub be linked to service providers in the community, such as transition houses and victim service workers, so that people can move efficiently from one option to another when they need to. For example, a community service worker may help an

²⁵ *Developing Models for Coordinated Services for Self-Representing Litigants: Mapping Services, Gaps, Issues and Needs*: Supreme Court Self-Help Steering Committee, Vancouver, January, 2004

unrepresented litigant to complete a court application and then accompany the person to an appointment with a lawyer.

The Hub should strive to provide an effective, integrated referral service offering current information about the full range of available family programs²⁶. Locating related services in the same location can promote this kind of integration, as evidenced by the success of the Robson Square project, where LSS and the Ministry of Attorney General work together to provide mediation and other services out of one family court location.²⁷

At Robson Square, family duty counsel, advice lawyers and family justice counsellors serve clients at a single location. Family justice counsellors provide mediation while duty counsel can speak for clients in court on simple matters, help draft documents to be filed in court, and negotiate and settle issues. Advice lawyers help unrepresented clients before and after their court appearances and help low income parents who are participating in the Family Justice Centre mediation process.

By contrast, in Surrey, where two lawyers are on duty daily and the number of cases is about the same as at Robson Square, mediation is not available at the courthouse. This means that people have to make an appointment and arrange to go to another location. If child care and transportation are issues, this small delay and inconvenience can mean the difference between taking advantage of mediation services and not.

5. Streamlined service delivery through the Hub

We recommend

- that an effective, integrated referral service, supported by a local advisory committee, be developed as an essential component of the Family Justice Information Hub.
- that, to identify and better coordinate services, the Hub referral service be supported by a comprehensive online database, available to clients, judges, lawyers, and all service providers.

²⁶ Some very good resources already exist to support this. For example, the Red Book Online is a guide to community, social service and government agencies and services across the Lower Mainland. Updated monthly, it provides more than 4000 detailed listings of a variety of services including legal, counselling, health, financial, housing, employment, education, recreation, cultural, political, business and transportation. This resource was developed by the Vancouver Public Library and Information Services Vancouver, with funding from the provincial government.

²⁷ *Evaluation of the Expanded Family Duty Counsel Project (Robson Street Court House) Interim Report*. Vancouver: Legal Services Society of British Columbia. Prepared by Focus Consultants (2003). *Evaluation of the Family Duty Counsel Project in Six Provincial Sites*. Vancouver: Legal Services Society of British Columbia. Prepared by Focus Consultants (2004).

4 Consensual Dispute Resolution

4.1 Changing Expectations

Over the past 20 years the range of dispute resolution options available to separating families has expanded enormously. In BC there are qualified family law and child protection mediators, Family Justice Counsellors providing mediation, lawyers practising collaborative law, and dispute resolution services offered through social service agencies.

Still, people choose to go to court. These newer, more family-friendly options remain the “alternative” and the courtroom remains the norm.

There once was an expectation that if mediation and other “alternative dispute resolution” (ADR) options were simply made available, people would recognize their advantages and seek them out, rather than choose to go to court. This has not happened to the extent some expected. Although more and more families are aware of “ADR,” public awareness of these options still competes with a lifetime of exposure to the court system.

It also used to be accepted that mediation could work only if the parties voluntarily chose it. This has proved to be wrong. Settlement rates and satisfaction levels are about the same, whether people have chosen mediation or been compelled to try it.²⁸

The fact is that most people learn about mediation when they actually participate in it, and most are pleased with the process and the result.

This is why we are proposing that, unless there is good reason not to, anyone who wants to go to court with a family law issue must first try to resolve it through a consensual process. “Mediation” and “collaborative process” are defined below; we refer to them collectively as “Consensual Dispute Resolution” (CDR).

A decision by a judge must be available when necessary, but families should have primary responsibility for making their own arrangements, even if their legal relationships are changing.

This reversal of long held assumptions must be reflected in public spending priorities. Subsidies should be shifted so that the fee for taking a family matter to court more closely reflects its true cost. This money, and the savings to be

Most people learn about mediation when they actually participate in it, and most are pleased with the process and the result.

²⁸ Dr. Joan B Kelly, *Family Mediation Research: Is there Empirical Support for the Field?* Conflict Resolution Quarterly, Vol. 22, nos. 1-2, (Fall-Winter 2004). A study of California mandated mediation found a majority of participants satisfied with both process and outcome.

A cultural shift in our expectations surrounding best-interest conflict resolution is essential. Rather than turning to the courts to make difficult relationship decisions, a comprehensive system needs to be in place that is based on the psychological, social, and other dynamics that underlie these matters and encourages the development of cooperative, interest-based problem solving.

Firestone and
Weinstein, 2004

gained through efficiencies in the court system can then be used to ensure that CDR can be affordable to all.

These recommendations are designed to change the way people think about resolving family disputes—the people who are going through separation or divorce as well as those working in the family justice system.

The Divorce Act was amended in 1985 to compel lawyers to discuss negotiation and mediation options with clients involved in support or custody disputes. The standard of practice should now require that lawyers do more than talk about options. We see the role of lawyers in family law continuing to be important, as more and more they are called on to actively help their clients choose the CDR option that has the best chance of success in their particular circumstances, not just in custody and support cases, but in all family matters. The role of lawyers will of course include assisting clients to pursue their best option.

Our hope is that in the not too distant future, the initial response of almost anyone facing family break-up will be to try CDR with a recognized professional; then, if that should fail, go to court and ask a judge to become involved.

By requiring people to try CDR before asking a court to intervene, we aim to build a cultural expectation that the responsibility for resolving disputes is, at least in the first instance, the responsibility of the family members themselves.

The family justice system will support them in the exercise of this responsibility, by offering information, services and referrals and ensuring that CDR options remain available in a meaningful way, with levels of support and advocacy that respond to families' actual needs.

4.2 Definitions

Before going further, we should make clear what we mean by “mediation” and “collaborative process.”

Mediation is a way for people to resolve a dispute with the help of a neutral third party facilitator—the mediator—who has no decision making power. Unlike litigation, it is a private process that is both informal and flexible. The people themselves, and not the mediator, decide the terms of the agreement. The mediator is trained in communication, problem solving and facilitation. Different models of mediation are available, including “shuttle mediation” in which the mediator meets separately with each of the spouses and they do not come face-to-face. Mediation can happen with or without lawyers present, depending on the amount of support and advocacy people want.

Collaborative process (also known as collaborative law, collaborative practice, or collaborative divorce) is a way for divorcing or separating couples to work together, with their lawyers, to resolve disputes respectfully and constructively. The couple and their lawyers agree at the start not to resort to

the courts and that if either of them starts a contested court action, the process ends and both lawyers withdraw from the case. This means that each person has the support of an advocate who has been hired specifically to help that person resolve matters. Other professionals, including financial advisors and child specialists, may be involved as well, depending on the people's needs and the issues involved. The focus is on a coordinated resolution of all the issues that are important to the parties, whether they be legal, emotional, or financial.

4.3 Family Violence, Power Imbalance and Gender

It is difficult to know the full extent of family violence in Canada because it often remains hidden. Some people never disclose that they have been abused and others may endure abuse for a long time before acknowledging it or seeking help.

In proposing a family justice system that asks spouses to take responsibility for their own family arrangements after break-up, we recognize the need to consider issues of gender, power and violence.

A large-scale study by Statistics Canada in 1999²⁹ estimated that 8% of women and 7% of men who were married or living in a common law relationship during the previous five-years (690,000 women and 549,000 men) had experienced some type of violence by their partner at least once. Men reported a significant amount of violence, but the survey showed that the nature and consequences of family violence were more severe for women.³⁰ Other studies report a much higher incidence of family violence.

Research tells us that separation is a high risk time for family violence. More than a quarter of women who are killed by a spouse are killed during the time following separation, and in almost half those cases, there was no known history of spousal violence.³¹

In proposing a family justice system that asks spouses to take responsibility for their own family arrangements after break-up, we recognize the need to consider issues of gender, power and violence. The safety of family members must be the number one priority.

This report advocates for a Family Justice Information Hub that would be a safe place for people to find information and for public education in the areas of family violence, legal rights and options. The Hub would provide for ready access and referrals to community resources for victims of abuse, and help with getting quick access to court in emergency situations.

²⁹ The 1999 General Social Survey was a telephone survey in which 26,000 French and English speaking males and females over the age of 15 were asked about the occurrence of violence in intimate relationships both during the last year, and the preceding five years. Questions related to a selection of physically violent acts, and also to a selection of emotionally abusive acts.

³⁰ From The Daily: A Statistical Profile (2001)
<http://www.statcan.ca/Daily/English/000725/d000725b.htm>

³¹ *Could Starbucks Tragedy Have Been Prevented?* Media Release from Institute of Family Violence (Feb 2, 2002). <http://www.bcifv.org/hottopics/media/feb2.shtml>

CDR allows for assessment and management of power imbalances so that a fair and lasting agreement can be reached.

family violence and CDR

Some commentators advise women against using mediation to resolve support and property issues. They believe that inequality in income and power between men and women in our society makes it impossible for most women to achieve fair settlements, except by court order. However, hiring lawyers and going to court is not necessarily the solution either. It is possible that hostility and aggression can be misused by one party in the court process to overwhelm, intimidate and exhaust another.

Mediators say they can identify and effectively address such power imbalances in most cases and that they proceed with mediation only when it can result in a fair settlement. They point out that there are forms of mediation that include little or no face-to-face negotiation between the parties and that offer support and protection.

Our view is that power imbalances exist in many forms in all relationships and it is how these are identified and handled that is important. CDR allows for assessment and management of power imbalances so that a fair and lasting agreement can be reached.

This means, of course, that assessors need to be highly skilled and alert to risk factors so they can steer clients to services that can help. Using tested and accepted protocols to screen for violence is crucially important. Dispute resolution professionals must also be properly trained and able to use a variety of techniques, including separate meetings with the parties, and to recognize when parties need the support of others, such as lawyers, to help them in their negotiations.

Legal advice is key will be important for both parties once they reach an agreement to make sure that the settlement is fair before it is made binding.

4.4 Mandatory Participation in CDR

In the mandatory CDR model that we propose, it is participation in a single CDR session that is mandated, not settlement. People can participate in collaborative law or mediation voluntarily but if they do not, they will be required to attend mediation before appearing before a judge unless they qualify for an exemption. We recognize that this requirement is a fundamental shift, although it builds on a trend that has been developing over the last decade. We have carefully considered the arguments on both sides, but overriding all the concerns we have identified are these:

“Mandatory Consensual Resolution” may sound like a contradiction in terms, but it is only participation in a single session that will be mandatory. Whether they are able to reach agreement will be up to the parties.

- CDR recognizes that separation and divorce, though they have legal consequences, are emotional events, often closely linked to issues that the law is powerless to address.
- CDR gives people a more constructive way to address emotions and improve communication between parents and their children, and between parents who are moving from an intimate relationship to one that is more “business-like.”
- CDR processes can give children a voice in a cooperative forum.
- CDR can improve communication between parents of children in care and the social service agencies they deal with.
- CDR can reduce costs to families, to the court system, and to society.
- CDR helps people develop problem solving skills they can use to avert future disputes.

A large body of research³² and experience in BC and elsewhere now supports these conclusions. Still, there are legitimate questions that need to be addressed and we do so in this table:

Table 1: Mandatory CDR

| ARGUMENTS AGAINST MANDATORY CDR | RESPONSE IN SUPPORT OF MANDATORY CDR |
|---|--|
| CDR is, by definition, a voluntary process. | Agreement is always voluntary; participation in a single session is all that is to be mandated. |
| Mandatory CDR delays access to a court and, if unsuccessful, adds cost. | Mediation can fit within the timeframes of a court proceeding without adding delay. What is important to families is access to an effective way to resolve their dispute. Most cases will resolve, but for those who cannot agree on all issues, CDR will identify and narrow those that a court must address. Then the court process can be more efficient and effective. |

³²See for example: Cole, McEwen and Rogers, *Mediation: Law, Policy and Practice*, 2nd edition, Volume 1. West Publishers (2003). Numerous mediation studies are summarized in this publication.

| | |
|---|---|
| Abusers may use CDR as a tool to harass and maintain contact with their victims. | Court proceedings can also be misused in this way and, especially for unrepresented litigants, safeguards may be ineffective. One session is all that is required. Skilled mediators and collaborative lawyers can manage the process so as to minimize risk, for example, by using “shuttle mediation” where people do not have to be in the same room together. Inappropriate cases must be screened out of CDR. |
| Some people need strong advocacy to help them when they are going through separation or divorce | CDR processes can, and commonly do, include effective advocacy in a cooperative forum. |

Under a mandatory system, everyone for whom CDR is appropriate and who would otherwise take their disputes to court will participate in at least one CDR session. The result will be many more people resolving issues in this way, higher satisfaction with the resolution process, more durable agreements, and a more efficient and effective court system for those who need it.

The CDR process must be designed to ensure that a party’s access to court is not unduly delayed either by the other party’s refusal to participate, or by a lack of CDR providers. Further, anyone who refuses to participate in mandatory CDR should not be allowed to take any step in the court process except a response to a court application, until the CDR requirement is met.

We recommend mandatory CDR for cases involving support, custody, access, guardianship or property division. There may, however, be an argument for exempting some categories of cases, such as support applications by the Ministry of Human Resources in respect of income assistance recipients, or possibly some applications under the *Family Maintenance Enforcement Act*. This needs further study.

We recommend mandatory CDR for child protection cases but recognize that, given the rules and statutory time lines that apply to these cases, the structure of a mandatory mediation regime for these cases would differ from one for disputes between separating or divorcing couples. The time and resources available to us do not allow for adequate exploration of these complex policy questions, which will need to be developed by others at a later date.

6. CDR requirement

We recommend

- that people be required to have attended a CDR session before they are allowed to take a first contested step in a court process, unless exempted;
- that this requirement apply to all family cases, including custody, guardianship, access, child support, spousal support, property division, and child protection.

4.5 A Range of CDR Options

Twenty years ago the use of mediation as a tool for resolving family law disputes was seen as a breakthrough. Since then, the dispute resolution community has grown and matured and process options have multiplied so that now there is a consensual dispute resolution process that can help to resolve almost any case.

The assessment service at the Hub will help people to choose the process that best meets their needs.

Many will find the traditional face-to-face mediation model the most appropriate and useful, but there are other options.

For example, a person who wants to use a lawyer in CDR can retain a collaborative law lawyer or can use a mediation model in which people bring their lawyers to the sessions or consult with them between sessions and before committing to an agreement.

A family with extreme conflict might choose to use shuttle mediation so that they do not have to be in the same room together, and may choose to include support people for each of them.

Mediators who are trained to work with children can do so in separate sessions, giving children a voice in mediation.

Mediation is effective in a wide range of situations but we recognize that there are cases where it is not appropriate. For most of those, a collaborative process can be effective because it allows for a more intensive form of advocacy or support. Interdisciplinary collaborative practice groups offer a range of services from various professionals including:

- divorce coaches, who are counsellors with post-graduate degrees in mental health fields and training in mediation and collaborative processes. They support people through the emotional turmoil of separation, help them communicate with each other as they work towards resolution, and help parents develop parenting plans that meet their children's needs.
- child specialists, who give children a voice when parents have differing ideas about what the children want or what is best for them. The child

specialist gives parents unbiased information from and about their children to help them develop a parenting plan.

- financial advisors, who work with both spouses on budgeting and provide projections to help each of them understand the financial impact of different settlement proposals.

We do not know how many separating families simply stay away from the family justice system altogether, even though they need help resolving their disputes, but we do know that this happens. There are several possible explanations:

- they cannot afford a lawyer and are too intimidated or confused to go into the court system unrepresented;
- they are concerned that they will lose control of cost and of the process if they retain a lawyer;
- for cultural reasons they distrust the justice system; or
- they are reluctant to enter an adversarial forum, and are unaware of or cannot afford an alternative.

Access to and information about mediation, collaborative process, and limited legal services to support negotiated settlements will help make these processes available to those who now do not approach the family justice system at all.

4.6 Complying with the Mandatory Requirement

The mandatory CDR requirement we recommend would apply only to those who are asking for a court hearing on a contested matter.

People who have tried a CDR process but have not successfully resolved all issues will obtain a certificate signed by a CDR professional, establishing that the requirement has been met.

Those entitled to issue a certificate of compliance with the CDR requirement would be either certified mediators or collaborative professionals who meet practice and ethical standards that should be developed and adopted through a consultative process.

Certified mediators would include anyone who is:

- certified by Family Mediation Canada,
- a member of the family roster of the BC Mediation Roster Society, or
- a lawyer who meets the Family Law Mediator requirements set by the Law Society of BC.

The mandatory CDR requirement we recommend would apply only to those who are asking for a court hearing on a contested matter

7. Compliance certified by qualified professionals

We recommend

- that qualified mediators and collaborative professionals be authorized to issue certificates of compliance with the CDR requirement.

4.7 Assessment

Mediation may not be appropriate if:

- there has been abuse (though abuse does not always rule out mediation);
- harm will likely come to anyone, including a child, as a result of participating;
- an imbalance of bargaining power cannot be managed so as to make the mediation procedurally fair; or
- the parties do not have the mental capacity to participate meaningfully.

High quality screening for abuse and power imbalances is essential for the safety of family members. The assessor may find that a person can safely participate in CDR, but only with the support of someone such as a lawyer, or a friend or family member. Those who are or have been subject to abuse can be particularly vulnerable during the separation process, so it is important to know whether there has been abuse in the relationship and if so, how serious. Some people do not recognize that they are living in an abusive relationship: they may blame themselves, or deny or minimize the abuse. This means that staff in the assessment service must be highly trained and skilled in these areas.

Because people may go to a CDR practitioner on their own without having first seen an assessor, the mediator or collaborative professional also will need to be alert in the initial interview to abuse issues and to monitor continuously because people do not always disclose abuse at an early stage. If the CDR professional determines, after the CDR process has begun that it is not appropriate, the parties would receive a certificate of compliance and would be permitted to go to court.

However, the existence of abuse does not always mean that CDR cannot be effective. Experience in child protection mediation has taught us a lot about the ability of the mediation model to accommodate the needs of many families, even where there has been serious abuse, addiction or mental illness.

BC's Family Mediation Practicum Project³³ and Family Justice Counsellors use a three-step screening protocol³⁴ that is a good starting point for developing an assessment model. It includes:

³³ See: <http://www.ag.gov.bc.ca/dro/family-mediation/>

³⁴ An example of such a protocol is included at Appendix B.

1. intake screening: at first contact, an initial screening for abuse.
2. separate face-to-face interviews by the mediator before the first session, to allow the mediator to decide whether mediation is appropriate.
3. ongoing screening by the mediator who watches for signs of coercion or intimidation as the mediation progresses.

exemptions

Couples who want only to file an agreement or consent order would not be included in the mandatory requirement, but for all other cases, exemptions from the CDR requirement should be limited.

An automatic temporary exemption should apply to anyone asking the court for a restraining order (whether to protect a person or assets). Unless there is an exemption through the assessment process, for reasons of family violence, for example, the CDR requirement would have to be met after the restraining order application is heard, before another contested step in the court case.

Anyone who wants to make an application for a contested hearing other than a restraining order and wishes to be exempted from participating in CDR, would go to the assessment service at the Family Justice Information Hub. There, the case would be screened to determine whether it is appropriate for CDR. If it is not appropriate, the person would be exempted and would then be allowed to take the next step in the court process.

Even those who are exempted from mandatory CDR can be offered voluntary referrals to other community services such as legal aid, or mental health or substance abuse services.

8. An assessment and screening service

We recommend

- that a high quality assessment service be provided, applying accepted, standardized screening protocols.
- that in the limited circumstances where mandatory CDR is not appropriate, exemptions based on formal assessment and screening by qualified individuals be available from the Family Justice Information Hub.
- that an automatic temporary exemption from the CDR requirement be available in the case of an application for a restraining order; unless there is a further exemption, the requirement must be met after the restraining order application but before another contested step in the litigation process.

4.8 Practice Standards and Quality Control

To the extent that it mandates CDR, the government has a responsibility to ensure that CDR services are provided by qualified practitioners who meet recognized standards of practice.

These quality control mechanisms are already at work in BC:

- BC's Family Justice Counsellors, who are government employees and who provide family mediation to people of modest means, are certified by Family Mediation Canada³⁵.
- The BC Mediation Roster Society makes available to the public rosters of family and child protection mediators.³⁶ By defining admission criteria, having mandatory standards of conduct and providing a process to deal with complaints it brings a level of quality control to the process.
- The Law Society of BC has training requirements for lawyers who wish to do family mediation. It also defines certain rules for the conduct of family mediation and provides a process to deal with complaints.

If the government authorizes only those professionals who meet established standards (see 4.6) to issue certificates of compliance with the CDR requirement, then these standards will become the accepted standards of practice.

Public education will also be important. Once the public has a better understanding of the dispute resolution professions, market forces will play a role in enforcing standards of practice.

There now are many opportunities for people to learn dispute resolution skills but fewer opportunities to gain experience. The Family Mediation Practicum Project is following the example of the successful Small Claims Mediation Practicum Program³⁷, but the number of people it can serve is limited. More opportunities are needed for trained CDR practitioners to gain practical experience.

We endorse the roster model used by the BC Mediation Roster Society and recommend it be used for CDR purposes.

³⁵ See www.fmc.ca

³⁶ See <http://www.mediator-roster.bc.ca/>

³⁷ See <http://www.courtmediation.com>

9. Standards for mandatory services

We recommend

- that assessors, mediators and collaborative professionals providing services under this mandatory scheme be required to meet recognized standards of training and practice.
- that a roster be established for collaborative practitioners, modelled on the BC Mediation Roster Society's family roster.
- that ways be found to provide more opportunities for trained CDR professionals to gain practical experience.

4.9 Making CDR Accessible

Consensual dispute resolution should be attractive to people as a cost-effective way to resolve family issues, accessible at all income levels. At present, litigation is a highly subsidized method of dispute resolution. Our view is that public subsidies should be shifted towards CDR.

We propose that an initial mediation session be provided free of charge to any family. Payment would be made by government at an established tariff rate. A couple would be free to use, and pay for, the services of a CDR professional who charges more, if they so choose.

For those in financial need, assistance should be available, on a sliding scale, for enough sessions to allow a meaningful opportunity for settlement.

Families for whom mediation is not appropriate may well be able to make use of collaborative process. Manitoba is currently funding a legal aid collaborative project for family law clients and the results of that project should be monitored for possible application in BC.

To the extent that family legal aid funding is available, the LSS should continue to support CDR through its programs and its tariff.

Technology offers potential for reducing the cost of CDR in some instances. Video conferencing and webcam conferencing are being used by private mediation firms in the US³⁸ and should be explored for use where travel costs are a barrier to access.

³⁸ See Mediation First service by webcam and chatroom at <http://www.mediationfirst.com> or videoconferencing at www.privatejudge.com

10. A subsidized mediation session

We recommend

- that mediation be made available in a meaningful way, for example, by providing the first session free for everyone, with further sessions charged on a sliding scale, depending on income.

4.10 Access to Legal Advice in Support of CDR

People need access to different forms of independent legal advice, whether from a privately retained lawyer providing full representation throughout, or a lawyer hired to advise on a single issue or on a final agreement. (In Chapter 7 we discuss the role of “unbundled” legal services in the family justice system.)

If people reach an agreement through CDR without the involvement of lawyers, they will need some advice to finalize the agreement and put it into a form that will be legally binding: either a written agreement or a consent order filed with the court. People should be educated about the importance of this advice.

Again, the expectation is that people will pay for this service, but subsidies should be available, according to need. Lawyers should be encouraged to be prepared to support the use of CDR by offering to provide legal advice whether before, during or after CDR processes. They could receive referrals through the Hub. For people who do not have a privately retained lawyer, legal advice for this limited purpose should be available at the Hub.

11. Legal advice on agreements

We recommend

- that people be educated about the importance of obtaining legal advice before entering into a binding agreement;
- that legal services, including independent legal advice, be available to help low and middle income families formalize the agreements they have reached through CDR so that they are legally binding.

4.11 Children and CDR

The law says that decisions about parenting arrangements must be based on the best interests of the child. When parenting disputes go to court, judges, lawyers and parents struggle to find ways to understand and give expression to those interests.

Mediation can offer a forum where parents can more easily hear their children’s concerns and take them into account in their agreements. Mediators need to be trained to involve children in the process in appropriate ways. The

use of trained child specialists should be supported to bring children's voices into mediation and collaborative sessions.

In Chapter 5 we refer to the study being conducted by The International Institute for Child Rights and Development into child participation in family court and in processes in British Columbia. That report and its implications for children's participation in CDR should be considered carefully.

5

Rules, Procedures and Hearings

Continuous links between “front end” services, CDR options, and the courts are a hallmark of the integrated family justice system that we propose.

In the family justice system we propose, consensual resolution is the mainstream and trials are the alternative, but trials still will play a key role and courts must remain accessible. In some cases, the need for a trial may reflect failure by an uncompromising person to take responsibility for reaching an agreement. In others, trial may be necessary to resolve a new or difficult issue, or to address uncertainty in the law. In any event, it is the knowledge that the courts can ultimately be invoked if necessary that brings many people to the bargaining table.

Under our proposed family justice system, people will have been given every opportunity to settle before they get to the courtroom. So, once it is clear that a case is destined for trial, a timely and efficient hearing should become the focus of everyone’s efforts. That said, links between the court and family services must remain readily available. For example:

- new information and advice may be needed or new settlement opportunities may arise as litigation evolves, so it must be easy for families to “loop back” into information and advice services or into CDR at any time; and
- the courtroom should be supported with services that will allow better decisions to be made for children and help to reduce conflict. Some of these services have already been described in Chapter 3 and others are identified in this chapter.

These continuous links between “front end” services, the range of CDR options, and the courts are a hallmark of the new, integrated family justice system that we propose.

5.1 Tailoring Processes to Families’ Needs

Once it is clear that a family cannot resolve its issues and a decision must be made, the dispute should be resolved as expeditiously as possible. We think family cases should be carefully managed through the court process to ensure that they move forward. Our case management system relies on meaningful court events that focus on early settlement.

Family law is not the only area of law where procedures have become too expensive and complex. An urgent need to streamline all types of litigation was identified by the Canadian Bar Association’s 1996 Civil Justice Task Force, Lord Woolf’s 1996 report on England’s civil justice system, Ontario’s 1996 *Civil Justice Review*, and many others. But in family law, where resources are usually strained, emotions run high and families need to make plans for their future, the need to simplify and streamline is most acute.

In family cases it is increasingly common for at least one, if not both sides to be unrepresented. Common law jurisdictions around the world are seeing a significant increase in the number of unrepresented litigants. They are here to stay, so every family law form and procedure should be designed so that the general public can understand and use them.

Preparing pleadings (the formal documents that are the basis of a lawsuit) is a significant hurdle for people with no legal training. For those who do have a lawyer, the preparation of pleadings can be an expensive part of the process.

Most families do not have complicated financial lives and do not need and cannot afford complex pre-trial procedures that have been developed with commercial and personal injury cases in mind. Family cases, whatever the issues, could benefit from a level of process that is proportionate to what is at stake and flexible enough to meet the unique requirements of each case.

“Proportionality” should be a goal of family law procedure. Ontario’s family court rules,³⁹ by way of example, state their primary objective as enabling the court to deal with cases justly. Dealing with a case justly is defined, in part, as “dealing with the case in ways that are appropriate to its importance and complexity” and “giving appropriate court resources to the case while taking account of the need to give resources to other cases.”

“Proportionality” should be a goal of family law procedure. The balance between procedural complexity and efficiency must be readjusted in favour of efficiency.

Another example can be found in England where proportionality has been adopted as the overriding objective of the Civil Procedure Rules: the rules aim to deal with cases in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party.

Any suggestion of streamlining procedures may raise concerns about potential loss of protection and risk of unfairness. In fact, procedures we have now, particularly in Supreme Court, have become so complex and unaffordable that unfairness is often the result. Balance between procedural complexity and efficiency must be readjusted in favour of efficiency. We adopt the views expressed in the Civil Justice Reform Working Group’s Green Paper⁴⁰:

On the other hand, it can be argued that protracted procedure is frustrating access to the courts to a degree that threatens the credibility of the civil justice system, and some balancing in favour of affordable dispute resolution must be achieved. Access to justice cannot mean every litigant has, or needs, access to every procedure in every case. More to the point, the fear of the unfairness that might occur in some cases if process is reduced or constrained must be balanced by the unfairness that is occurring now because the courts have become unaffordable for most litigants. From this perspective the argument is that the real and ultimate effect of so much civil process is to undermine or eliminate fairness for the many would-be litigants who cannot use the system. By definition this unfairness is less visible; it is visited on the

³⁹ http://192.75.156.68/DBLaws/Regs/English/990114a_e.htm

⁴⁰ *Green Paper: the Foundations of Civil Justice Reform*, released by the Civil Justice Reform Working Group, Vancouver, BC, (September 2004), p.5. Link from http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp

heads of those who cannot afford to get before the courts, but it is arguably a greater unfairness.

proposed rule changes

What follows is a general framework for a single set of simplified family rules. We are convinced that streamlined family rules will enhance fairness by making the court more accessible for the few cases that need adjudication. The guiding principle is process that is proportional to the issue.

The table does not list every step in the litigation process but illustrates the type of changes we are recommending.

There are other rules and options that we have considered and decided not to recommend. For example, “pre-action protocols” are being used extensively in civil litigation in the United Kingdom: the theory was that requiring an exchange of information between parties before an action could be started would lead to many settlements and streamline cases that did not settle. In fact, the best information we have is that the potential value of these protocols is often undermined by the complicated and expensive paperwork they generate.

On the other hand, a different pre-action procedure is being tried in Australia: new family law rules say that before starting a case, each party must try to resolve the dispute using “primary dispute resolution methods” (such as mediation) and must disclose relevant information to the other. There are exceptions to the requirement but, generally, a person who does not comply may begin a court case but may face “serious consequences” including cost penalties.

Our approach does encourage people to try to resolve their disputes before turning to the courts and establishes a new expectation that this is a family’s responsibility, but we have chosen not to recommend at this time that such a requirement be imposed before an action can be started. That said, it will be worth monitoring the operation of the new Australian rule to see whether it offers some lessons worth following.

We also considered the use of arbitration for family law disputes and concluded that while it may possibly be more procedurally streamlined than litigation, it may in many cases be equally complex and expensive. Further, we feel that the most productive direction for reform is not toward another adversarial alternative.

The challenge that now faces the profession is to devise a realistic standard of service for modest claims – short of “five star” but acceptable to the courts and public, and infinitely better than no service at all.

- Dale Sanderson, QC

Table 2: Proposed changes to family law procedures

| STEP | CHANGE | REASON |
|--------------------------------|--|---|
| Preserving a limitation period | <ul style="list-style-type: none"> ☑ Create a new one page document called a “Notice to Preserve Limitation” which asks only for identifying information from the parties and a description of the right or claim preserved, without a claim for relief. It must be filed and served to be effective. | <p>It should be possible to stop a limitation period from running without having to start an action.</p> <p>(Any dispute about entitlement to the right allegedly preserved can be resolved in subsequent litigation, if that occurs.)</p> |
| Starting a claim | <ul style="list-style-type: none"> ☑ Replace existing Supreme and Provincial Court forms with a simplified “Application” using check boxes and fill-in-the-blanks to identify and locate the parties, establish a reliable factual basis for jurisdiction, and describe what is being asked for. ☑ Require a sworn Financial Disclosure Form (FDF) be filed at the same time as the Application. | <p>Require only as much information as necessary at this stage; minimize exaggerated claims and polarizing affidavits.</p> <p>Early financial disclosure facilitates settlement while ensuring that the person receiving the Application has the information on which to base a response.</p> |
| Opposing a claim | <ul style="list-style-type: none"> ☑ The respondent files and serves a “Response” (simpler and shorter than a Statement of Defence) within a fixed time period, together with an FDF. ☑ Eliminate the Appearance. | <p>Simplify forms. Ensure that the applicant has the information on which to base negotiations.</p> <p>Eliminate unnecessary steps.</p> |

| STEP | CHANGE | REASON |
|-----------------------------|---|---|
| To get before a judge | <p>☑The party who wants to involve a judge serves the other with an “Appointment to Attend a First Case Conference” (FCC); and files, for non-urgent matters, a certificate of compliance with the CDR requirement (or an exemption certificate); and, for matters involving children, a certificate of attendance at a Parenting After Separation course.</p> | <p>Except for urgent matters, a party cannot go before a judge on a contested matter without first attending an FCC and, if there are parenting issues, the Parenting After Separation program.</p> |
| First Case Conference (FCC) | <p>☑The FCC is similar to Judicial Case Conferences and Family Case Conferences, but can go further. Parties attend. The judge takes an active role, helping to define the issues and plan the trial if settlement is not possible. A trial date may be set. No orders may be made except:</p> <ul style="list-style-type: none"> ○ a consent or unopposed order, including an uncontested divorce; ○ a temporary interim order, in urgent cases; ○ a procedural order (for discovery, expert reports, etc); ○ a declaration under s. 57 of the <i>Family Relations Act</i>; and ○ an order to attend mediation. | <p>Ensure that parties, especially if unrepresented, have explored all settlement options and if settlement is not possible, that they are well prepared for a trial.</p> <p>Eliminate unnecessary steps: uncontested orders should not require anything further.</p> <p>Orders that can promote settlement, or enhance trial preparation, should be available at the FCC, such as those listed here.</p> |

| STEP | CHANGE | REASON |
|----------------------------|--|---|
| Discovery of documents | <ul style="list-style-type: none"> ☑The basic documentation common to most cases, (the FDF and attachments) is automatically required; if further documents are needed, and are not provided, an application can be made at the FCC. | Eliminate unnecessary steps (Demand for Discovery of Documents). The scope of disclosure may be limited in the interests of streamlining. |
| Examinations for discovery | <ul style="list-style-type: none"> ☑Unless the parties agree, or a judge orders, there is no right to oral examinations for discovery. | Keep the process proportionate to the value of the dispute: most families' circumstances do not require examinations for discovery. This rule is in effect in Ontario. |
| Expert opinion evidence | <ul style="list-style-type: none"> ☑If expert evidence is needed on a financial or parenting issue the parties must agree on one expert, unless a judge orders otherwise. ☑A report rebutting a custody and access report is not permitted without leave of the court. ☑A rebuttal report on other issues is not permitted unless the experts have met and tried to resolve their differences. ☑Experts are officers of the court. | <p>Reduce costs: hiring experts for each side is prohibitively expensive for most families, and not always necessary.</p> <p>Eliminate the cost of having experts appear in court unnecessarily.</p> <p>Minimize the emotional harm that can be caused by expert reports on parenting issues.</p> |

| STEP | CHANGE | REASON |
|--|---|--|
| Chambers applications and case management hearings (CMH) | <p>☑ A pre-trial chambers application is permitted to resolve matters that cannot wait until a final hearing or Case Management Hearing.</p> <p>☑ If a second interim application is needed, a CMH is available at the direction of a judge or the request of a party. When possible, the same judge should be designated to manage subsequent interim applications and case management hearings.</p> | <p>Reduce cost and minimize conflict: interim applications in family cases can be expensive and inflammatory.</p> <p>Deal more effectively with high conflict cases.</p> |
| Mandatory offers to settle | <p>☑ These are mandatory in every case and must be exchanged before the Trial Readiness Conference. They cannot be modified or retracted after the Trial Readiness Conference without a court order. An offer must address all claims. Sealed copies of all offers in the court file will be considered when costs are determined.</p> | <p>Force parties to think through, and commit to, a proposed resolution early. Encourage realistic and genuine attempts at agreement.</p> <p>Enhanced front end services should better prepare parties to articulate and define their interests.</p> |

| STEP | CHANGE | REASON |
|--------------------------------------|---|---|
| Mandatory Trial Readiness Conference | <p>☑It begins with a consideration of whether settlement should be discussed. If settlement is not achieved the judge determines readiness for trial. A case not clearly ready for trial is taken off the list. A wide range of case management and trial management orders can be made, involving admissions of fact, admission of documents, a trial scheduling plan, evidence by affidavit, witness lists, time limits on direct or cross-examination, written submissions, etc.</p> <p>☑The judge who conducted an FCC or CMH may hear a contested chambers application or preside over a settlement conference but the settlement conference judge would not hear the trial, except with the consent of the parties.</p> | Make the trial as efficient as possible by narrowing the issues in dispute and readying the case for hearing. This will often reduce preparation costs and result in a shorter and more affordable hearing. |
| Trial | ☑The judicial role at trial is active and involved. The process is less formal. Proceedings are governed by the principle of proportionality. | A more flexible and informal hearing format can better meet the needs of families. (See s.5.2 for discussion.) |
| Incentives, disincentives and costs | ☑Family Law Rules should be strictly enforced. Costs should be used as a meaningful incentive for a reasonable and productive approach. | <p>Lawyers, their clients, and unrepresented litigants will benefit from the certainty and predictability that strict adherence to the rules will bring.</p> <p>(See s.5.3 for discussion of costs and fees.)</p> |

financial disclosure forms

The financial statements required in both courts are too complicated. The Supreme Court Financial Statement (Form 89) is 11 pages long. Many people are overwhelmed by the forms and give up before even beginning to provide their financial information. This creates two problems:

1. the forms are prepared incompletely, inconsistently or inaccurately.
2. the complexity of the form (and the detail required) delays meaningful settlement discussions and interim support applications, creating hardship for a person who needs interim child or spousal support.

There should be a simplified form for the majority of cases, where assets include at most, a house, cars, modest RRSPs or pensions, modest bank accounts and personal property. A more complex form could be available for use by the minority of families with more complicated financial circumstances.

The financial statements required in both courts are too complicated.

The form and Supreme Court Rules give no direction as to whether the expense information provided should reflect actual current expenses; expenses that would maintain the pre-separation standard; projected expenses once issues are resolved; or projected expenses based on what the person would like to spend, or believes would be fair (described by some as a “wish list”). The lack of direction causes confusion both for the person completing the form and for anyone who needs to rely on it.

The simplified forms should be signed under oath, as they are now. The required attachments (three tax returns and Notices of Assessment, pay stub and Property Tax Notice) should be maintained because they are essential for a basic financial assessment.

The automatic forms generation technology described later in this chapter is ideally suited to easing the task of completing financial disclosure forms.

12. Streamlined rules and forms

We recommend

- that rules and forms for family cases be simplified and streamlined to allow for expedited, economical resolution of all cases with processes proportional and appropriate to the value and importance of the case.
- that every family law form and procedure be designed to be used and understood by an unrepresented litigant.
- that the financial disclosure forms in particular be simplified and the basis on which expenses are to be recorded be clarified.

5.2 Using Technology to Enhance Access

automatic forms generation

One of the major hurdles faced by unrepresented litigants is completion of court forms, particularly in Supreme Court where traditional “pleadings” require legal knowledge and a more complete understanding of how to present a case than is available to most non-lawyers. Even in Provincial Court, completing the financial disclosure form is a daunting task: the form is more complex than it need be for most families, because it has to account for a wide range of possible circumstances.

Filling out a form incorrectly or incompletely can result in added expense and can also affect the success of a person's claim or defence. The court system itself pays a price as well, because registry staff spends time helping people, answering questions, and correcting or sending back forms that are not properly completed. Judges too, must take extra time in court when written information is not presented as it should be. Adjournments, delay and frustration often result.

Technology now provides an answer to the challenge of legal forms.

Technology now provides an answer to the challenge of drafting legal forms: automatic forms generation. In many US jurisdictions, people can go online and, by answering a series of questions produce properly completed, neatly printed forms.

The questionnaires are “dynamic.” That means that a person’s answers to certain questions determine whether further questions will be asked or not. For example, if there are no children, the system will not present questions about children; if there are five children, the system will ask for five names and birthdates. If the answer to a question about dividend income is that there is none, there will be no questions about amount.

These are not simply forms that can be completed online. The “pages” that a user sees do not necessarily look anything like the form that will ultimately be generated. They can take advantage of helpful graphic design, diagrams and photos, and hyperlinked instructions. Even if the forms themselves are mandated by rules or statutes, the questions that the user answers can be presented in any way that is most likely to elicit the needed information.

Current technology calls for these automatically generated forms to be printed out and then filed at the courthouse. Soon it should be possible to file them electronically from anywhere internet access is available. This approach is consistent with innovations now being developed in BC court registries.⁴¹

⁴¹ Court Services Branch has recently implemented technology which will allow electronic searches of civil court proceedings filed in any registry of the Supreme Court or the

This technology not only has the potential to provide access to court forms at any time and anywhere that there is internet access, but it allows for the presentation of helpful information in many ways, including streaming video and voice-over audio in English or any other language.⁴²

Experience in California has shown that not only do litigants find these forms easier than traditional paper forms, but the time required by court staff and legal professionals who help people with forms is decreased drastically.

Dedicated kiosks at Family Justice Information Hubs could give access to court forms generators in an environment where personal help is at hand and users can be linked to alternatives to litigation and to other services.

auto orders

Although a judge normally makes an order at the hearing, it cannot be enforced until a written order is prepared by the parties or their lawyers, signed by the court and entered in the court's records. There can be a long delay between the time that the judge makes the order and the time that it is entered and can be enforced. This can cause problems for the parties. For example, it can delay enforcement of a support order because the order cannot be registered for enforcement with FMEP until it has been entered.

In addition, orders can be difficult to understand. This can cause problems for the parties and for others who need to know what the order means in order to comply with it or enforce it.

"Auto orders" are intended to improve the court process by reducing delay and making orders easier to understand. The system uses a data base of common clauses that have been put into plain language to make sure that the orders are clear and easily understood. The court clerk prepares the order on the spot (by filling in the blanks in the appropriate standard clauses with the details of the order) as soon as the judge makes the order and it is printed in the courtroom. The parties (or their lawyers) leave the courtroom with a signed order that can be entered immediately. Manitoba successfully uses an auto orders system in support cases in its unified family court. There are pilot projects underway in BC to test the use of technology to speed the production of court orders.

Provincial Court. This is described as the first phase in the development of an "electronic court registry" to provide court services via the internet.

⁴² See <http://www.intresys.com> or <http://www.turbocourt.com> and www.icandocs.org

Court appearances by telephone are not new and with technology that is available could be used more widely in family cases.

court attendance by telephone and videoconference

When lawyers have to attend court for simple matters, and spend a long time waiting for their turn, the cost to clients can be significant. Court appearances by telephone are not new and with technology that is available now, could be used more widely in family cases.

In many US jurisdictions, lawyers schedule “CourtCall” appearances instead of going to the court in person, for telephone hearings where no evidence will be called. There is a charge of about \$50 per use, but the lawyer’s total fee is reduced because there is no need to leave the office. The lawyer simply dials a toll-free number, uses an access code, and then is free to continue at work until the case is called. The service is provided by a private enterprise, with no public funding.

Videoconferencing is another technology that may cut down on the cost of court appearances, including the taking of evidence. Facilities now exist in 34 court locations. BC courts have used videoconferencing extensively for appearances in criminal cases but less frequently for family matters. It has tended to be used to facilitate the appearance of witness, not parties. In family cases, cost has inhibited the use of videoconferencing but as costs come down, usage should expand.⁴³

13. Technology for better access

We recommend

- that BC implement user-friendly automatic online forms for family law cases.
- that systems be developed to allow people, including unrepresented litigants, to file court forms by email or over the internet.
- that auto orders be tested in BC.
- that communications technology be used more extensively to decrease the cost of legal representation and enhance access to the courts, for example, by expanding the use of appearances by telephone or videoconference.

a single set of rules

In the next chapter of this report we strongly urge a move towards a single court for family law cases. Whether this can be achieved in the short term or not, there is no good reason why there should not be a single set of rules and forms for family cases, regardless of the court in which they are filed. Ontario

⁴³ Australian Family Court Rules provide for using technology in a much wider range of circumstances than in BC. Relevant rules can be found at <http://www.familycourt.gov.au/>

has only one set of family rules, which apply to all family cases in its Unified Family Court and in its superior and provincial courts.⁴⁴

If two courts are to continue to handle these cases, the procedural changes we recommend will streamline procedures in both courts and still allow for discovery and other processes that may be needed in more complex matters. The rules should be comprehensive and “stand alone”; that is, they should not require a person to refer to other rules, such as the general Supreme Court Rules. This is needlessly cumbersome and complicated.

We do not propose any change to procedures for child protection cases under the *Child Family and Community Services Act* (CFCSA). The law used to be that these cases are not legal disputes between parents and government, but rather a search for a solution in the children’s best interests. For this and other reasons, a special set of rules was developed. They work quite well and there is no need for change. However, because actions under the *Family Relations Act* are often joined with CFCSA actions, we propose that the single set of family rules either include the CFCSA rules or be harmonized with them.

Rules for Supreme Court are developed by the Attorney General’s Rules Revision Committee, which includes judges and lawyers. The Provincial Court judges develop rules for that court in consultation with the Ministry of Attorney General. The rules that we are proposing will require a similar approach, by people with considerable experience in family law and a commitment to a new approach to dealing with family cases.

14. One set of rules and forms

We recommend

- that whether or not there is to be a single court for family law matters in BC, a single, stand-alone set of rules be adopted to govern all family law cases (except child protection matters) in whichever court they are filed.
- that the Attorney General establish a Family Law Rules Revision Committee to be responsible for developing and maintaining a single set of family rules, with representation to include judges, lawyers, the Ministry of Attorney General, court users and one or more members of the existing Rules Revision Committee.

5.3 The Conduct of Hearings

There are different ways to hold a trial or hearing and some are better suited to family cases than others. BC’s Supreme Court and Provincial Court each use an approach that is quite different from the other.

Historically, hearings in BC Supreme Court have been adversarial in nature, based on the presumption that both sides are represented by lawyers who

⁴⁴ See <http://www.attorneygeneral.jus.gov.on.ca/english/family>

Sometimes described as a “get to the merits” approach, a less formal and more flexible hearing model would complement simplified forms and expedited pre-hearing procedures discussed earlier.

present their clients’ cases in the best light possible while exposing weaknesses in the other side. Hearings tend to be more formal, with rules of evidence strictly applied. “It is essentially a due process model of decision-making, party driven, with extensive pre-trial disclosure. The parties are masters of their own rights, deciding how to prepare and present their case to an impartial, detached decision maker, with ample pre-trial opportunity to investigate, to obtain disclosure and proof, and to prepare arguments.”⁴⁵

By contrast, Provincial Court family law hearings are usually less formal. Provincial Court judges generally take a more active role, intervening more freely to control and direct the hearing though it remains an adversarial process.

In cases where the best interests of a child are at issue, we see judges in both courts most inclined to actively involve themselves to ensure that all necessary evidence is put before them as fairly and completely as possible.

Two considerations support a shift for all family cases toward less formal hearings:

- Family cases are different: the procedural framework that was developed for personal injury and commercial cases is too inflexible to address the interpersonal relationships and emotional content of family litigation.
- In most support and property cases, the cost and complexity of adversarial litigation is out of proportion to the monetary value of what is at stake.

The particular benefits of procedural flexibility for issues touching on the best interests of children are widely recognized in this and other jurisdictions. For example, the Family Court of Australia is now testing a “Children’s Cases Program”⁴⁶, described as “a new way of conducting family law litigation.”

Special rules provide that:

- rules of natural justice and procedural fairness apply, but many traditional procedural conventions are eliminated;
- proceedings are to be conducted as informally and quickly as possible;
- the focus of a hearing is on the child’s *future*, not the history of the parties or their relationships;
- the judge plays a leading role in the conduct of the hearing, deciding the location, the issues to be determined, the evidence to be called and the manner in which the hearing is conducted;
- evidence is conditionally admitted, subject to very narrow grounds for objection, with the judge ultimately determining the weight it is to be given;

⁴⁵ Hugh Landerkin and Andrew Pirie, *Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?* Canadian Bar Review, 28 (2), (2004)).

⁴⁶ <http://www.familycourt.gov.au/presence/connect/www/home/>

- the hearing may proceed as an “an orderly discussion” between the judge and the parties, their lawyers if any, and witnesses, and it is up to the judge whether, and under what terms, cross-examination is permitted.

People who appear in court without lawyers can be at a loss if they have sole responsibility for presenting the case; they welcome helpful intervention by a judge, and can benefit particularly from trial preparation conferences where they can receive guidance about what evidence they should present and how best to do it.

For nearly all family cases, quicker and less formal procedures can enhance access to court without compromising fairness. Sometimes described as a “get to the merits” approach, a less formal and more flexible hearing model would complement simplified forms and expedited pre-hearing procedures discussed earlier. The hearing itself would be actively managed by a judge who exerts considerable control over when and how evidence is received.

Active judicial management of the process is much easier to achieve if one judge is assigned responsibility for all matters concerning a particular family. A one family/one judge policy has other benefits as well:

- Having the same judge who made the original order deal with subsequent applications not only provides continuity, but also a way of holding parents accountable for their behaviour.
- It is more efficient: not only does the judge have an opportunity to become familiar with the case, but parties who understand that a judge who knows their history will be hearing subsequent applications may be slower to return to court unnecessarily. They will also be better able to predict the likely outcome, which should help them to make their own arrangements without the court’s involvement.

“encountering a different judge every time parents return to court is akin to switching doctors during treatment for a life-threatening illness.”

~ Justice Canada, 2003⁴⁷

⁴⁷ Freeman, Rhonda & Gary, *Managing Contact Difficulties: A Child-Centred Approach*, Department of Justice Canada, 2003

15. Informal hearings

We recommend

- that a simple, informal and less adversarial hearing model be available, giving and indeed encouraging broad judicial freedom to intervene and direct the hearing process.
- that a hearing model similar to Australia's Children's Cases Program be tested in BC for cases where the best interests of children are at issue.
- that judicial case assignment take into account the benefits of a one family/one judge policy.

child participation in family court

Section 24 of the *Family Relations Act* says that a judge must consider the views of the child when determining the child's best interests, if appropriate. The *Child, Family, and Community Services Act* contains the same requirement for child protection cases.⁴⁸

This does not mean that a child should be put in the difficult position of siding with one parent over the other. In court, it may mean putting the child's views before the judge through an expert, or in some cases giving the child the option to participate directly. Participation, for a child, may mean being given information about the court process and advice about the consequences of hearings and orders.

Children may also participate in CDR. These processes may actually be a lot more flexible and therefore more comfortable for the child.

In 2003 the International Institute for Child Rights and Development (IICRD), based at the University of Victoria, began a project to examine the issue of meaningful child participation in BC family court processes. Funded by the Law Foundation of BC, the two-year project is examining current child participation practices in custody, access and child protection cases in the court system. It will identify some of the challenges posed to child participation as well as ways that these challenges might be addressed.

The project's researchers have been surveying lawyers and judges, and consulting with experts to identify current practices locally, nationally and internationally. They are also talking with children, lawyers and judges. We

The child is the hidden client in the divorce proceedings.

- Judith Wallerstein

⁴⁸ Article 12 of the UN Convention on the Rights of the Child (ratified by Canada and British Columbia) also sets out the right of a child who is capable of forming his or her own views to express those views freely and have them given due weight in matters affecting the child, particularly in judicial and administrative proceedings.

are advised that the information gained so far suggests that there are many options for involving young people: they can share their views in family court proceedings through affidavits, expert assessments, their own legal counsel, or by speaking directly to judges or decision makers. But the reality is that child participation in court processes is not the norm.

The literature in this area says that children themselves often want to have their views considered. Some children feel that no one listens to them and they need an opportunity to be heard. Adults sometimes worry about making children feel that the outcome of a case could be “their fault,” but discussions with young people suggest that it is often better for more information to be shared. When information is not shared and decisions are made that do not please everyone, children often end up blaming themselves. As well, children sometimes have information that no else has, and parents or other adults do not always know what is important to a child.

The IICRD project findings will be available in its final report to be released in the fall of 2005.

16. Involving children

We recommend

- that all participants in the family justice system find better ways to discover children’s best interests and to make them a meaningful part of family justice processes.
- that the final report of the International Institute for Child Rights and Development on child participation in family court processes be carefully considered by family justice system policy makers and other stakeholders.

5.4 Court fees

The provincial government charges a fee for starting a court case in BC Supreme Court and for filing certain documents with the court. There is also a daily hearing fee that applies to trials. These fees apply to all cases, including family matters. Cases that go to trial or use substantial court time are significantly subsidized.

In Provincial Court there are no fees for family law cases, to make it easier for people to take their family disputes to court. The proposals in this report would make it easier for people to resolve their disputes themselves. Relatively few should need a decision by a judge.

We think that court fees can support the principle that people are responsible for resolving their family law disputes, by encouraging them to try to resolve their disputes without starting a court case. Fees also can support the principle

of proportionality, by encouraging people to use no more than the services than they really need.

These fees could be applied to help support the cost of expanded front end information, referral and consensual dispute services. In some places, governments add a surcharge to court fees, which is used to help pay for other dispute resolution services.

We believe that there should be fees for using the court for family disputes, whether BC adopts a single family court or not. Just as we propose a single set of rules and a single hearing model if family court continues in both courts, we believe there should be a single set of court fees. And, when fees are levied, they should more accurately reflect the actual cost of using the court.

This would mean charging fees in Provincial Court for family law cases for the first time. Some will see this as a barrier to access to court. The current fee structure in Supreme Court may also be a barrier for some. Our belief is that what is important to families is access to an effective way to resolve their disputes. Under the system that we propose, this will not usually involve going to court.

We recognize that there may need to be exceptions for certain types of cases, such as child protection cases. We also recognize the importance having courts that are financially accessible to people who need to use them. Any changes to fees will have to include ways of making sure that people who need to go to court are not barred because of cost.

17. Court fees to support principles

We recommend

- that court fees be used:
 - ♦ to encourage people to resolve their family law issues outside of court; and
 - ♦ to support the principle of proportionality, by encouraging people to use no more than the services that they really need.
- that fees collected from users of family court more accurately reflect the actual cost of using the court and be applied to help support the cost of expanded front end services.

5.5 Court costs

There sometimes is confusion over the term “court costs.” The money a person must pay at the courthouse to start a case, file documents, or have a trial is referred to as “court *fees*.” “Court *costs*” refers to the money a judge may order an unsuccessful party to pay to a successful party at the end of a case to help compensate for some of the successful party’s legal expenses.

The Provincial Court has no authority to award costs.⁴⁹

In Supreme Court, court costs are available to a successful party but orders for costs are uncommon in family cases. Judges are often reluctant to order costs because the current rules and structure encourage the use of litigation and in some cases, people have no option but to go to court. With the changes that we propose, it should be much easier to avoid litigation and costs should be used more aggressively if the courts are used unreasonably.

offers to settle

If a party makes an offer to settle that is accepted, the general rule is that neither party is entitled to costs up to the date the offer was delivered, but the party making the offer is entitled to costs from that date.

If a party makes an offer to settle that has not expired, been withdrawn or accepted, and then obtains a judgment at least as favourable as the terms of the offer, that party is entitled to costs up to the date the offer was delivered and double costs from that date.

We believe that judges' authority to award costs has an important role to play in encouraging people who go to court to use the court process efficiently and effectively. If British Columbia continues to use two levels of court for family cases, the authority to award costs should be extended to Provincial Court judges so that all family cases can be treated similarly.

18. Expanded use of orders for costs

We recommend

- that costs be used more effectively to promote settlement, for example by imposing cost consequences for unreasonable settlement offers.
- that if family cases continue to be heard in two levels of court, the authority to award costs be extended to Provincial Court judges.

5.6 Working with Orders and Agreements

People like to think of an agreement or order as the end of the dispute. Too often, though, it is only the beginning of a long battle to see that its terms are honoured. Once people have an agreement or an order, they are pretty much on their own to try and figure out how to make it work and what to do if there are problems. In fact, failure to live up to the terms of an agreement or court order is typically the major focus of continuing conflict between separated or divorced spouses.

⁴⁹ There is one exception: if one party requires an expert witness to attend court unnecessarily, the judge may order that person to pay the expert's expenses: Provincial Court (Family) Rule 11(8) and Provincial Court (CFCSA) Rule 4 (10)

We need a system where families can get help, if they need it, to resolve problems as they arise. Just as we have proposed that people should not have to go to court to resolve their family disputes in the first instance, people should not have to go to court to resolve problems with parenting or support agreements and orders after they have been made.

The Family Justice Information Hub has just as important a role to play at this stage as it does at the beginning of a family conflict. When an order or agreement is made, if people do not have lawyers, staff at the Hub will be available to explain their obligations under the order or agreement, the availability of programs to help them comply, the consequences of not complying and what to do if the other parent does not comply.

We discuss enforcement of parenting arrangements (custody and access) first, and then enforcement of support obligations. There are some common elements and parents may try to link the two, but we see them as raising very different concerns.

high conflict families

Punitive enforcement measures by courts do not resolve these kinds of disputes and may actually encourage them

- Pauline O'Connor

Research tells us that disputes over parenting arrangements are more likely to occur in circumstances of ongoing extreme hostility between parents who have not been able to separate their roles as parents from the unresolved conflict in their relationship. Disputes can erupt over seemingly minor issues such as telephone access, one-time schedule changes or vacation planning and can result from a parent's need to punish the other or control the other's time with the child.

Only a small percentage of family disputes involve such high conflict but because these couples return to court frequently, they use a disproportionate amount of the court's time and resources. Along the way, they also use up their own financial resources, reinforce their negative views of each other and subject their children to harmful conflict. Some of these cases involve family violence.

Legal remedies will not resolve difficult compliance cases in a way that serves children's interests because they do not address the underlying conflicts that drive these cases into court. "Punitive enforcement measures by courts do not resolve these kinds of disputes and may actually encourage them."⁵⁰

Studies have identified "markers" that can help to identify high conflict cases. Examples of such markers include: the desire of a child not to visit a parent; repeated unsubstantiated allegations of poor parenting; family violence; numerous court applications; a large amount of affidavit material; and a

⁵⁰ Pauline O'Connor, *Child Access in Canada: Legal Approaches and Program Supports*, Justice Canada, (2002).

“The parents are unable to make use of the divorce to resolve issues within or between themselves and are frozen in the transition. In effect, the form of the custody dispute becomes their new pattern of relationship”.

-Johnson and Campbell⁵²

history of access denial.⁵¹ The assessment service should adopt a protocol that builds on this research.

If these families can be identified and helped even before the first agreement or order is made, it may be possible to reduce or avoid later enforcement problems. Assessment at an early stage can identify the resources most likely to help high conflict couples resolve their problems. Not all families need the same kind of help, so a wide range of services is essential. All organizations delivering family services, including the Legal Services Society, should be responsive to the unique needs of high-conflict families. For example:

- **Parent education:** Earlier we spoke of the benefit of programs such as Parenting After Separation to help parents understand and meet their children’s needs, but the parenting skills needed in high conflict situations are different than where conflict is low and parents can communicate effectively.⁵³
- **Parenting coordination:** A parenting coordinator (sometimes called a “Special Master”) is a neutral person, appointed by a judge, who helps people resolve parenting disputes, provides education and advice, and with prior approval of the parents and the judge, makes decisions within the scope of the order of appointment. Parenting coordinators are highly qualified mental health professionals, mediators or family law lawyers with experience in problem solving, mediation, communication, family law, adult psychology, developmental psychology and children’s adjustment issues. Experience in the US shows that a skilled parenting coordinator can effectively help parents build workable, long-lasting parenting relationships and resolve ongoing parenting disputes.⁵⁴ There are legal and process issues surrounding parenting coordination that need to be addressed, but we believe this is a valuable service that will help high conflict parents develop the most effective parenting arrangements for their children in the least contentious way.
- **Counselling:** Counselling may be one-on-one, in joint sessions, or groups, for adults and for children. Some counselling models may overlap with mediation. Most provide information about legal options, help parents make their own decisions and give them an opportunity to resolve their disputes. Programs for children help them learn healthy coping skills.

⁵¹ Stewart, R. *The Early Identification and Streaming of Cases of High-Conflict Separation and Divorce: A Review*. Ottawa: Department of Justice Canada. (2002). p. 12-13

Gilmour, G. *High-Conflict Separation and Divorce: Options for Consideration*. Ottawa, Department of Justice Canada, 2004. p. 28.

⁵² Johnston, J. and Campbell, L., *Impasses of Divorce: The Dynamics and Resolution of Family Conflict*; New York: The Free Press. 1988.

⁵³ Manitoba offers a 6-hour parent education program in two sessions; at the second session, parents with higher levels of conflict are taught different parenting strategies.

⁵⁴ Garrity and Barris 1994 study, quoted in Glenn A. Gilmour, *High-Conflict Separation and Divorce: Options for Consideration*, Justice Canada, (2004)

- **Mediation:** Mediation can help parents resolve their disputes, even in some cases where there has been family violence. These parents may, however, need a different kind of mediation—impasse mediation⁵⁵—which involves a series of sessions combining therapy and counselling and includes the whole family.
- **Australia's Contact Orders Program:** This program warrants further examination. It helps high conflict families manage their child contact (access) arrangements and focus on their children's needs. The program works with families trying to establish contact arrangements both before and after a court order. A variety of child-focused interventions include group work, education, counselling, mediation, supervised access and exchange, and case management. Information from children is provided to parents with the children's consent, at the parents' sessions. A 2002 evaluation found that feedback to parents on what their own children say about the effect of the conflict on them is often the most powerful element of the program and can be the impetus parents need to change their attitudes and behaviour. It also found that adult groups including men and women, and custody and access parents are useful, and that activity-based group sessions for children can help them feel less isolated.

access issues

Access denial is unquestionably a problem for some parents. Research suggests that failure to exercise access is also a problem.⁵⁶ In BC, the main legal remedies for non-compliance are

- contempt of court proceedings in Supreme Court, which can lead to a fine, jail or both, or
- an order under s.128 (3) of the *Family Relations Act*, in either court which can result in a fine, jail or both.

Neither of these is used very often.

Some provinces have additional statutory provisions for dealing with non-compliance. Some aim to try to encourage compliance through parent education or mediation.

Saskatchewan's *Children's Law Act*, Newfoundland and Labrador's *Children's Law Act* and Australia's *Family Law Act* include statements about the very limited circumstances in which non-compliance with a parenting

⁵⁵ J. Johnston, J. & L. Campbell, *Impasses of Divorce: The Dynamics and Resolution of Family Conflict*, (1988).

⁵⁶ Bailey, Martha, *Overview and Assessment of Approaches to Access Enforcement*, Department of Justice Canada, (2001).

order may be justified, for example, when necessary to protect the health and safety of a child.⁵⁷

Judges could be given more tools. Amendments to the *Family Relations Act* could be considered to make it clear that judges may order, for example, attendance at a specialized parenting program; or appointment of a mediator or a parenting coordinator. Initiatives in other jurisdictions should be reviewed as well, for further options.

19. More services for high conflict families

We recommend

- that services be available to help high conflict families resolve disputes, both before and after an agreement or order is made.
- that through the assessment process proposed in chapter 3, high conflict families be identified as early as possible and provided with specially targeted dispute resolution services.
- that the Hub assessment service develop a protocol for identifying and offering services to high conflict families.
- that court files involving high conflict families be administratively earmarked and assigned to a judge who will hear all subsequent applications in the case.
- that the Family Justice Information Hub be the contact point for people when a compliance problem arises with respect to an agreement or order.
- that parenting coordination be available to help high conflict parents in appropriate cases.

helping people meet their support obligations

People who are experiencing, or even just considering separation or divorce need information about financial issues. After separation, the expense of supporting two households is a strain for most families and people need all the help that they can get. If budgeting and debt management were among the problems that led to family conflict in the first place, separation will only add to the family's financial difficulties.

One of the functions of the Family Justice Information Hub should be to provide information and referrals so that people can get help with:

- budgeting
- credit and debt management

⁵⁷Saskatchewan: <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/c8-2.pdf>;
Newfoundland and Labrador: <http://www.gov.nl.ca/hoa/statutes/c13.htm#41>;
Australia: http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/

- asset management
- protection of existing credit, and
- financial crisis management.

Workshops modelled on the Parenting After Separation program could deliver useful information and help people to identify and use other resources. We believe that enhanced budgeting assistance at the front end would reduce support enforcement problems later.

Even if people succeed in negotiating a suitable support agreement, or obtaining a court order, they often run into problems when the arrangements no longer fit the family's changing circumstances.

For example, over time, a child's needs typically increase and a paying parent's income may increase or decrease significantly. People are often hesitant to try to renegotiate an agreement, or to go to court for a new order because the cost of doing so may be out of proportion to the potential benefit.

The Comprehensive Child Support Service, started as a pilot project in February 2002 in Kelowna, offers an array of services to help parents obtain or change a child support order or agreement. A Child Support Officer can help parents understand the child support guidelines and calculate what is payable under those guidelines. If both parents agree, the Child Support Officer will work with them to negotiate a child support amount. The officer will also refer parents to other professionals such as an outreach worker from the FMEP or a Family Justice Counsellor, or to other programs and services, such as Parenting After Separation, financial management, legal advice and debt counselling.

An evaluation of the project⁵⁸ showed that this service helped many parents resolve their child support issues. They appreciated the one-on-one contact with the Child Support Officer and not having to repeat their story multiple times to different people. Referrals were effective in meeting parents' needs for further services and everyone who took advantage of facilitated negotiations offered by the project was able to reach an agreement. The service now operates in Kelowna, Surrey and Vancouver.

20. Expanded Comprehensive Child Support Service **We recommend**

- that the Comprehensive Child Support Service model be adopted as a component of the Family Justice Information Hub.

Keeping child support amounts up to date can go one step further, to an automatic process. Section 25.1 of the *Divorce Act* provides for setting up a

⁵⁸See <http://www.ag.gov.bc.ca/justice-services/publications/fjsd/ccss/FinalReport.pdf>

provincial child support service to recalculate amounts at regular intervals, based on updated income information, using the child support guidelines.

Prince Edward Island and Newfoundland and Labrador have recently begun to operate child support recalculation services. They recalculate child support each year, based on updated information about the paying parent's income. This means that parents do not have to go to court to ask for a variation of a court order. Children benefit from increased support when the paying parent's income goes up, and if it goes down, the parent benefits from an order that more realistically reflects his or her ability to pay.

This approach should reduce the number of orders that go into arrears and need to be enforced, as well as the number of court applications for increases in child support.

The Ministry of Attorney General, with funding from Justice Canada, plans to test and evaluate a recalculation service in BC and we support this move.

When a parent or spouse does not comply with the terms of an order, the options include private enforcement or enforcement through FMEP. Private enforcement can be expensive for the user; FMEP is expensive for the public.

The FMEP, a service of the Ministry of Attorney General, is responsible under the *Family Maintenance Enforcement Act* for monitoring and enforcing support orders and agreements that are filed with it.

Some provinces have stepped up their enforcement mechanisms and will, for example, cancel the driver's licence of a person who defaults on support payments. BC will decline to renew a licence at the expiry date. Some provinces will recognize enforcement from another province, so that a person in default cannot move across a provincial boundary and obtain a new licence.

21. More enforcement options

We recommend:

- that British Columbia review enforcement measures being taken in other provinces to determine how best to expand the options available for enforcing family support obligations.

5.7 Legislative Changes are Needed

In spite of the increasing availability of CDR, and the growing awareness of its advantages, many families end up using the court system. One reason is that they are compelled to, by our family laws.

The two foundational statutes, from which most of our family law derives, are BC's *Family Relations Act* and the federal *Divorce Act*. Both are significantly out of step with the principles and values endorsed in this and most other

Reform of our family justice system will not be complete until these statutes are brought into line with modern thinking.

family law reform reports. Reform of our family justice system will not be complete until these statutes are brought into line with modern thinking⁵⁹.

As currently drafted, these statutes stand in the way of reform because they:

- imply that the courtroom is the primary dispute resolution forum;
- are built on an adversarial foundation that promotes approaches of attack and defend, escalating conflict and causing emotional harm;
- frame parenting issues in language that tends to polarize parents; and
- do not go far enough to encourage parties to work towards agreement through CDR.

The *Family Relations Act* can be changed by the Province. The *Divorce Act* can only be changed by the federal government.

In 2002 the federal government introduced a bill (Bill C-22/2002) in Parliament to make changes to the *Divorce Act* to help parents focus on making parenting arrangements that best meet their children's needs. That bill died on the order paper when Parliament adjourned before the 2004 federal election.

The forum for addressing change to the *Divorce Act* is a federal/provincial/territorial committee called the Coordinating Committee of Senior Officials - Family Justice. BC actively participates on this committee, along with representatives from all provinces and territories and the federal government, to address family justice issues.

preserving limitation periods

To encourage people to genuinely try to resolve their disputes before considering court as an option, we need to change the provisions that require certain court actions to be started within a limited time. Under the *Family Relations Act* there are three situations in which a person will lose rights if a court action is not started in time:

1. A stepparent can be required to pay support for a stepchild only if the claim is made within one year after the person's last contribution to the child's support.⁶⁰
2. A common law spouse can be required to pay spousal support only if the claim is made within a year of separation.⁶¹

⁵⁹ One of the main objectives of the Australian *Family Law Reform Act 1995* was to move away from a system in which litigation was the primary form of decision making and to make cooperative dispute resolution the primary option. This objective is specified in the Act. See: http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/

⁶⁰ *Family Relations Act* s.1 defines "parent" to include a stepparent if the stepparent contributed to the child's support for at least a year, and if the court proceeding is begun within a year after the person's last contribution.

3. A claim for division of family assets or variation of a separation agreement can only be made within two years of divorce, judicial separation or annulment.⁶²

These provisions must be amended to give people some other way to preserve the right to begin an action if CDR fails. One possibility would be to include in these definitions a person who has agreed in writing to extend the time period.

Another approach, as suggested in our table of proposed rule changes above: a simple one page document called a “Notice to Preserve Limitation” which would identify the parties, provide brief information about their relationship and describe the right or claim to be preserved. Filing the notice at the court and serving it on the other party would stop the limitation period from running. This would preserve legal rights and give the parties an opportunity to pursue a cooperative resolution while avoiding the cost and potential polarizing impact of starting an action.

22. Preserving rights without going to court

We recommend

- that the law be changed to make it possible to preserve a family law limitation period without starting an action or seeking a court order, by agreeing in writing or filing and serving a “Notice to Preserve Limitation.”

defining the “triggering event”

The *Family Relations Act* provides a mechanism for fixing a non-owning spouse’s interest in family assets at the date of what is referred to as a “triggering event.” The triggering event is defined by s.56(1) as the first of any of these events:

- a separation agreement;
- a declaratory judgment under s.57 (which must be made by a judge and requires the starting of a court action);
- a divorce or judicial separation; or
- an annulment.

⁶¹ *Family Relations Act* s.1 defines “spouse” to include common law spouses who have lived together for at least two years, if a court proceeding is begun within a year after they stopped living together.

⁶² *Family Relations Act* s. 1 defines “spouse” for the purpose of Parts 5 and 6, as a person who applies within two years of the divorce, judicial separation or annulment.

The only triggering event that does not require court involvement is a separation agreement. The *Act* does not define “separation agreement” and the law is unclear. If separation agreements, for the purpose of s.56, were defined to include written agreements as to the date of the triggering event, people could go on in confidence to try to resolve their issues without starting a court action.

23. Setting the triggering event by agreement

We recommend

- that s.56(1) of the *Family Relations Act* be amended to include in the definition of a triggering event, a written agreement by the spouses to set the triggering event at an agreed upon date.

The *Family Relations Act*, s. 120.1 discourages common law couples from making agreements about ownership of assets either during their relationship or at its end. Before this section was enacted, such an agreement was a contractual arrangement and if a judge were asked to review its terms the review would be on the basis of contract law. Now, these agreements are reviewable for fairness, on the same basis as if the people were legally married.

Many common law couples want to use an agreement to confirm separate property status, but if they sign an agreement about their property it will be measured against the principles of a joint property regime. Therefore, many lawyers now advise common law couples not to sign an agreement. The result is that s. 120.1 deters common law couples from making private agreements.

24. Options for common law couples

We recommend

- that s.120.1 of the *Family Relations Act* be amended to provide that Parts 5 and 6 of the Act do not apply to an agreement by people who are not married to each other unless the agreement specifically provides that those parts do apply.

variation of separation agreements

Applications to vary separation agreements constitute a significant portion of the family cases that go to trial. In British Columbia, judges have considerable discretion to vary agreements. This promotes litigation because people have reason to think that a judicial decision might leave them better off than under the terms of their agreement. It also serves as a disincentive for some people to conclude an agreement, since there is no certainty or assurance of finality.

Other provinces’ laws provide for more certainty in separation agreements by limiting the authority of judges to vary the terms. We support the private ordering of family arrangements and suggest that serious consideration be

given to a statutory limit on judicial discretion in this area. This change would be consistent with the shift in public expectation that we advocate—that people will take responsibility for resolving their own disputes.

25. Limiting judicial discretion to vary agreements

We recommend

- that British Columbia consider amending the *Family Relations Act* to limit judicial discretion to vary the terms of a separation agreement.

family violence and “best interests”

The *Child Family and Community Services Act* includes family violence as a factor to be considered in deciding whether to remove children from their parents, but family violence is not addressed in the *Family Relations Act*, which governs disputes between parents. Changes to the definition of “best interests,” to include consideration of family violence in the determination of a child’s “best interests,” were proposed for the *Divorce Act*.⁶³

26. Considering the impact of family violence on children

We recommend

- that the definition of the “best interests of the child” in the *Family Relations Act* be expanded to include consideration of family violence, including its impact on the safety of the child and other family members.

These recommendations would help bring the statutes on which our family law is based into line with the new ways of thinking about family dispute resolution that this report proposes. We hope that everyone with an interest in the family justice system, and especially the lawyers who work in this area and their provincial and national organizations can work together to make this happen.

27. Family law statutes to reflect cooperative values

We recommend

- that British Columbia amend its *Family Relations Act* and work with other provinces to encourage Canada to change to the *Divorce Act* so that these laws reflect the principles and cooperative values identified in this report;
- that the Canadian Bar Association, through its national family law section, support this work at the federal level.

⁶³ Bill C-22 (2002) which was introduced in late 2002 but died on the order paper when parliament adjourned before the 2004 federal election See: <http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=N&StartList=A&EndList=Z&Session=11&Type=0&Scope=I&query=3276&List=toc-1>

6 Family Court Structure

6.1 The Court and the Family Justice System

We have been asked to examine possible models for organizing BC’s family justice system and in particular to consider whether a unified family court (“UFC”) is the preferred model for our province. This part of our Report examines the organization and structure of our existing family court system and considers some alternative models.

The focus of our work, and of this report, has been on services to families and on the transformation of our family justice system to one based on values of cooperation and the promotion of the wellbeing of family members. This approach, described in the earlier chapters, leads us to the conclusion that a unified family court, however it may be achieved, is the ideal forum in which to foster this new family justice culture.

our existing family court structure

If we were starting today with a clean slate to design a court system to serve the needs of separating families in British Columbia, it certainly would not look like the system we have. In addition to making it more fundamentally cooperative, we would create a single level of court offering a variety of family support services and simplified procedures at locations throughout the province. In fact, the single court or unified jurisdiction model has long been discussed and recommended in BC, but for historical reasons rooted in the Constitution and in federal/provincial funding arrangements, it has never happened.

What we have instead is two separate but parallel courts, with duplication and overlaps in services and jurisdiction that are confusing to the public and wasteful of scarce resources. The Provincial Court, with provincially appointed judges, handles more than half the family cases in BC and is relatively accessible, but it cannot grant divorces or order the division of family property. Nor can it grant injunctive relief or exercise equitable jurisdiction. Some people experience delays and repeat appearances in Provincial Court. The Supreme Court, with federally appointed judges, has full family law jurisdiction but has fewer locations and more complex and usually more expensive procedures.

In terms of jurisdiction and accessibility the two courts compare generally as follows:

If we were starting today with a clean slate to design a court system to serve the needs of separating families in British Columbia, it certainly would not look like the system we have.

Table 3: Family Law Jurisdiction of BC's Courts

| | PROVINCIAL COURT | SUPREME COURT |
|-------------------------------------|--|--|
| Jurisdiction, or issues heard | Custody & access Guardianship Child support Spousal support Maintenance enforcement Paternity Restraining Orders Child protection (CFCSA) | Custody & access Guardianship Child support Spousal support Maintenance enforcement Paternity Restraining orders Adoption Division of family property Occupancy of family home Divorce Parens Patriae Contempt |
| Procedures | Less formal; fewer rules | More formal; more rules |
| Forms | "Fill in the blanks" | require drafting, & legal knowledge |
| Court fees | No charge to file an application | Fees payable (e.g., \$208 to file application) |
| Locations with permanent judges | 33 | 11 |
| Locations served by visiting judges | 55 | 30 |
| Full-time judges | 135 | 84 ⁶⁴ |
| Part-time judges | 18 | 16 |

The Provincial Court is more accessible to families in a number of ways.

- It has a wider reach, geographically speaking, than the Supreme Court, with registries and sitting judges in many of BC's smaller communities in addition to the larger centres that are also served by the Supreme Court.
- Its informality and simplified procedures and "fill-in-the-blank" forms are more accommodating to the many people who come to the justice system without lawyers to represent them.
- It is usually more affordable; unlike Supreme Court there are no fees for filing an application in Provincial Court and no hearing fees. It is easier for people who cannot afford a lawyer to represent themselves in Provincial Court than Supreme Court.

On the other hand, the Supreme Court has advantages for people who are represented by lawyers, and for cases dealing with complex financial matters. The Supreme Court offers more opportunities for each side to learn about the other's case before trial and the opportunity for a very thorough hearing if that is needed.

As a result of this two-court system, we see:

⁶⁴ As of February, 2005. In addition, there are 14 Masters of the Supreme Court, doing a large volume of family law work.

A two-court system for family law matters is “confusing, frustrating and expensive.”

– Breaking Up is Hard to Do, 1992

- confusion: it is hard for parties to understand the differences between the courts and to know which one to use;
- inefficiency: people go to Provincial Court for custody or support orders because it is easier for them but later must apply to Supreme Court for property division or divorce;
- duplication: in addition to the possibility of one family invoking the jurisdiction of two courts, there is the cost of maintaining two parallel systems of courts with their own physical facilities, and their own rules, forms, and administrative structures;
- delay: an application in Provincial Court to enforce a Supreme Court support order can be delayed if a party asks at the hearing for a change to the order. (The order can be enforced in Provincial Court but it can be changed only by the Supreme Court.)

The 1992 B.C. Report “Breaking Up is Hard to Do,” found that most people who had started through the family court process were aware that two levels of court exist to deal with family law matters, and:

They found this confusing, frustrating and expensive. The general consensus was that if major changes can’t be made to the current court structure, at a minimum there should be one court dealing with family matters. This court must be easy to access and understood by the lay person.⁶⁵

6.2 Moving to a Single Court for Family Law

Seven out of ten provinces⁶⁶ have implemented, in all or part of the province, a one court system—the Unified Family Court. Initially envisioned as “a specialized court with specialized judges operating under special rules to meet the needs of a special segment of society,”⁶⁷ these courts generally feature:

- a single level of court with jurisdiction over all family cases (“unified jurisdiction”)
- simplified rules and procedures,
- judges specialized in family law,
- a focus on cooperative resolution, and
- extensive non-judicial services for families.

The value of unifying jurisdiction, simplifying procedures and providing additional services for families has been considered and endorsed in reports going

⁶⁵ p. 115

⁶⁶ in addition to the seven provinces that have unified family court, Quebec deals with most family matters in its superior court. The superior court in Quebec is described as having exclusive jurisdiction over family matters—divorce, annulment, separation, support, child custody, property. However, child protection and adoption are dealt with in the Court of Quebec, Youth Division (a provincial court).

⁶⁷ McLeod, J.G. (2004). *The Unified Family Court Experience in Ontario*. Unpublished report prepared for the Ontario Ministry of Attorney General, p.22

We strongly concur in earlier calls for unified family law jurisdiction.

back 30 years in British Columbia⁶⁸ and from other provinces over the same period.⁶⁹ We will not repeat what these reports have said, but we strongly concur in their support for the basic concept of unified family law jurisdiction.

However, as sound as the theory of a unified family court is, implementation can be problematic. Inadequate funding and restricted implementation have stood in the way of these courts meeting expectations in some provinces. Inadequate funding can result in delay, backlog and lack of necessary support services. Implementation in only certain regions of a province can undermine the objectives of access and simplicity: where the province had two courts for parties to choose from before implementation, it now has those two plus UFC.

In BC, implementation of UFC would need to successfully address three particular concerns:

- **geography:** a unified family court must be at least as accessible as our current courts, especially in terms of geographic reach. This is a particular concern in British Columbia where much of the population is located in smaller centers distant from large urban areas.
- **responsiveness:** Our existing system serves two client groups. The Provincial Court typically provides informal and relatively inexpensive resolution and has extensive experience in child protection cases and parenting issues. Supreme Court involves greater formality and procedural complexity, at higher cost, for cases where, often, more money is at stake. These two courts have distinct styles and cultures. A UFC would need to reconcile these differences while remaining at least as responsive and adaptable as the existing system, if not more so.
- **services:** adequate funding for expanded services is critical. Without enhanced family services the shift from an adversarial to a cooperative culture cannot be made and the family court can not meet its mandate.

⁶⁸ These include 1974 *Royal Commission on Family and Children's Law* ("Berger Commission"), the 1988 *Access to Justice Report* ("Hughes Committee"), and the 1992 *Breaking Up is Hard to Do* report. As well, the judiciary and the family bar have expressed support for the theoretical aspects of the unified family court model. A report from the Provincial Court, for example, states that the public interest favours the amalgamation of all family cases into one court. It concludes that this would create efficiencies and avoid undesirable duplication of proceedings. The Supreme Court states that a unified family court model could provide an effective family law process in BC as long as there is a commitment to provide sufficient judges, sufficient support resources, and province wide coverage.

⁶⁹ These range from the Ontario Law Reform Commission (1974) *Report on Family Law Part V Family Courts* through to the *Report and Recommendations of the Alberta Unified Family Task Force* in 2001. The 1998 *Report of the Special Joint Parliamentary Committee on Custody and Access* encouraged the federal government to continue to work with the provinces to establish unified family courts.

28. Unified family law jurisdiction

We recommend

- that British Columbia implement a unified family law jurisdiction.
- that in addition to unified jurisdiction, the family court should have these essential attributes:
 1. simplified rules and procedures;
 2. a specialized bench;
 3. a strong cooperative resolution focus; and
 4. extensive services for children and families.
- that if a formal unified court is not implemented, these key attributes be incorporated to the extent possible, into whatever family court structure BC has.

The question is not really whether a unified jurisdiction model should be adopted. It should. The real question is: what should it look like?

The question is not really *whether* a unified jurisdiction model should be adopted. It should. The real question is: what should it look like and how do we get there? In other words, which UFC model can work for BC, and how can it be implemented? There are different ways to establish unified family jurisdiction. This report considers three possible approaches.

1. **The superior court approach:** adopted in seven provinces, this model removes jurisdiction over all family matters from the provincial courts and left with the superior (federally appointed) courts.
2. **Full Provincial Court jurisdiction:** both courts remain involved in family law, and Provincial Court judges are given the same family law jurisdiction as Supreme Court judges.
3. **Coordinated jurisdiction approach:** not a true unified family court, this structure keeps the two existing courts in place but coordinates and integrates their work. Provincial Court judges are appointed as Supreme Court Masters and are given increased, but not full, family law jurisdiction.

We will discuss each of these options in turn, but first we offer a brief discussion of s.96 of the *Constitution Act, 1867* and how it has affected family justice reform in Canada.

6.3 Section 96 and Family Justice Reform

Section 96 of the *Constitution Act* empowers the federal government to appoint superior court judges, but judicial interpretation of this section has made it more than an appointing power. It has been used to protect the core jurisdiction of the superior courts, so as to provide a constitutional base for national unity through a unitary judicial system.

The Supreme Court of Canada has developed principles to ensure that s. 96 would not be rendered meaningless by the provinces giving their provincially

appointed judges the same jurisdiction and powers as superior courts. In other words, not only does s.96 restrict the power of the provinces; it constrains the federal government from delegating any jurisdiction that falls within the ambit of s.96—that is, those powers that were exercised by superior court judges at the time of Confederation.

The *Constitution Act* also gives the federal government jurisdiction over divorce and property, so the province cannot assume jurisdiction over family property matters.

In the 1970s, in its new *Family Relations Act*,⁷⁰ British Columbia tried to give Provincial Court judges concurrent jurisdiction to make a wide range of orders in family cases, including orders affecting property rights. That legislation was challenged as being unconstitutional. In that case⁷¹ the Supreme Court of Canada upheld the Provincial Court’s authority to make guardianship, custody and access orders, but found that property matters are only for superior courts to consider so it was beyond the power of the provincial Legislature to authorize the Provincial Court to make orders concerning family property.

The consequence of this is that if any province wishes to put all family cases in a single court, the only option is a superior court. The practical difficulty is that superior courts are not as accessible as provincial courts, in terms of geography, procedure or cost.

6.4 A Superior Court UFC

This model, already implemented to varying degrees in seven provinces, establishes a single, unified superior court dedicated to family law, funded partly by the federal government,⁷² and implemented in stages.

These provinces have worked with the federal government to “unify” the jurisdiction by eliminating the role of the Provincial Court in family matters⁷³ and putting all cases into a superior court presided over by federally appointed judges. Judges are assigned for a lengthy term, or permanently, to the court and are, or become, family law specialists. The goal of a user-friendly court culture is further supported through extensive family services and simplified rules and forms.

⁷⁰ R.S.B.C. 1979, c.121

⁷¹ *Reference Re Family Relations Act (British Columbia)*, [1982] S.C.R. 62

⁷² Different funding models have been used over time. Most recently, the federal contribution consists in relieving the province of the cost of provincially appointed family court judges (75% of whom are appointed from Provincial Court ranks) by paying the salaries of the s. 96 UFC judges. The provinces allocate their salary savings to collateral family services such as mediation and parent education programs, which other federal programs also support.

⁷³ The scope of jurisdiction usually includes all matters in Table 3. All provinces save Nova Scotia exclude youth criminal justice matters from the UFC.

We certainly can learn from the other provinces, but we need to be careful about applying their experiences to BC

Manitoba, New Brunswick and Prince Edward Island have used this approach to implement UFCs province wide. Saskatchewan, Ontario, Nova Scotia and Newfoundland and Labrador have UFCs in some locations, though Ontario and Nova Scotia plan to achieve province wide coverage.⁷⁴

In some provinces, and in many respects, this model for achieving UFC appears to work well enough, but there are problems. It is difficult to accurately generalize about its overall effectiveness because:

- it appears to work better in some provinces than others;
- details of the model and the adequacy of funding arrangements supporting it differ from province to province; and
- variables such as geography, population density patterns, pre-existing court structure and local legal culture vary significantly from province to province and can affect the success of implementation.

We certainly can learn from the other provinces, taking care to avoid implementation issues that have arisen elsewhere. Some weight must undoubtedly be given to the fact that seven out of 10 provinces have already adopted this model but reviews vary and there is little by way of formal evaluation or objective study and no client surveys.

Reports out of Manitoba are positive: the Manitoba Bar feels there is greater consistency in family law decisions under UFC and that they can rely on a higher level of knowledge from the bench. There are reports that UFC has resulted in better case management, a more adaptable court, improved integration of the helping professions, and an enhanced status for family law. A small, informal study 10 years ago endorsed Manitoba's UFC.⁷⁵

Professor James McLeod's recent paper on the Ontario UFC system concludes that although there have been some problems, on balance the experiment has been a success.⁷⁶ However, elsewhere in his paper Professor McLeod says these courts have met with mixed reaction across Ontario. The Ontario government is committed to unified family court expansion. The benefits of a single forum for the resolution of family law matters, coupled with the provision of appropriate services, are clearly recognized by the province and have received broad public support. At the same time, some Ontario counsel have expressed concerns about backlog, delay and shortage of services.

⁷⁴ See Appendix E for a brief description of UFCs in Canada.

⁷⁵ A survey of 33 family law lawyers and all 5 masters, done in 1994 on the 10th anniversary of the province's unified family court, provided a "snapshot of opinion" (Freda Steel, *The Unified Family Court – Ten Years Later*, Manitoba Law Journal vol. 24 no. 2). Everyone agreed that a court with comprehensive jurisdiction for family law was better than the previous system. Only one person disagreed with the concept of specialist unified family court judges and a majority was not in favour of assigning General Division judges, even temporarily, to the unified family court.

⁷⁶ *supra*, note 61

Most problems associated with UFCs have revolved around implementation rather than the UFC model itself

Reports of delay and lack of services from Nova Scotia and Newfoundland and Labrador show how the potential strengths of the UFC model can be compromised by lack of funding. In Nova Scotia, where UFC was established in 1998, there is a common view that it is probably a superior model, but it struggles with delay and backlog because it has been inadequately funded since implementation.

McLeod writes that most problems associated with UFCs have revolved around implementation rather than the UFC model itself.⁷⁷ Both Ontario in Nova Scotia have concerns with respect to delay. The problem in Ontario is sometimes linked to the transition of child protection work from the provincial to the superior court.⁷⁸

Besides provincial variations, different user groups can have different perspectives on UFC. For example, lawyers almost unanimously endorse the specialized family bench, but many judges are concerned about the potential for burnout and isolation.

implementing the superior court model in BC

Opportunities to implement this model depend on adequate federal and provincial funding. Federal money has been made available several times in the last 30 years. An offer of federal funding for UFC expansion that was announced in September 2002 was inferior to earlier offers.⁷⁹ But if a viable funding offer is made in the future to support this superior court approach to implementation, should BC accept it?

The answer is “Yes, but only if the funding is adequate.” As the *Alberta Unified Family Court Task Force* concluded:

“...the adoption of a specific court structure will not of itself ensure that family law is properly administered in the province. In fact, the establishment of an under-resourced unified family court would lose the benefits of both courts now involved in family law and would not achieve the benefits associated with the unified family court concept. It would be a retrograde step.”⁸⁰

The test for adequate funding will be whether combined federal and provincial contributions can provide:

1. the information, assessment and referral programs recommended in Chapter 3 (the Family Justice Information Hub);

⁷⁷ *ibid*, p.1

⁷⁸ *ibid* p. 29

⁷⁹ It was ultimately clarified that for every federal dollar given to the province for unified family court under this proposal, a federal dollar would be taken away from funding for existing provincial family programs. Earlier federal unified family court funding programs did not involve a similar penalty.

⁸⁰ *Unified Family Court Task Force (2001). Report, Recommendations and Executive Summary. Minister of Justice and Attorney General, Province of Alberta*

2. enough judges and staff to ensure that cases can be heard in a just and timely manner; and
3. province wide implementation within a reasonable time.

By one estimate,⁸¹ implementation by way of the superior court process in, say, seven locations capturing about half the family law cases in BC—a reasonable working estimate of what the first phase of implementation would look like—might free up about \$2 million in Provincial Court judges' salaries to be applied to family services. If this were the extent of the financial incentive for using the superior court model, it is probably not adequate by the above definition. While an additional \$2 million would always be welcomed, it is not, in relative terms, a large sum. To put it in perspective, the existing Family Justice Counsellor Program costs \$10-million per year, the FMEP costs \$15-million and LSS already spends nearly \$3-million per year on family duty counsel.

Further on the point of adequate funding, McLeod links concerns about UFC to insufficiency of judges to staff it:

Most practicing family lawyers welcome the unification of jurisdictions in principle but have concerns about staffing in particular. By far, the greatest source of complaint seems to involve the staffing of the Court. It is trite to state that the success of the court depends upon the provision of adequate resources to address the problems that led to the creation of the court.⁸²

Province wide implementation does not mean that a UFC should appear overnight in every location in the province, but it does presume that it would be available to all British Columbians within a foreseeable period. Under the superior court model, implementation occurs in stages. Staged implementation would be acceptable. In fact, one advantage of staged implementation is that it allows the new structures and procedures to be tested on a smaller scale, and mistakes to be rectified as implementation proceeds. However it would only be acceptable if the duration of the implementation process is reasonable, say not exceeding five to seven years.

Any consideration of province wide UFC implementation must be tempered by a realistic recognition that there are some practical limitations on the affordability and universality of many government supported services. Not every community across B.C. has the same services, and many specialized services in the areas of health, education and law, for example, are only available in or through larger population centres. A balance must be struck; an “all or nothing” approach to province wide UFC implementation would result in nothing.

⁸¹ *Unified Family Court: Background and Discussion Paper #1*. (October 7, 2002). B.C. Justice Review Task Force. www.bcjusticereview.org

⁸² *supra*, note 61, p. 25

In Nova Scotia UFC is now available to about 75% of the population. The Ontario example is more troubling. Ontario began with one location in 1977, added four in 1995 and 12 more in 1999. UFC is now in 17 locations, and sits regularly in three others, with 34 non-UFC sites remaining. One commentator observes that “. . . substantial areas of the province are still without such courts despite strong urgings that they should be available throughout Ontario.”⁸³ After nearly 30 years, UFC is available to only about 40% of Ontarians. Referring to criticisms the Ontario UFCs have attracted, McLeod says:

Had the Courts been extended to all judicial centers in a more timely fashion or had it been made clear that all centers would ultimately become unified, some of these criticisms may have been blunted.⁸⁴

We are concerned about partial implementation over the long term because it would leave the province with three courts handling family cases and risk unacceptably disparate levels of service among regions.

How well would the regions be served? We recognize the challenges of providing specialist “section 96” judges in smaller communities but experience in BC and elsewhere suggests that there are ways it can be done so that even remote areas of the province that do not have a courthouse or permanent UFC judge can have the benefits of a unified family court. Some options are:

- having UFC judges travel to smaller communities on a regular basis (a UFC circuit model). If there is to be a specialized bench, the Supreme Court judge on circuit would need to be both a family specialist and a generalist. Scheduling could be complex and travel costs high;
- having a judge serve in both UFC and the general division in some communities;
- allowing people in remote communities to file court documents in UFC “filing centres,” which could be, for example, the local Provincial Court Registry or another designated office;
- allowing the use of fax or email for filing documents in court, for correspondence with court registry and for serving documents; and
- using telephone or videoconference for motions, hearing and conferences. BC is well ahead of many provinces in the use of this technology and though at present it is too costly to be a viable alternative, it will eventually prove to be a viable tool for delivering some UFC services to remote areas.

⁸³ W.A. Bogart, *Families: The Law, Ontario Courts and a Changing Society*, Sept. (2004), p.17, referring to *Ontario Civil Justice Review, First Report* (1995).

⁸⁴ *Supra*, note 61, p. 25

29. A superior court UFC, *if* adequately resourced

We recommend

- that the superior court approach to implementation of a unified family court system is the preferable model, and should be implemented, but only if the Province is certain that:
 - ◆ it can be adequately resourced, and
 - ◆ it can be at least as accessible (particularly geographically) and responsive to the range of family clients as is our current two court system.
- that the test for determining adequacy of resources be that there are resources sufficient to provide:
 - ◆ the information, assessment and referral services recommended in chapter 3 of this report and the subsidy for CDR recommended in chapter 4;
 - ◆ judges and staff sufficient to hear cases in a timely manner; and
 - ◆ a commitment to province wide implementation of a UFC within five to seven years.
- that BC develop a proposal to the federal government for establishing a Supreme Court UFC, incorporating the other recommendations made in this report.

Our Supreme Court and Provincial Court currently serve people in different ways. The Provincial Court:

- generally serves litigants with few or no assets;
- sees more unrepresented litigants;
- has simplified rules and limited pre-trial procedures;
- allows judges to take a more active role in directing the conduct of the hearing;
- has different rules for family and commercial disputes, allowing a different approach for family cases; and
- adopts a more informal “helping” role toward litigants.

The Supreme Court:

- generally serves litigants with more assets;
- operates on the presumption that parties are represented by lawyers, even though they often are not;
- has extensive pre-trial procedures and relatively complex rules;
- remains more formal and judges assume a more traditional role at the hearing; and
- has one set of rules covering both family and commercial disputes, making it harder to address the unique aspects of family cases.

A BC unified family court should provide all of the services of the two existing courts and yet look quite different from each of them.

A question frequently raised by lawyers is whether people would be as well served if all family cases were heard in a superior court? Would the court retain the characteristics of the existing Supreme Court process, resulting in reduced access for many people who now use the Provincial Court? This involves both a consideration of the procedural options needed to meet different needs, and recognition that the trend towards settlement processes in family law litigation means that judges need new skills.

We must pay careful attention to this question. If a new family court fails to adopt the attributes and commitment needed for a problem solving approach, then it fails entirely. A BC unified family court should provide all of the services of the two existing courts and yet look quite different from each of them. It must provide a range of simplified procedural options for families whose financial circumstances range from the simple to the complex. At the same time, its judges must be active, informal and involved in the management of family hearings.

Our view is that several factors in a careful implementation process would work to ensure that the style or culture of the court meets the needs of all families. Transition to a UFC necessarily involves change to a new judicial role so that judges would not choose, and would not be chosen, to sit on this court unless they were open to the new approach. Further, new, simplified court rules and procedures together with the closer integration of services for families would give the judges both the framework and the tools necessary to shift into a new role.

In any event, judges' approaches towards the management of family cases have changed significantly over the past several years. Judges on both courts are to be highly commended for becoming increasingly responsive to the unique needs of families and to the burdens of cost and extensive procedure. Family case conferences in Provincial Court and judicial case conferences in Supreme Court are examples of innovation that reflect an increasingly active and involved judicial role in the management of family cases.

30. A new family court culture

We recommend

- that a BC unified family court meet all of the needs now met by the two existing courts while adopting a unique culture, distinct from each of them. It should provide the simplified procedural options recommended in chapter 5 and ensure that judges adopt a more active, informal and involved role in the management of family hearings.

youth criminal justice and child protection cases

All provinces with UFC include in the court's jurisdiction all matters referred to in Table 3 (above at 5.8). For historical reasons, Nova Scotia alone also includes youth criminal justice cases within its UFC jurisdiction.

Some provinces have experienced delay in processing cases, partly as a consequence of shifting the responsibility for child protection cases from the provincial to the superior court.⁸⁵ In addition to concerns about workload and delay, there are other arguments for keeping child protection cases in Provincial Court. That court has decades of experience with these cases and generally manages them effectively. As well, many judges feel that there are strong links between youth justice cases and child protection cases that argue for both being heard by the same bench. On the other hand, many child protection cases are joined with claims under the *Family Relations Act*, and it goes directly against the rationale supporting unified jurisdiction to have two courts involved in family cases. Ultimately, the benefits of fully unified jurisdiction support the approach taken in other provinces.

31. Comprehensive UFC jurisdiction, except youth criminal justice **We recommend**

- that the jurisdiction of the unified family court include all family and child-related cases currently within the jurisdiction of both the Provincial and Supreme Court, but not youth criminal justice cases.

6.5 Full Provincial Court Jurisdiction

This model involves both Supreme Court and Provincial Court judges hearing all family matters in a different form of unified family court. Provincial Court judges would be given the same jurisdiction as Supreme Court judges over all family issues. Like the superior court model, this model would also have simplified procedures, specialized judges⁸⁶, a cooperative focus and enhanced services for families.

There are two ways that full family law jurisdiction might conceivably be accomplished. The first is by dual appointment: one person is simultaneously appointed by the province, with the entire jurisdiction of a provincial court judge, and by Canada, with federal jurisdiction limited to divorce and division of property. Alternatively, the *Divorce Act* could be amended to delegate jurisdiction over divorce and property division to provincially appointed judges.

Full jurisdiction is an attractive option because it would simplify implementation by taking advantage of the many Provincial Court locations around the province.

⁸⁵ In the Report of the Ontario Superior Court of Justice for the Opening of Courts on January 6, 2003 Chief Justice Smith said, in reference to the family courts, "we could not have anticipated that the change in legislation and its application would so greatly increase the volume of child protection work . . . tremendous pressure has been placed on the superior court in order to deal with the increased workload generated by an increase in child protection cases."

⁸⁶ It would be very difficult to have permanently specialized family judges in outlying areas. Judicial specialization is discussed further at chapter 7 of this report.

Full jurisdiction is an attractive option because it would simplify implementation by taking advantage of the many Provincial Court locations around the province. It has the potential to preserve the flexibility, responsiveness and province wide accessibility of our current system and to be less expensive to implement than a conventional s.96 unified family court.

However, there are numerous administrative, legal and constitutional problems that would need to be resolved before such a model could be implemented.

From a policy and administrative perspective, for example, if the dual appointment approach were taken, it could be problematic to have a single judge appointed to two separate offices, each governed by a different legal regime of terms and conditions.⁸⁷ The objection might be raised that once a judge is appointed under s.96 he or she is and remains a superior court judge for all purposes and could not, at the same time, be subject to a second set of conditions governing tenure and duties.⁸⁸

Also, the full jurisdiction model would have the effect of shifting some portion of the Supreme Court's family work to the Provincial Court, with potentially significant administrative and scheduling consequences for both courts and possible fiscal consequences for the Province.

These and other legal and administrative hurdles would need to be thoroughly explored to assess the viability of a full provincial court jurisdiction model.

While such an analysis is beyond the scope of this paper, one particular issue warrants elaboration: s.96 of the *Constitution Act, 1867*, which is the foremost impediment to the full provincial court jurisdiction approach. Although s.96, on its face, only speaks of a power of appointment, over the years the Supreme Court of Canada has interpreted it much more broadly, giving it a functional aspect as well. The section authorizes the federal government to appoint superior court judges and has been interpreted by the Supreme Court of Canada to mean that neither the provincial nor the federal government can confer authority over divorce or family property on provincially appointed judges. As s.96 is currently interpreted, it is a complete bar to implementation of a full provincial court jurisdiction model.

The concept of a unified family court consisting of both Provincial and Supreme Court judges is not a new one. In 1975, the Berger Commission⁸⁹

In 1977, B.C.'s Attorney General proposed to the Federal Justice Minister that a unified family court be created at the provincial court level through a system of dual appointments.

⁸⁷ Federally and provincially appointed judges have different salary levels and annuity plans, as well as different rules respecting tenure, removal from office, extrajudicial activities, and so on.

⁸⁸ The dual appointment approach is problematic because the choice of s.96 judges would be limited to the pool of Provincial Court judges, and there may be an issue on Canada's side as to whether this amounts to an inappropriate fetter on the Governor General's power of appointment.

⁸⁹ Fourth Report of the Royal Commission on Family and Children's Law: The Family, the Courts, and the Community.

The practical advantages may be sufficiently compelling, particularly in the event that the superior court model ultimately proves unworkable, to warrant a further look at the dual appointment model.

urged a dual appointment approach—the creation of a single court with complete family jurisdiction composed of Provincial and Supreme Court judges.⁹⁰ The Commission proposed federal-provincial negotiations to make it possible to confer that jurisdiction on a provincially appointed judge. Its recommendation 24 reads:

We recommend that, looking to the future, the provincial government should, in negotiations with the federal government, seek to bring about the joint appointment of judges to the Unified Family Court. These judges should be invested with complete jurisdiction by both governments to deal with family matters.

In 1977, BC's Attorney General proposed to the Federal Justice Minister that a unified family court be created at the Provincial Court level through a system of dual appointments. While the Berger Commission Report had speculated that the federal government might question whether it could appoint a judge to the Supreme Court for limited purposes, the Commission had concluded that "A joint appointment of a single judge by the provincial and federal governments is not, in our opinion, prohibited by the constitution." However, for reasons including some of those noted above, the Federal Minister ultimately rejected the proposal as unworkable.

This is perhaps unfortunate. Giving Provincial Court judges full family law jurisdiction is probably the most practical and efficient method of achieving unified family jurisdiction in BC. It would simplify implementation of a province wide unified family court by taking advantage of the many Provincial Court locations throughout BC. Keeping both courts in the business of family law meets the challenge of geographic accessibility and makes optimal use of the existing court infrastructure. It would also simplify the complex transition phrase that other provinces have experienced (or are still experiencing after 30 years) leaving them with three different courts doing family law: unified courts in the larger centres and both provincial and superior courts everywhere else.

These practical advantages may be sufficiently compelling, particularly if the superior court model ultimately proves unworkable in BC, to warrant a further look at the full Provincial Court jurisdiction model. This could be considered only if a different interpretation of s.96 is possible.

That said, we do note that family law occupies a profoundly different place in family life and in Canadian society than it did 130 years ago when s.96 was drafted: the current divorce rate is nearly 40%; a large proportion of unions now occur without marriage; same sex marriage is recognized in BC; and second and third marriages and blended families abound. There is virtually no one in our society who is untouched, directly or indirectly, by family law. The

⁹⁰ A person suitable to the province and Canada is appointed under both the *Provincial Court Act* and the federal *Judges' Act*. That is, a Provincial Court judge is also designated a s.96 judge but with jurisdiction limited to family law matters.

social interest in having the most effective and accessible family justice system possible is enormous.

The full provincial court jurisdiction model confronts many difficulties. Existing authorities are clearly against an interpretation of s.96 that would support it, and an array of administrative issues would need to be considered before its viability could be fully assessed. However, if the superior court UFC model cannot be implemented in BC, these issues should be explored and the possibility of the full jurisdiction model more fully investigated.

32. Another UFC model

We recommend

- That if the superior court UFC model is unattainable in BC, the legal and administrative issues associated with the full provincial court jurisdiction model be more fully investigated in order to determine if it could be a viable model for BC.

6.6 Coordinated Jurisdiction

If a UFC model is not implemented in British Columbia, either through the superior court approach or through a full Provincial Court jurisdiction model, then we propose a coordinated jurisdiction approach.

This is not a unified family court. It represents an attempt to achieve some of the benefits of unified jurisdiction, while leaving the two existing courts in place, by trying to better integrate and coordinate their work. Different ways to do this have been explored over the years. The model we have considered involves expanding the jurisdiction of Provincial Court judges by making them Masters of the Supreme Court and giving them as much family law jurisdiction as possible under s. 96.

BC attempted a variation on this theme in a project that operated in Surrey, Richmond and Delta from April 1974 to March 1977.⁹¹ The Berger Commission had proposed a family court pilot project that would integrate the work of the Provincial Court and Supreme Court in family matters under one roof. The goal was to minimize the negative effects of fragmented jurisdiction by having the two courts act as one to the greatest extent possible.

Provincial Court judges were given authority to conduct hearings and submit reports and make recommendations on family matters to the Supreme Court. Both courts were served by a single administration and by the same family court counsellors and family advocates. Courtroom and office accommodation for judges of both courts were provided in the same building.

Coordinated jurisdiction represents an attempt to achieve some of the benefits of unified jurisdiction, while leaving the two existing courts in place.

⁹¹ For a full description of the project see Appendix D

As it turned out, the Provincial Court authority to conduct hearings and submit reports and recommendations was not much used and judicial services continued to be duplicated. Some aspects of the integration were successful but Provincial and Supreme Court judges did not develop a “team” approach and, with few exceptions, did not act in complimentary ways to eliminate “forum shopping” or duplication of administrative and judicial efforts. Although some aspects of this two-tiered model were considered successful, it was generally concluded that the negative effects of fragmented jurisdiction were not sufficiently reduced.⁹²

The 1988 Access to Justice Report (the “Hughes Committee”) recommended a different form of coordinated jurisdiction. It proposed that the Supreme Court have exclusive jurisdiction over family law but:

- Every Provincial Court registry would be designated a sub-registry of the Supreme Court for proceedings under the *Family Relations Act* and files would be opened as Supreme Court files.
- Provincial Court judges would sit as Masters of the Supreme Court. They would handle procedural matters, pre-trial conferences, and settlement conferences in Supreme Court cases and their orders would have full effect unless set aside or varied by a Supreme Court judge.
- If the parties agreed, a Provincial Court judge sitting as a Master could vary a support, custody or access order of a Supreme Court judge.
- Support services, including conciliation counsellors and mediators, would be integrated and available at both levels.

It was hoped that this approach would bring continuity to the conduct of each family law case because a separating couple would have one file throughout; that it would improve access to the Supreme Court throughout the province; and that it would reduce expense for many people by eliminating the need to begin proceedings in Supreme Court.

This recommendation was not implemented for two reasons. First, Provincial Court judges did not wish to assume these functions. More significantly, perhaps, there were concerns about the constitutionality of provincially appointed judges varying Supreme Court orders, even with the parties’ consent.

We have considered a third alternative that would combine elements of both of these earlier approaches. It would:

- create a single administrative entity—the BC Unified Family Court, with a Supreme Court Division and a Provincial Court Division;

⁹² This was explained by: lack of opportunity (there were limited appropriate cases); lack of knowledge and preparation (little effort was made to encourage the use of the provisions); lack of acceptance by Provincial Court judges (some Provincial Court judges made it clear that they did not appreciate being given a task that had previously been done as a quasi-judicial function by registrars); and availability of registrars (registrars continued to handle referrals).

- provide a single filing window and wide geographic access to the new court by designating every Provincial Court registry a sub-registry of the Supreme Court for family law proceedings;
- establish one set of family law rules and forms for both divisions; and
- designate all Provincial Court judges as Masters of the Supreme Court, defining their powers to include as much *Divorce Act* and division of asset work as possible.

Both courts would retain their current jurisdiction but in addition, Provincial Court judges would conduct hearings and submit reports and recommendations on simple property division cases to the Supreme Court for confirmation. As far as possible, their recommendations would be confirmed by desk orders⁹³ in the Supreme Court and the grounds for challenging them would be narrow.

The court registry would automatically stream cases: contested divorces and claims for restraining orders, occupancy of a family home, complex property division, and any other property division case at the request of a party, would go to the Supreme Court division. *CFCSA* matters would go to the Provincial Court division. Some cases could be sent to either division: simple property division cases, applications for interim or final custody, access, guardianship, child support, or spousal support orders; enforcement or variation applications and pre-trial or settlement conferences.

Judges would work together to minimize cases where families appear before both courts and services would be integrated and available in both courts.

This approach will be worth pursuing only if it is supported by the full range of front end services that are recommended in chapter 3, and the range of consensual dispute resolution options recommended in chapter 4. It would also require the dedication of a number of judges from both courts as family law specialists, to provide the leadership and continuity that are so essential for an effective family court.

Our concern is that this approach may be complicated and awkward. Implementation costs and continuing administrative expense could outweigh potential benefits and might be better applied toward front end services. We are also concerned that this kind of approach tinkers at the edges of the existing structure without introducing the degree of fundamental change that the family justice system clearly needs. The money and effort that it would require would be better spent in implementing the unified jurisdiction that is the next logical step in the evolution of our family justice system.

Nonetheless, if neither the superior court approach nor full Provincial Court jurisdiction ultimately proves workable for the province, we would urge BC to

⁹³ A desk order is one that is signed by a judge, if it meets the requirements, without the necessity of anyone appearing in court.

explore whether some of the objectives recommended in this report could be met by better coordinating the family law work of the two existing courts.

33. If not UFC, another option

We recommend

- that if neither the superior court approach nor the full Provincial Court jurisdiction approach to unified family law jurisdiction ultimately proves workable, BC explore whether some of the problems arising from split jurisdiction can be addressed by better coordinating the family law work of the two existing courts, by:
 - ◆ providing a single filing window;
 - ◆ designating every Provincial Court registry a sub-registry of the Supreme Court for family law proceedings;
 - ◆ designating all Provincial Court judges as Masters of the Supreme Court with as much authority to do Divorce Act work as possible; and
 - ◆ ensuring that delivery of expanded family support services is integrated for both levels of court.

Judicial resources

Both the full Provincial Court jurisdiction model and the coordinated jurisdiction approach assume that the Provincial Court has the capacity to absorb some of the family work now done in Supreme Court. Unless other jurisdictional responsibilities could be “traded” back to the Supreme Court, it is likely that additional Provincial Court appointments would be needed.

In contrast to the superior court model, these approaches would have the effect of shifting some cost from the federal to the provincial government. More family cases in Provincial Court could create pressure for more Provincial Court appointments. As well, the fact that provincially appointed judges would be doing some of the same work as federally appointed judges for less pay might eventually put upward pressure on Provincial Court salaries. One of the challenges would be to negotiate a basis for funding this model with the federal government.

There may be other responses to the resource implications of these proposals and they would need detailed study by financial and policy experts. One possibility that might be considered is the reallocation of some of the time of the 14 provincially appointed Supreme Court Masters who already devote a significant portion of their time to family matters. Insofar as the Supreme Court would be relieved of some of its family work, it may be reasonable to dedicate some of the time of the Masters to support of the Provincial Court.

34. Resources to support the court**We recommend**

- that if BC decides to implement either a full Provincial Court jurisdiction model or a coordinated jurisdiction approach:
 - ◆ the federal government be urged to increase its contribution to BC for the family services recommended in chapters 3 and 4 of this report; and
 - ◆ the Province consider whether some of the time of the Supreme Court Masters could be allocated to support Provincial Court family cases.

7

Judges and Lawyers and Family Justice

7.1 Judges: Qualifications, Training, Specialization

Although there is a growing trend among lawyers to specialize in one or more areas of law, our courts expect judges to be expert in all areas of the law. Many judges never practised family law, but once appointed they are expected to bring knowledge and sensitivity to family disputes.

Those who did practise in the field will be well versed in the law, but for many families who end up in trial the truly wrenching issues are not legal at all: there may be emotional trauma, psychological adjustment issues, substance abuse problems or overwhelming financial stresses. These all fall outside of the realm of traditional legal training.

In addition to proposing a system that manages more of these problems before they get to the courtroom, we say that because family law is so different, the role of the judge must be different, and the qualities judges hearing family law cases need are also different. The role requires a special interest in families and an aptitude and tolerance for family issues.⁹⁵

Further, ongoing training should be available to family court judges in areas such as family dynamics, child development, gender bias, substance abuse, sexual abuse, family violence and the psychological effects of separation, as well as information about community social services and about Aboriginal and ethno-cultural communities.

A report to the Canadian Bar Association in March, 2001⁹⁶ said that judges, lawyers and mediators need to understand how to assess the patterns and severity of abusive behaviour and the psychological and physical consequences for the family members over time.

As family law changes, the skills required of the judge change. The increasing use of judicial case conferences and settlement conferences in family cases means that judges must be skilled facilitators as well as decision makers, and our proposed changes take this even further. The qualities of an active

“So little of our work involves legal issues to be truly adjudicated. At our level in family court, we are the dumping ground for massive social and economic issues and the acts of very dysfunctional families. I am more a social worker than a judge.”⁹⁴

⁹⁴A Canadian judge interviewed for a study by the American Judicial College, as reported in the Globe and Mail, Aug. 14, 2002, article by Kirk Makin

⁹⁵See *Royal Commission on Family and Children’s Law*, [Berger Report] Recommendation 1. *Breaking Up is Hard to Do*, supra note 2, Recommendations 46 to 51.

⁹⁶L. Neilson, *Spousal Abuse, Children and the Legal System*. (2001) http://www.unbf.ca/arts/CFVR/spousal_abuse.pdf pg 247.

manager are critical to the changes we propose to the family court hearing model in chapter 5.2 of this report.

It will also be important for judges hearing family cases to be trained to meet the particular challenges posed by increasing numbers of unrepresented litigants in what are often emotionally-charged situations. Judges in these cases need to be particularly skilled and knowledgeable if proceedings are to be run efficiently and are to instil confidence in the litigants. They need to be able to make decisions quickly and communicate them clearly, so that the parties understand what has happened and feel a sense of finality.

It is generally agreed that specialist judges are a key element in a family court's success. They bring substantive and procedural expertise, more efficient and predictable hearings, and enhanced sensitivity to the social and emotional issues involved. Dedicated specialist judges are also needed to provide continuity and leadership to a court that is moving forward and providing judicial services in new ways.

On the other hand, some BC judges express concern about the possibility that specialization will lead to isolation and burnout. Some would strongly resist doing family work full-time for the long-term.

One school of thought supports judicial specialization but for a limited term: "...many judges will need a change of pace and it is beneficial to bring the insights of other types of legal problems to bear on family law issues."⁹⁷

Others feel that family law is sufficiently unique, and the advantages of specialization so important, that judges should be appointed permanently to family court. They also emphasize the critical role that judicial leadership plays in creating a family-oriented court culture and argue that long-term specialization best serves this end.

There is no doubt that many BC judges and lawyers have the legal skills, personal aptitude and willingness it takes to be a specialist family law judge.

On balance, we are convinced that the advantages of specialization outweigh the risks. We believe that it would be relatively easy, over time, to create a bench of permanent specialized judges, and this should be the goal.

Still, we recognize that today's judges, who did not accept appointments with the expectation or intention of full-time family work, may not find a permanent appointment to a specialized bench acceptable. Judges who do not want to sit on a specialized bench should not be asked to do so. Over time however, new appointments should be made to a permanent, specialized family bench within a specialized court.

We note that in spite of the fact that approximately one third of the work in the Supreme Court involves family law, few family lawyers have been

⁹⁷ CBA Task Force on Court Reform Ottawa, 1991, p. 237

appointed to the Supreme Court bench in the last decade. Family law expertise can certainly be acquired on the bench, but it should also be a factor in selecting lawyers for appointment.

35. Judicial specialization and leadership

We recommend

- that judges in family courts, unified or otherwise, be specialists with family law expertise, whether that expertise is gained in practice or on the bench.
- that qualifications for judges chosen to hear family cases include a special interest in, commitment to and aptitude and tolerance for family law.
- that all judges who hear family cases be skilled facilitators as well as decision makers.
- that the criteria for selecting judges for family court include their ability to show leadership in the transition to a cooperative culture in the family courts.
- that all judges who hear family cases be given the opportunity to receive ongoing training in family dynamics, child development, family dysfunction, family violence and its impact on all family members, including children who witness it, consensual dispute resolution processes, as well as information about services available to help families, and the First Nations and ethno-cultural communities they serve.
- that judges who do not want to sit on a specialized bench not be asked to do so, but that over time new appointments be made to establish a permanent, specialized family bench.
- that a greater proportion of judicial appointments be made from among family law lawyers.
- that until there is a permanent, specialized family bench, judges specialized in and dedicated to hearing family cases be rotated through a family division for terms of from two to five years.

Our proposals build on the momentum of mediation and other consensual dispute resolution processes that give the clients more options and more control over their disputes.

7.2 Lawyers' Changing Roles

The practice of law and our understanding of what it means to be a lawyer are undergoing profound changes. The traditional view of the lawyer as holder of special knowledge, to whom clients turn for advice and for advocacy in the courts is giving way to a new ideal of the lawyer working with the client in a variety of ways towards a resolution of the client's real problem.

We see examples of this shift everywhere: In the commercial sphere, large law firms market their ability and willingness to work with accountants and management consultants to further their clients' business interests.

On the family law side, we have seen more and more lawyers taking mediation and negotiation training, and using those skills in their practices, whether they hold themselves out as mediators or not. Whether or not they actually practice collaborative law, more and more lawyers practice collaboratively, joining forces with other professionals such as mental health workers or financial counsellors, and working with their clients towards solutions.

Clients' expectations are changing as well. Just as people today expect to be more involved in their medical care than in the past, they expect a larger role in managing their legal affairs.

building on the momentum

Our proposals build on this momentum. Mediation and the other consensual dispute resolution processes proposed here will give the clients more control over their disputes and will challenge lawyers to exercise their problem solving skills in the interests of achieving better outcomes not only for clients, but for families.

The Continuing Legal Education Society, the Justice Institute and Law Schools are all playing a key role in helping the legal profession make this shift. The Continuing Legal Education Society has offered a variety of high quality mediation programs for family lawyers for 20 years.

The Program on Dispute Resolution at the University of British Columbia Faculty of Law offers a series of courses over three years designed to provide students with a better understanding of a range of non-adversarial dispute resolution processes. This and similar courses offered at the University of Victoria Faculty of Law make a helpful contribution toward establishing the cooperative approach to family cases recommended in this report.

We suggest that even more could be done. Law students and practising lawyers could benefit from knowledge and insights to be gained from other professions and disciplines in areas such as family dynamics, child development, family dysfunction, violence and related issues, as well as information about available family and social services.

Lawyers as a group, with their advocacy skills and understanding of the current system's shortcomings, are well equipped to take up the cause of promoting a justice system that responds better to the needs of families.

*Process is the map,
lawyers are the drivers,
law is the highway and
justice is the destination.
Lawyers are supposed to
be experienced about the
best, fastest and safest
way to get there...As
such, we should be on
the front line for reform,
taking our outmoded
systems and being seen
to be putting the public
before our pockets or our
prestige.*

- Madame Justice
Rosalie Abella, SCC

ethical rules need to evolve

More than training and education are needed, however. If lawyers are going to fully embrace a shift from a strict focus on legal rights and obligations towards solutions that address the spectrum of family issues, they need to be supported by the Law Society and its rules, and by the legal profession's governing statute.

Professional ethics prescribe a duty to the client—one person—but offer no guidance to lawyers who see that in serving the client, harm is sometimes caused to children, to the other spouse, or to the family unit. Aggressive pursuit of the legal rights of one parent is often at odds with the best interests of the child, sometimes called the “hidden client”⁹⁸. Society has a strong interest in preserving a working relationship between separated parents. This interest should translate into an obligation on the part of family lawyers to minimize conflict and to promote cooperative methods of dispute resolution in all appropriate cases. Express guidance should be given to family lawyers about how to balance their role as advocate with the potential harm it may cause to the family, and especially to children. In the UK and in the US, model guidelines are being developed.⁹⁹

“unbundled services”

We have mentioned in this report the notion of “limited legal advice,” and “unbundled services.” By this we mean legal services or advice that is limited in its scope, as opposed to the traditional retainer where the lawyer takes conduct of a matter and manages the file from beginning to end.

A recent example of unbundled services is the Legal Services Society program to provide duty counsel in the Provincial Courts, now being implemented in the Supreme Court. Timely legal advice can encourage settlement of cases. The services offered at the many “drop in” legal clinics are further examples of unbundled services. A person comes to a clinic, asks a lawyer about a particular problem, gets some advice or information, and may never see that lawyer again.

Lawyers have always offered “unbundled services” in one form or another, but we see an expanding role for this sort of limited scope service in family law, where many people cannot afford legal representation from beginning to end or simply want to manage their own case to the extent that they can.

⁹⁸“The adversarial mode frequently sets the stage for children to become the battleground and/or weapons in the parental conflict. As victims, their lives may become distorted permanently.” Lita Linzer Schwartz, *Enabling Children of Divorce to Win*, Family and Conciliation Courts Review 32(1): 80 (1994)

⁹⁹ For guidelines developed by the American Academy of Matrimonial Lawyers, see: <http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm>

Lawyers are well equipped to take up the cause of promoting a justice system that responds better to the needs of families.

Again, lawyers need to be supported in this role, by their institutions, including the Law Society, Bar Association and Continuing Legal Education Society. For example, a lawyer from a large firm who wishes to donate services to a drop in clinic may find it difficult to do so because of the Law Society's conflict of interest rule. Designed to protect clients, the rule is that before advice is given to one spouse, the lawyer would have to check to make sure that nobody in the lawyer's entire firm has acted for the other spouse. This makes it impractical for many lawyers to offer advice in a clinic setting.

The American Bar Association's Model Rule 6.5 is based on actual knowledge: recognizing that the risk to the client is substantially reduced because of the limited nature of the advice being given and the short duration of the solicitor/client relationship, the rule prohibits a lawyer from advising a client only if the lawyer has actual knowledge of a conflict. This eliminates the need for extensive checking for potential conflicts. Otherwise, it is very difficult for lawyers from private firms, especially large ones, to volunteer their time at pro bono clinics.

Washington State goes further and allows these clinics to open files for both parties, so that both spouses can be helped.

More significant for lawyers are the liability concerns that can be a powerful disincentive for those who would like to offer their services on an unbundled basis. Lawyers are steeped in the tradition that every file demands complete and thorough treatment: "no stone may be left unturned." While laudable as a goal, sometimes the result is that the client who cannot afford complete service gets no legal service at all.

The Law Society of British Columbia has recently undertaken a study of issues posed by the delivery of unbundled services and we support this initiative.

The Continuing Legal Education Society has an important role to play in supporting lawyers as they advance and refine the definition of what it is to be a lawyer. We have already mentioned the contribution it makes to mediation training. It can also offer educational programs, manuals and online resources that would be a real benefit to lawyers who are willing to offer their services to clients on an unbundled basis.¹⁰⁰

¹⁰⁰ A website such as www.probono.net offers an example of the kind of resources and support network that can help make this service delivery model not only possible and beneficial for clients, but profitable and satisfying to lawyers.

36. Support for the changing role of family lawyers

We recommend

- that the Law Society of BC recognize the changing roles and duties of family law lawyers and develop a Code of Practice for Family Lawyers to give guidance in the balancing of a lawyer's partisan role with the potential harm it may cause to other family members, especially children.
- that the Law Society of BC adopt rules to support the provision of unbundled legal services.
- that the Legal Services Society continue its innovative work in the family law area and that its family law policy and family programs respond to the recommendations set out in this report.
- that the Continuing Legal Education Society's Family Practice Manual, Family Law Agreements, and other materials for family law lawyers reflect the recommendations made in this Report and place more emphasis on the exploration of cooperative dispute resolution alternatives at the initial interview and before an action is commenced.
- that BC Law Schools continue to offer a range of courses on cooperative dispute resolution processes and that their family law courses teach a fundamentally cooperative approach to the management of family law cases, and teach family law in the broader context of the social and psychological forces that separating families are subject to.
- that the Continuing Legal Education Society support the work of lawyers who are willing to offer unbundled services to clients, through educational programs, manuals and online resources; and the work of family lawyers generally by offering opportunities for lawyers to learn from other professions and disciplines about family dynamics, child development, family dysfunction, violence and related issues, as well as information about available family and social services.
- that training and mentoring opportunities be created, such as those provided by the Dispute Resolution Practicum Society to allow lawyers to gain supervised experience in collaborative law.

8

Implementing and Evaluating Reforms

Wherever possible, the implementation plan for any reform initiative should provide for formal evaluation. An arm's length evaluation accomplishes several things: it provides objective evidence of the wisdom of the innovation, it provides reliable information about strengths and weaknesses, which can serve as a basis for modifications, and it is the most effective tool to support an argument for continued or enhanced funding.

The Hughes Committee report observed that the key to evaluation is comparative data and a set of standards against which performance can be measured. One of the principal problems encountered by those seeking to evaluate reform initiatives in the justice system is the lack of a data base and the want of detailed understanding about what actually happens to cases after they enter the justice system. There is very little hard information about who uses the courts, about the progress of cases or about when, why or how cases are resolved within the system.

Better information would allow for a more sophisticated understanding of what is needed and of what does and does not work. BC is well ahead of many jurisdictions in its use of information technology in the court system. There should be continued work in this area to implement systems capable of capturing the data needed to support information-based decision making and meaningful evaluations.

37. Data collection and evaluation of initiatives

We recommend

- that, wherever possible, the implementation plan for any reform initiative provide that it will be formally evaluated.
- that efforts be made to improve data collection systems within the family justice system to capture data that will allow for better understanding of the progress of cases after they enter the justice system.

9

Conclusion

In preparing this report the members of the Working Group have been singularly struck by the consistency of the recommendations made in family law reports, articles and academic papers, in this jurisdiction and in others, over the last 30 years. Our frank concern is that this report could become just another repetition of familiar recommendations. The fact that some of these recommendations have been implemented during that time, with positive results, tells us that we are on the right track. Our advice now is that steps be taken to fully implement a fundamentally non-adversarial approach to family dispute resolution in BC.

As we are at pains to say in the report, this is not to take away from the good work and advances that have been made in this direction, especially in the last 10 years. We are now in a position to actually realize the vision of those earlier reports. What will be needed is the pursuit of the following objectives as a priority:

- reallocation of resources from the back end of the family justice system to significantly enhance front end information and services for families;
- expansion of the use of consensual dispute resolution processes, making trial a valued but last resort;
- simplification and streamlining of family court procedures; and
- framing by every professional, of virtually every case, from the moment it enters the system, as a problem to be solved and not a case to be litigated.

To this last point can be added that perhaps the biggest challenge we see ahead is the need for a continuing evolution of the culture of the family justice system. Changes to systems and procedures alone will not be sufficient, and in fact are secondary to changes to the values, standards, principles and practices that constitute the day to day workings of the family justice system. The key to achieving a new justice system for families and children is for the professionals in the system to fully incorporate the wider problem solving approach advocated here.

This Working Group's task is now complete. The next step will be taken by the Justice Review Task Force, which will provide an opportunity to users of the family justice system and to the professionals who work within it to respond to this report. Our hope is that the dialogue that ensues will reinforce the message of this report to those with decision making power, and that the insights and experience of those who use the family justice system will further develop and enhance its recommendations for change.

10

Recommendations

1. The Family Justice Information Hub as a front door

We recommend

- that highly accessible Family Justice Information Hubs be established throughout British Columbia as the front door to the family justice system, and that the Hubs:
 - ◆ offer extensive information, needs assessment services, and referrals to other services, including to lawyers;
 - ◆ be promoted as the place where people can go for help with family problems at any time, from the very early stages and as long as there are issues to be resolved;
 - ◆ be established in as many communities as possible, and wherever possible be physically located in or have a presence in a courthouse;
 - ◆ be accessible province wide over the telephone and the internet;
 - ◆ be part of a province wide network, but supported by local community service providers and other stakeholders; and
 - ◆ serve as a focus for coordinating family justice system services, including local community services for separating families, so as to minimize service gaps and overlaps.

2. A wide range of information and advice services

We recommend

- that a primary role of the Family Justice Information Hub be the provision of information and referrals to lawyers and other services for parents, children and anyone else involved in family break-up.
- that the Family Justice Information Hub provide information through printed materials, over the telephone, the internet, and at kiosks.
- that the Family Justice Information Hub offer limited legal advice as well as information.
- that an internet portal be developed as the digital doorway to the Family Justice Information Hub.
- that the role of court registry staff be reviewed to ensure that they are equipped to play a supportive role in the new family justice system.
- that Parenting After Separation be available province wide, and that it be mandatory for all parents involved in contested applications concerning children.

3. Accessible information for everyone

We recommend

- that information on the family justice system be delivered in a way that respects the principles of plain language and the diversity of languages and cultures in our province.
- that information be delivered in a wide range of formats, to reach all British Columbians, including those in remote communities, those with low literacy, with visual or hearing impairment.
- that in-person services be provided wherever possible, using visiting services as necessary. Otherwise, communications technology should be used to make personal contact with people in remote parts of the province.
- that the unique needs of Aboriginal communities in each area of the province be a particular focus of attention for local steering committees.

4. A needs assessment and screening service

We recommend

- that a needs assessment service, with appropriately trained and qualified staff, be available to anyone at the early stages of a dispute as a component of the Family Justice Information Hub.
- that where possible, assessment be available in person, and where that is not possible, by telephone or other communications technology.
- that guidelines for identifying and responding to family violence be developed for use by those who work in the family justice system.
- that the assessment service of the Family Justice Information Hub support dispute resolution by screening participants, providing information and referrals, and granting exemptions (from the consensual dispute resolution requirement).

5. Streamlined service delivery through the Hub

We recommend

- that an effective, integrated referral service, supported by a local advisory committee, be developed as an essential component of the Family Justice Information Hub.
- that, to identify and better coordinate services, the Hub referral service be supported by a comprehensive online database, available to clients, judges, lawyers, and all service providers.

6. CDR requirement

We recommend

- that people be required to have attended a CDR session before they are allowed to take a first contested step in a court process, unless exempted;

- that this requirement apply to all family cases, including custody, guardianship, access, child support, spousal support, property division, and child protection.

7. Compliance certified by qualified professionals

We recommend

- that qualified mediators and collaborative professionals be authorized to issue certificates of compliance with the CDR requirement.

8. An assessment and screening service

We recommend

- that a high quality assessment service be provided, applying accepted, standardized screening protocols.
- that in the limited circumstances where mandatory CDR is not appropriate, exemptions based on formal assessment and screening by qualified individuals be available from the Family Justice Information Hub.
- that an automatic temporary exemption from the CDR requirement be available in the case of an application for a restraining order; unless there is a further exemption, the requirement must be met after the restraining order application but before another contested step in the litigation process.

9. Standards for mandatory services

We recommend

- that assessors, mediators and collaborative professionals providing services under this mandatory scheme be required to meet recognized standards of training and practice.
- that a roster be established for collaborative practitioners, modelled on the BC Mediation Roster Society's family roster.
- that ways be found to provide more opportunities for trained CDR professionals to gain practical experience.

10. A subsidized mediation session

We recommend

- that mediation be made available in a meaningful way, for example, by providing the first session free for everyone, with further sessions charged on a sliding scale, depending on income.

11. Legal advice on agreements

We recommend

- that people be educated about the importance of obtaining legal advice before entering into a binding agreement;

- that legal services, including independent legal advice, be available to help low and middle income families formalize the agreements they have reached through CDR so that they are legally binding.

12. Streamlined rules and forms

We recommend

- that rules and forms for family cases be simplified and streamlined to allow for expedited, economical resolution of all cases with processes proportional and appropriate to the value and importance of the case.
- that every family law form and procedure be designed to be used and understood by an unrepresented litigant.
- that the financial disclosure forms in particular be simplified and the basis on which expenses are to be recorded be clarified.

13. Technology for better access

We recommend

- that BC implement user-friendly automatic online forms for family law cases.
- that systems be developed to allow people, including unrepresented litigants, to file court forms by email or over the internet.
- that auto orders be tested in BC.
- that communications technology be used more extensively to decrease the cost of legal representation and enhance access to the courts, for example, by expanding the use of appearances by telephone or videoconference.

14. One set of rules and forms

We recommend

- that whether or not there is to be a single court for family law matters in BC, a single, stand-alone set of rules be adopted to govern all family law cases (except child protection matters) in whichever court they are filed.
- that the Attorney General establish a Family Law Rules Revision Committee to be responsible for developing and maintaining a single set of family rules, with representation to include judges, lawyers, the Ministry of Attorney General, court users and one or more members of the existing Rules Revision Committee.

15. Informal hearings

We recommend

- that a simple, informal and less adversarial hearing model be available, giving and indeed encouraging broad judicial freedom to intervene and direct the hearing process.
- that a hearing model similar to Australia's Children's Cases Program be tested in BC for cases where the best interests of children are at issue.

- that judicial case assignment take into account the benefits of a one family/one judge policy.

16. Involving children

We recommend

- that all participants in the family justice system find better ways to discover children's best interests and to make them a meaningful part of family justice processes.
- that the final report of the International Institute for Child Rights and Development on the matter of child participation in family court processes be carefully considered by family justice system policy makers and other stakeholders.

17. Court fees to support principles

We recommend

- that court fees be used:
 - ◆ to encourage people to resolve their family law issues outside of court; and
 - ◆ to support the principle of proportionality, by encouraging people to use no more than the services that they really need.
- that fees collected from users of family court more accurately reflect the actual cost of using the court and be applied to help support the cost of expanded front end services.

18. Expanded use of orders for costs

We recommend

- that costs be used more effectively to promote settlement, for example by imposing cost consequences for unreasonable settlement offers.
- that if family cases continue to be heard in two levels of court, the authority to award costs be extended to Provincial Court judges.

19. More services for high conflict families

We recommend

- that services be available to help high conflict families resolve disputes, both before and after an agreement or order is made.
- that through the assessment process proposed in chapter 3, high conflict families be identified as early as possible and provided with specially targeted dispute resolution services.
- that the Hub assessment service develop a protocol for identifying and offering services to high conflict families.
- that court files involving high conflict families be administratively earmarked and assigned to a judge who will hear all subsequent applications in the case.

- that the Family Justice Information Hub be the contact point for people when a compliance problem arises with respect to an agreement or order.
- that parenting coordination be available to help high conflict parents in appropriate cases.

20. Expanded Comprehensive Child Support Service

We recommend

- that the Comprehensive Child Support Service model be adopted as a component of the Family Justice Information Hub.

21. More enforcement options

We recommend:

- that British Columbia review enforcement measures being taken in other provinces to determine how best to expand the options available for enforcing family support obligations.

22. Preserving rights without going to court

We recommend

- that the law be changed to make it possible to preserve a family law limitation period without starting an action or seeking a court order, by written agreement or by filing and serving a “Notice to Preserve Limitation.”

23. Setting the triggering event by agreement

We recommend

- that s.56(1) of the Family Relations Act be amended to include in the definition of a triggering event, a written agreement by the spouses to set the triggering event at an agreed upon date.

24. Options for common law couples

We recommend

- that s.120.1 of the Family Relations Act be amended to provide that Parts 5 and 6 of the Act do not apply to an agreement by people who are not married to each other unless the agreement specifically provides that those parts do apply.

25. Limiting judicial discretion to vary agreements

We recommend

- that British Columbia consider amending the Family Relations Act to limit judicial discretion to vary the terms of a separation agreement.

26. Considering the impact of family violence on children

We recommend

- that the definition of the “best interests of the child” in the Family Relations Act be expanded to include consideration of family violence, including its impact on the safety of the child and other family members.

27. Family law statutes to reflect cooperative values

We recommend

- that British Columbia amend its *Family Relations Act* and work with other provinces to encourage Canada to change to the *Divorce Act* so that these laws reflect the principles and cooperative values identified in this report;
- that the Canadian Bar Association, through its national family law section, support this work at the federal level.

28. Unified family law jurisdiction

We recommend

- that British Columbia implement a unified family law jurisdiction.
- that in addition to unified jurisdiction, the family court should have these essential attributes:
 1. simplified rules and procedures;
 2. a specialized bench;
 3. a strong cooperative resolution focus; and
 4. extensive services for children and families.
- that if a formal unified court is not implemented in BC, these key attributes be incorporated to the extent possible, into whatever family court structure BC has.

29. A superior court UFC, if adequately resourced

We recommend

- that the superior court approach to implementation of a unified family court system is the preferable model, and should be implemented, but only if the Province is certain that:
 - ◆ it can be adequately resourced, and
 - ◆ it can be at least as accessible (particularly geographically) and responsive to the range of family clients as is our current two court system.
- that the test for determining adequacy of resources be that there are resources sufficient to provide:
 - ◆ the information, assessment and referral services recommended in chapter 3 of this report and the subsidy for CDR recommended in chapter 4;
 - ◆ judges and staff sufficient to hear cases in a timely manner; and

- ◆ a commitment to province wide implementation of a UFC within five to seven years.
- that BC develop a proposal to the federal government for establishing a Supreme Court UFC, incorporating the other recommendations made in this report.

30. A new family court culture

We recommend

- that a BC unified family court meet all of the needs now met by the two existing courts while adopting a unique culture, distinct from each of them. It should provide the simplified procedural options recommended in chapter 5 and ensure that judges adopt a more active, informal and involved role in the management of family hearings.

31. Comprehensive UFC jurisdiction, except youth criminal justice

We recommend

- that the jurisdiction of the unified family court include all family and child-related cases currently within the jurisdiction of both the Provincial and Supreme Court, but not youth criminal justice cases.

32. Another UFC model

We recommend

- that if the superior court UFC model is unattainable in BC, the legal and administrative issues associated with the full provincial court jurisdiction model be more fully investigated in order to determine if it could be a viable model for BC.

33. If not UFC, another option

We recommend

- that if neither the superior court approach nor the full Provincial Court jurisdiction approach to unified family law jurisdiction ultimately proves workable, BC explore whether some of the problems arising from split jurisdiction can be addressed by better coordinating the family law work of the two existing courts, by:
 - ◆ providing a single filing window;
 - ◆ designating every Provincial Court registry a sub-registry of the Supreme Court for family law proceedings;
 - ◆ designating all Provincial Court judges as Masters of the Supreme Court with as much authority to do Divorce Act work as possible; and
 - ◆ ensuring that delivery of expanded family support services is integrated for both levels of court.

34. Resources to support the court

We recommend

- that if BC decides to implement either a full Provincial Court jurisdiction model or a coordinated jurisdiction approach:
 - ◆ the federal government be urged to increase its contribution to BC for the family services recommended in chapters 3 and 4 of this report; and
 - ◆ the Province consider whether some of the time of the Supreme Court Masters could be allocated to support Provincial Court family cases.

35. Judicial specialization and leadership

We recommend

- that judges in family courts, unified or otherwise, be specialists with family law expertise, whether that expertise is gained in practice or on the bench.
- that qualifications for judges chosen to hear family cases include a special interest in, commitment to and aptitude and tolerance for family law.
- that all judges who hear family cases be skilled facilitators as well as decision makers.
- that the criteria for selecting judges for family court include their ability to show leadership in the transition to a cooperative culture in the family courts.
- that all judges who hear family cases be given the opportunity to receive ongoing training in family dynamics, child development, family dysfunction, family violence and its impact on all family members, including children who witness it, consensual dispute resolution processes, as well as information about services available to help families, and the First Nations and ethno-cultural communities they serve.
- that judges who do not want to sit on a specialized bench not be asked to do so, but that over time new appointments be made to establish a permanent, specialized family bench.
- that a greater proportion of judicial appointments be made from among family law lawyers.
- that until there is a permanent, specialized family bench, judges specialized in and dedicated to hearing family cases be rotated through a family division for terms of from two to five years.

36. Support for the changing role of family lawyers

We recommend

- that the Law Society of BC recognize the changing roles and duties of family law lawyers and develop a Code of Practice for Family Lawyers to give guidance in the balancing of a lawyer's partisan role with the potential harm it may cause to other family members, especially children.

- that the Law Society of BC adopt rules to support the provision of unbundled legal services.
- that the Legal Services Society continue its innovative work in the family law area and that its family law policy and family programs respond to the recommendations set out in this report.
- that the Continuing Legal Education Society's Family Practice Manual, Family Law Agreements, and other materials for family law lawyers reflect the recommendations made in this Report and place more emphasis on the exploration of cooperative dispute resolution alternatives at the initial interview and before an action is commenced.
- that BC Law Schools continue to offer a range of courses on cooperative dispute resolution processes and that their family law courses teach a fundamentally cooperative approach to the management of family law cases, and teach family law in the broader context of the social and psychological forces that separating families are subject to.
- that the Continuing Legal Education Society support the work of lawyers who are willing to offer unbundled services to clients, through educational programs, manuals and online resources; and the work of family lawyers generally by offering opportunities for lawyers to learn from other professions and disciplines about family dynamics, child development, family dysfunction, violence and related issues, as well as information about available family and social services.
- that training and mentoring opportunities be created, such as those provided by the Dispute Resolution Practicum Society to allow lawyers to gain supervised experience in collaborative law.

37. Data collection and evaluation of initiatives

We recommend

- that, wherever possible, the implementation plan for any reform initiative provide that it will be formally evaluated.
- that efforts be made to improve data collection systems within the family justice system to capture data that will allow for better understanding of the progress of cases after they enter the justice system.

11

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